Nos. 01-70354 & 01-70361

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Petitioner

v.

CONTAINER STEVEDORING COMPANY,
STEVEDORING SERVICES OF AMERICA,
EAGLE PACIFIC INSURANCE COMPANY *and*
CLARICI BENJAMIN,
Respondents

_____

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

_____

BRIEF OF PETITIONER, DIRECTOR, OWCP, UNITED STATES DEPARTMENT OF LABOR

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BRIEF OF PETITIONER, DIRECTOR, OWCP

ISSUES PRESENTED

1. Whether the Benefits Review Board ("Board") erred in concluding that a claimant's pending hearing loss claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA")[1] against the first employer was nullified

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[1] Longshore and Harbor Workers' Compensation Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-950 (1988). The Act's title was rendered gender-neutral ("Longshore*men's*

after the filing of a second hearing loss claim against a second employer after further occupational noise exposure and aggravation of his disability.

2. Whether the ALJ's application of the "last employer" rule should serve to relieve the first employer, Container Stevedoring Company ("CSC"), of liability.

3. Whether the ALJ's application of a "one determinative audiogram" rule is consistent with the purposes of the LHWCA, as it would allow Benjamin's employer at the time of the full manifestation and quantification of the extent of disability caused by an occupational disease to avoid liability for that disability by delaying recognition of that disability until a claimant has experienced further aggravation of that disability as a result of work with a subsequent employer.

. . ." changed to "Longshore . . . Workers'") by LHWCA Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1639, 1654 (Sept. 28, 1984), *amending* LHWCA § 1, *as amended*, 33 U.S.C. § 901.

STATEMENT OF JURISDICTION

A. The statutory basis for the administrative law judge's ("ALJ") subject matter jurisdiction was section 19(d) of the LHWCA, 33 U.S.C. § 919(d). On December 8, 1999, the District Director filed the ALJ's December 3, 1999 Decision and Order Awarding Benefits. *Director's Excerpts of Record ("DER"), 1.*

B. The Board had jurisdiction of the employer's timely appeal pursuant to LHWCA section 21(b)(3), 33 U.S.C. §921(b)(3).

C. This Court has jurisdiction to review the final Order of the Board, issued on January 5, 2001, inasmuch as the Petition for Review, filed February 28, 2001, was timely filed with this Court within 60 days of issuance of the Board's decision, pursuant to section 21(c) of the LHWCA, 33 U.S.C. §921(c)(3).

STATEMENT OF THE CASE

James Benjamin filed two claims for occupational hearing loss. *DER 16.* In January 1991, Benjamin filed his first claim for benefits against his then employer, CSC, after exposure to industrial noise, with an accompanying audiogram demonstrating a 28.5 percent hearing impairment. *DER 2*. No administrative action was taken on this claim. *DER 18.* In 1994, after further exposure to industrial noise, Benjamin filed an additional

claim for occupational hearing loss against his last maritime employer, Stevedoring Services of America (SSA). *DER 15.* A subsequent audiogram demonstrating a 34 percent impairment. *DER 3.*

Upon Benjamin's death in 1998, Clarici Benjamin, as administratrix of his estate, sought a hearing on both the 1991 and 1994 claims. *See DER 2.* ALJ Alexander Karst found that the two credited audiograms[2] were both probative as to the extent of Benjamin's hearing loss at the time that each claim was filed. *DER 8.* The ALJ concluded, however, that he was legally required to choose one of the audiograms as the best measure of the hearing loss. *Id.* The ALJ found that the latest audiogram was "the more determinative" since "it better reflects the overall injurious exposure the claimant suffered in his employment." *DER 9*. The ALJ thus made an award of benefits against SSA, the second employer, for the 34 percent impairment demonstrated by the later audiogram. *See DER 10, 11.* The

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[2] Section 8(c)(13)(C) of the LHWCA provides in pertinent part:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii)such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C §908(c)(13)(C).

ALJ made no award on the initial claim against the first employer, CSC, although the associated audiogram demonstrated a 28.5 percent hearing impairment prior to Benjamin's hiring by SSA. *See DER 11.*

The ALJ then found that SSA demonstrated its entitlement to relief under section 8(f), the Act's "second injury" fund provision, which generally provides an employer/carrier with partial relief from liability if an injured worker's current level of disability is contributed to by a pre-existing impairment. *DER 10-11.* Here, the ALJ found that, prior to Benjamin's current 34 percent hearing loss, he suffered from a pre-existing manifest (28.5 percent) hearing loss that contributed to the latter hearing loss, thus establishing the three elements required for entitlement to section 8(f) relief. *DER 11. See* 33 U.S.C. §908(f).[3] Accordingly, the ALJ found SSA liable for the 5.5 percent increase in hearing loss measured by the difference between the 1991 and 1996 audiograms. *Id.* He held the Special Fund liable for the pre-existing 28.5 percent hearing loss. *Id.*

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[3] Under section 8(f) of the Act, 33 U.S.C. § 908(f), an employer's workers' compensation liability is partially mitigated when an employee's pre-existing disability causes his or her workplace injury to be greater than it would be without the pre-existing disability. *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198 (1949); *American Mutual Insurance Co. of Boston v. Jones*, 426 F. 2d 1263 (D.C. Cir. 1970).

Both the Director and SSA sought review of the ALJ's Decision and Order by the Benefits Review Board. *DER 15.* The Director asserted that 1) the worker suffered two distinct hearing loss injuries, the latter an aggravation of the former, giving rise to two distinct claims requiring separate adjudication and 2) that CSC and SSA should each have been found separately liable under the statutory schedule for the amount of impairment caused by each claimed injury. *DER 16.* Further, the Director – although agreeing to application of section 8(f) on the second claim – requested that the Special Fund be granted a credit against its liability for the amount CSC owed on the first claim.[4] *DER 16.* The BRB rejected the Director's arguments and concluded that SSA was liable for the entirety of Benjamin's hearing loss under the "last employer" rule. *DER 18.*

STATEMENT OF RELEVANT FACTS

The relevant facts of this case are undisputed. After working for some time on the waterfront, Mr. Benjamin, while employed with CSC – where he was exposed to harmful noise levels -- was administered an audiogram in February 1991. *DER 15.* This audiogram demonstrated a 28.5 percent binaural hearing impairment. *Id.* The claimant subsequently and last

[4] SSA joined the Director in asserting that there should be separate awards.

worked for SSA, where he received further occupational noise exposure prior to his retirement in April 1992. *Id.* In September 1996, the claimant underwent another audiogram, which demonstrated a 34 percent binaural impairment. *Id.*

SUMMARY OF THE ARGUMENT

Benjamin filed two separate claims against two separate employers for two separate occupational hearing loss injuries: for the cumulative hearing loss shown by the February, 1991 audiogram, fully credited as a reflection of Benjamin's impairment as of that time, and for the cumulative aggravation of that impairment by Benjamin's noise exposure thereafter, measured by the 1996 audiogram, fully credited as a reflection of his hearing impairment as of the time of his retirement in 1992. *DER 3, 8, 9, 11*.

Both the ALJ and the Board erred in extinguishing the initial claim based on the mere existence of the latter claim. The Board's conclusion that the pending 1991 claim against CSC merged with the 1996 claim against SSA is unsupported by statutory or regulatory authority. The LHWCA provides for expressly limited methods for resolution of a pending claim: a denial, award, settlement or withdrawal. *See generally* 33 U.S.C. §§904, 907, 919; 20 C.F.R. §702.225. There is thus no statutory basis for a "merger" of the claims as employed by both the ALJ and the Board.

The Board's purported reliance on the so-called "last employer" rule to support its conclusion, *DER 18,* was, in fact, a misreading of that rule that allowed CSC to escape liability in the claim filed against it. The "last employer" rule is a judicially created doctrine under which, in specific circumstances, full liability for an occupational disease resulting from a claimant's exposure to injurious stimuli during more than one period of employment is assigned to a single employer. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied,* 350 U.S. 913; *see Port of Portland v. Director, OWCP* [*Ronne I*], 932 F.2d 836 (9th Cir. 1991); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978); *cert. denied,* 440 U.S. 911 (1979). In the case at bar, the Board erroneously applied the last employer rule to absolve CSC of any liability merely because SSA was a later employer of Benjamin. *See DER 18.* The Board viewed the present case, simplistically, as one involving a singular occupational disease and identified a single last employer, SSA. *DER 18.* It failed to recognize that the facts presented in this case required the interplay of two doctrines, the last employer rule and the aggravation rule. The aggravation rule 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). In the case of occupational hearing loss, the initial degree of disability may be aggravated by further exposure during subsequent employment. In those instances, the last employer rule must be applied not once, as the Board ruled, but twice, giving rise to two last employers, one for each quantifiable and compensable occupational disease. The first employer is then held liable for the initial disability attributed to it, while the second employer is deemed fully liable for the worker's current level of impairment, with potential relief under § 8(f).

The Board's rule here, however, sharply diverges from the established procedures simply because the first claim remained pending at the time of the adjudication of the second claim. The effect of the Board's ruling is that in cases where the worker's disability has already been identified and quantified, rather than an employer paying for that portion of the disability clearly attributable to it, the cost will be transferred to the Act's second injury fund by application of section 908(f) and thereby disbursed throughout the maritime industry. That result does not comport with the principles underlying § 8(f), which hold that where, as here, an employer's liability on a separate,

compensable claim is capable of assessment, that employer is always liable for the disability it caused, and its liability should not be spread out to the maritime industry through application of § 8(f).

The Board's holding also encourages an employer against whom a claim is filed to deny liability and delay adjudication of the claim until an aggravation of the worker's condition occurs in subsequent employment, in the hope that the aggravation will extinguish the earlier employer's liability. Such a delay is clearly inconsistent with the Act's policy of insuring the timely payment of benefits. *See* 33 U.S.C. §921. Indeed, the Act is so concerned with encouraging prompt payment that it provides for a ten percent increase in basic compensation, payable by any "last employer" who fails to file a timely controversion or who fails to pay benefits on an initial claim. *See* 33 U.S.C. §914(e). Yet, If the Board's decision stands, arguably the ten percent augmentation of liability will be extinguished as a corollary to the nullification of the initial claim, as it would certainly be unreasonable to force the second employer to assume liability for the first employer's failure to act in accordance with its procedural responsibilities. This is yet another example of the Board's clear contravention of the statutory mandate.

The Board's reasoning even complicates the application of the LHWCA attorney's fees provision, which mandates that a claimant who successfully prosecutes his claim may recoup expenses. Would the second "last employer" be responsible for the attorney's fees reasonably incurred against the first liable employer? What if the second employer promptly paid the claim and thereby avoided the imposition of attorney's fees against it? Would the claimant then be responsible for payment of his or her own attorney's fees? Once again, the Board's improper ruling increases the likelihood that the claimants -- the very people whom the Act was meant to protect -- will suffer economic injury.

ARGUMENT

THE BOARD IMPROPERLY APPLIED THE LAST EMPLOYER RULE TO EXTINGUISH AN OTHERWISE VIABLE CLAIM AGAINST A LIABLE EMPLOYER FOR A MANIFEST DISABLING OCCUPATIONAL HEARING LOSS BECAUSE OF THE FORTUITY THAT THE CLAIM REMAINED PENDING AFTER AGGRAVATION OF THAT DISABILITY AND THE FILING OF A SECOND CLAIM AGAINST A SUBSEQUENT EMPLOYER.

A. Standard of Review.

The Board reviews an ALJ's decision under the substantial evidence test. The LHWCA provides that "the findings of fact in the decision under

review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). The Court reviews the Board for adherence to this standard and for legal error. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980).

This appeal exclusively concerns a question of LHWCA *law*; the facts are undisputed. *DER 18.* This Court has expressly recognized that the Director is the administrator of the LHWCA and that on questions of LHWCA law his views are entitled to deference. In *Goldsmith v. Director, OWCP,* 838 F.2d 1079, 1080 (9th Cir. 1988), this Court "adopt[ed] the reasoning" of *Shahady v. Atlas Tile & Marble Co.,* 673 F.2d 479 (D.C. Cir. 1982), which held that the Secretary of Labor has designated the Director as the agency respondent in proceedings under LHWCA § 21(c), whether or not the Director supports the Board's decision. 20 C.F.R. § 802.410(b). The *Shahady* Court recognized the Director's "broad authority and substantial responsibility," as the delegate of the Secretary of Labor, "to play an active role in implementing, administering and enforcing the LHWCA." *Shahady,* 673 F.2d at 482. *Accord generally Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates)*, 519 U.S. 248 (1997). In consideration of the Director's role, this Court has since consistently recognized that it owes "considerable weight" and "deference" to the Director's construction of the statute he is

charged with administering. *See, e.g.*, *Force v. Director, OWCP*, 938 F.2d 981, 983 (9th Cir. 1991); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 838-39 (9th Cir. 1991).[5] Thus, although the courts remain the final authorities on questions of statutory construction, the Director's interpretations of the LHWCA and articulations of administrative policy should govern, unless they are unreasonable, contrary to the purposes of the statute, or violative of clearly expressed legislative intent on the point at issue. *See generally*, *e.g.*, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 & nn.9, 11 (1984); *Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 125-26 (1985).

B. The Board Erred In Finding That The Two Claims Merged.

The Board held that because "no action" was taken on Benjamin's 1991 claim and because his 1994 claim was for "the same injury," the ALJ "properly treated the two claims as one." *DER 18.* In so doing, the Board erred as a matter of law. For the reasons set forth below, its Order should be overturned.

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[5] *Accord*, *e.g.*, *Director, OWCP v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790, 793-95 (2d Cir. 1992), *overruling Director, OWCP v. General Dynamics Corp. (Krotsis)*, 900 F.2d 506, 510 (2d Cir. 1990); *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 258 (4th Cir. 1991); *Texports Stevedores Co. v. Director, OWCP (Maples)*, 931 F.2d 331 (5th Cir. 1991); *Jones v. Director, OWCP*, 977 F.2d 1106, 1110 (7th Cir. 1992).

First, there is no statutory basis for the Board's ruling that Benjamin's initial claim was either extinguished or merged with his second merely because it remained pending when the second was filed. *See DER 18.* The 1991 claim was filed against CSC based on the initial credited audiogram demonstrating a 28.5 percent binaural impairment. *DER 15*. That audiogram provided a basis for Benjamin's claim because it demonstrated the extent of his impairment at the time the test was taken. Even after the filing of a second claim, the first claim remained pending because, contrary to the holding of the Board, its purported resolution -- *i.e.*, merger with the subsequent claim -- was not procedurally permissible under any reading of the LHWCA. The fact that Benjamin's condition was subsequently aggravated, leading to the filing of a second claim, does nothing to legally alter the pending nature of the first claim.

The LHWCA provides for expressly limited methods for resolution of a pending claim: a denial, award, settlement or withdrawal. *See generally* 33 U.S.C. §§904, 907, 919; 20 C.F.R. §702.225. There is no statutory or regulatory basis, either express or implied, for the "merger" of the claims as ordered by both the ALJ and the Board.[6]

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[6] In *Director, OWCP v. General Dynamics Corporation* (*Krotsis*), 900 F.2d 506 (2d Cir. 1990), the Board applied its merger

C. **The Board Erred In Its Application Of The "Last Employer" Rule.**

The Board did not attempt to rest its "merger" theory on any statutory or regulatory procedure, but instead relied on a misreading of case law to support its creation of a merged claims doctrine. The Board reasoned that the last employer rule, first formulated in *Cardillo* by the Second Circuit court, served to assign all liability in the instant case to SSA *DER 18.* As articulated in *Cardillo*, the "last employer" rule states that

> the employer during the last employment in which 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

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doctrine to extinguish an initial hearing loss claim that remained pending after aggravation and the filing of a second claim. The Second Circuit affirmed the Board's decision that the employer's payment on the initial claim should be treated as an advance payment on the second claim. In so holding, the Court merely noted the Board's ruling below that the worker's "unsettled" 1979 claim and his 1983 claim were "merged." The Court did not treat the correctness of the Board's merger doctrine as an issue presented and consequently did not address its propriety. Indeed, the Court emphasized that the issue presented was *not* whether the Board (properly?) applied the credit doctrine, which, the Court observed, concerns the crediting of compensation for a prior disability once that disability has been aggravated. Rather, the Court framed the issue presented as whether the employer's payment on the first claim could be characterized as an advance payment of compensation on the second claim, since the Board's treatment of the claims as merged (which was not appealed) effectively eliminated the first claim. *Id.*

> disease arising out of his employment, should be liable for the full amount of the award.
>
> * * * *
>
> The treatment of carrier liability was intended to be handled in the same manner.

225 F.2d at 145.

The last employer rule was created to avoid the "difficulties and delays which would inhere in the administration of the Act" if attempts were made to apportion liability among several responsible employers. *Cardillo*, 225 F.2d at 145. Indeed, the rule apportions liability in a roughly equitable manner because "all employers will be the last employer a proportionate share of the time. *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1983) (*quoting Cordero, supra*). The *Cardillo* court found the "last employer" principle to be based on Congressional intent at the time of the Act's passage in 1927. The court cited the legislative history of the Act, stating:

> It was acknowledged that, absent such [an apportionment] 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 that would inhere in the administration of the Act, were such a provision incorporated into it.

225 F.2d at 145, *citations omitted*. Consequently, the court refused to adopt the same apportionment provision already rejected by Congress with the knowledge that an employer, in whose employment no disability was caused, could nevertheless be held liable for compensation. Congress cited the rule of *Cardillo*, with approval, in passing the 1984 Amendments to the LHWCA.[7]

The Board viewed the present case, simplistically, as one involving a singular occupational disease case and identified a single last employer, SSA. *DER 18.* It failed to recognize that the facts presented in this case involved the interplay of two doctrines, the last employer rule and the aggravation rule. The aggravation rule 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."); *Independent Stevedore Company v. O'Leary*, 357 F.2d 812, 814 (9th Cir. 1966). Here, Benjamin's

[7] Longshore and Harbor Workers' Compensation Act Amendments of 1984, Joint Explanatory Statement of the Committee of Conference, U.S. Code Cong. & Admin. News 2771, 2778.

quantifiable 28.5 percent occupational hearing loss was aggravated by further occupational exposure, giving rise to a new, compensable occupational disease.

This Court's decision in *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986) is instructive on the point. In *Kelaita*, a worker suffered two separate, cumulative trauma injuries while working for two different employers and filed separate claims against each. The Court applied the last employer rule to this "two injury" situation and concluded that the second employer, in whose employment the claimant aggravated his initial injury, was liable for the full amount of the award of benefits, with no apportionment of benefits between his employers.[8] *Id.*

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[8] As explained more fully below, the *Kelaita* panel determined that liability should be assessed against either the first employer or the last employer, depending strictly upon whether the claim involved an occupational disease or two traumatic injuries. In the latter situation, the Court applied a rule similar to that used by the Board in this occupational disease case, absolving the first employer of all liability in the two-injury context, even though there is no statutory justification for effectively extinguishing a viable claim against that employer. Although the holding in *Kelaita* is in considerable tension with the statutory terms and the case-law generally (see, e.g., *Strachan Shipping Co. v. Nash*, 782 F2.d 513 (5th Cir. 1986)(en banc); *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F. 2d 759 (5th Cir. 1989); *Cordero*, and discussion, *infra* at pp. 22-23), the validity of that holding, which deals only with the appropriate attribution of liability in a two-injury case, is not at issue in this case, which involves an occupational disease.

The Court distinguished the "two injury" case presented in *Kelaita* from an occupational disease case, indicating, in *dicta*, that in cases of occupational disease, liability should be assessed against the employer for whom the worker was employed when he "first became disabled." *Id.* at 1311. In this case, Benjamin's hearing loss is unquestionably an occupational disease – indeed, the very occupational disease with respect to which the "last employer" rule was developed in the form quoted by the Court and distinguished from the "two-injury" rule. *Id.* at 1311 (quoting from *Cardillo*, 225 F.2d at 145.) Thus, under *Kelaita's* reasoning, in this occupational disease case, the first employer, CSC, should be held liable – precisely the opposite of the result that the Board reached in holding SSA alone fully liable.

The *Kelaita* dicta also suggest, however, that liability for any worsening of the occupational disease during subsequent employment would also be the responsibility of the first employer. Indeed, subsequently, in *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 623-624 (9th Cir. 1991), the Court contrasted the last employer rule for occupational disease cases with what it referred to as the "two-injury" rule or "aggravation rule," thereby implying that aggravation of an occupational

disease cannot occur.

In so concluding, the panels in *Kelaita* and *Foundation Constructors* may have assumed that in a case involving an occupational disease, the second employer could be relieved of liability on the theory that the ultimate disability resulted not from aggravation, but from a natural progression of the first injury – which would have occurred absent any further exposure. In fact, the suggestion that the second employer would be absolved of all liability in an occupational disease case could only properly rest on two unstated assumptions: (1) that the occupational disease continued to progress even absent further exposure, *and* (2) that further exposure did not, in fact, aggravate the condition. As a matter of fact, however, the initial degree of disability arising from an occupational disease may be aggravated by further exposure during subsequent employment. In that instance, as occurred in this case, the last employer for whom the worker was employed prior to the manifestation of the increased disability would be liable for the deterioration. Such a resolution must be the appropriate one. It would be untenable to hold a first employer liable -- not only for the disabling consequences of an occupational disease arising during the first employment -- but also for the increased impairment resulting from work for a

subsequent employer. Accordingly, where there has been aggravation of an occupational hearing loss, the last employer rule must be applied not once, as the Board ruled, but twice, giving rise to two last employers, one for each quantifiable and compensable occupational disease.

The First Circuit's decision in *Bath Iron Works Corp. v. Director, OWCP (Jones)*, 193 F.3d 27 (1999) is on point. In that case, a worker was initially awarded benefits against his employer and its carrier for permanent partial disability due to work-related asbestosis. After further occupational exposure and worsening of the condition, he petitioned for modification of his award on the theory that he had suffered a new injury and was therefore entitled to receive permanent total disability benefits at the higher average weekly wage prevailing on the date of the new injury. The employer became self-insured prior to the date of the new injury. A second ALJ initially found that the deterioration was due to the natural progression of his occupational disease. Accordingly, the ALJ held that the *initial* insurer remained liable for the worker's now permanent total disability at the lower average weekly wage– the precise result suggested by the *Kelaita* Court. *Id.* at 29, 32 n.2.

The ALJ's decision was subsequently vacated by the Benefits Review Board and remanded for further fact-finding due to *the ALJ's failure to*

consider evidence that the claimant's condition had been aggravated by further occupational exposure. On remand, the ALJ found that subsequent exposure had aggravated the worker's condition, thus entitling him to an award of permanent total disability against the self-insured employer at the higher average weekly wage. The First Circuit affirmed, thereby recognizing both the factual reality and legal propriety of the theory that an occupational disease may be aggravated, resulting in separate liability for two last employers/insurers. *See also Bath Iron Works v. Director (Hutchins)*, 244 F.3d 222 (1st Cir. 2001) (holding that the last employer/insurer rule does not prohibit assessment of liability for medical benefits against a first insurer after onset of occupational *injury* and liability for compensation benefits against a second carrier after further exposure and onset of disability).

Accordingly, the *Kelaita* Court's suggestion that a second employer could be absolved of liability in an occupational disease case would only be warranted where: (1) the case involved an occupational disease with a delayed onset and progressive disability, e.g., asbestosis, which, (2) was not, in fact, aggravated by further industrial exposure. The *Kelaita* Court's remarks, however, cannot apply in any case involving hearing loss. As the Supreme Court held in *Bath Iron Works v. Director, OWCP*, 506 U.S. 153,

163 (1993), in contrast to delayed onset occupational diseases such as asbestosis, occupational hearing loss is a disease which results in an immediate and non-progressive disability.[9]

In sum, the *Kelaita's* observation concerning the assessment of liability for occupational disease claims must be modified in cases of occupational hearing loss. As the *Kelaita* Court noted, and contrary to the Board's result in the instant action, the first employer will remain liable when the initial disability arises during the first employment. As there cannot be a natural progression of occupational hearing loss, however, liability for any deterioration of the condition cannot be assessed against the first employer, as *Kelaita* otherwise suggests. Where there is evidence that a subsequent employer aggravated the condition via later occupational exposure, that employer will incur liability as a second or "last" employer. *Jones, 193 F.3d at 32*. Thus, any work-related worsening of an occupational hearing loss after further occupational exposure must necessarily result from

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[9] The *Bath* Court specifically recognized that occupational hearing loss cases are distinguishable from "long-latency disease[s] such as asbestosis," as those individuals who have experienced injurious exposure to stimuli such as asbestos "suffer[ ] no injury until the disease manifests itself years later." 506 U.S. at 163. In contrast, individuals who receive hearing loss injuries are, the Court indicated, presumptively disabled at the time of the exposure to the injurious stimuli. *Id*. Each measured loss of hearing is thus properly treated as a separate and distinct claim under the LHWCA.

aggravation of the condition, not from natural progression. The evidence in this case established that Benjamin's hearing loss was so aggravated.[10]

Moreover, the terms of the last employer rule and its underlying rationale are fully supportive of the proposition that an occupational disease can be aggravated by further occupational exposure, thereby giving rise to two "last" employers. In *Cordero*, this Court recognized that "the onset of disability is a key factor in assessing liability under the last injurious–exposure rule." 580 F.2d at 1337. Thus, the Court reasoned that

> it does not detract from the operation of this rule to show that the disease existed under the prior employer or carrier, or had become actually apparent, or had received medical treatment*, so long as it had not resulted in disability*.

Id. (emphasis added). The *Cordero* Court also referenced Professor Larson's leading treatise on workers' compensation, which states that "[i]n the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability." *Id.,* quoting from Arthur Larson & Rex Larson, *Law of Workmen's Compensation* at § 95.21.

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[10] Thus, this Court need not decide whether the dicta in *Kelaita* -- suggesting that in occupational disease cases, the first employer remains liable for a disability arising from subsequent employment would warrant a different result for diseases other than occupational hearing loss.

Thus, the last employer rule, by its terms, allocates liability to the last exposing employer prior to the manifestation of disability. In this case, the Board refused to recognize that Mr. Benjamin suffered two separate injuries, giving rise to two separate manifest, measurable scheduled disabilities and two separate claims. Under *Cardillo,* because Mr. Benjamin "was suffering from [a quantified hearing loss]" while he was working for CSC – an impairment that was aggravated during his employment by SSA -- the rule must be applied to each claim. As a result, both CSC and SSA are "last employers" within the meaning of the rule.

In this case, however, the Board, instead of applying the rule to allocate liability against CSC -- the last exposing employer prior to the first hearing loss injury and first onset of disability -- used the rule to justify extinguishing the liability of CSC because of a subsequent aggravation of the disabling condition. As noted above, the last employer rule says nothing about a subsequent aggravation of a quantified, compensable occupational disease. *See Cardillo*, 225 F.2d at 145; *see also Ronne,* 932 F.2d at 840-841; *Cordero*, 580 F.2d at 1335. Where, as here, the aggravation of a measurable and compensable occupational disease is attributable to a different employer than the one that is liable for the initial manifestation of the disease, the aggravation is deemed a new occupational disease. Thus,

the last employer rule would apply a second time to allocate liability among those employers responsible for the second disabling condition. No reasonable construction of either the LHWCA or precedent can justify the Board's conclusion that Mr. Benjamin's later claim for aggravation of a disabling occupational disease -- after further harmful occupational exposure -- nullifies CSC's liability on the original claim for the extent of his disability before that aggravation.

Given the uncontested evidence of aggravation here, the Board's suggestion that Mr. Benjamin's claims were for the same injury is flatly wrong. The flaw in the Board's reasoning becomes all the more apparent when one considers the consequences if, prior to the filing of his second claim, Mr. Benjamin's initial claim had been deemed resolved and CSC held liable for the full extent of the disability arising at that time. Following the Board's "same injury" reasoning to its logical conclusion, Mr. Benjamin's subsequent claim against SSA, after further occupational exposure and aggravation of the hearing impairment, could only be logically resolved by either (1) denial of the subsequent claim because the "injury" would previously have been compensated; or (2) an assessment of full liability against SSA for the "injury" -- including reimbursement to CSC -- because CSC's liability on the first claim was extinguished by the filing of the

second claim. Either result is unpalatable, underscoring the faultiness of the Board's reasoning that the aggravation of a scheduled impairment is considered part of the same "injury."

As the First Circuit's decision in *Jones* illustrates, the courts have identified the appropriate method of resolving multiple claims arising from an initial injury and its subsequent aggravation. In those instances, the first employer is held liable for the initial disability attributed to it, while the second employer is deemed fully liable for the worker's current level of impairment, with potential relief under § 8(f). Credit for any compensation previously paid (on the initial claim) may be available, either to the second employer or to the Special Fund if § 8(f) relief is granted. In *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) (en banc), the worker suffered an initial work-related impairment to the knee and a subsequent work-related aggravation of the same knee. He settled his claim on the initial injury. The Fifth Circuit affirmed the worker's award on the second claim for his entire current level of disability, subject to a credit for the worker's recovery on the first claim. The court specifically addressed how the credit doctrine was to be applied, holding that the credit should be based on what the worker actually received on the initial claim, not what he could have recovered. But the court's entire analysis was based on the theory that each employer is liable

for the disability attributable to it (with § 8(f) relief granted to the second employer where appropriate and credit given either to the second employer or to the Special Fund).

The Board's rule here, however, sharply diverges from the established procedures simply because the first claim remained pending at the time of the adjudication of the second claim. The effect of the Board's ruling is that in cases where the worker's disability has already been identified and quantified, rather than an employer paying for that portion of the disability clearly attributable to it, the cost will be transferred to the Act's second injury fund by application of section 908(f) and thereby disbursed throughout the maritime industry,.[11] That result does not comport with the principles underlying § 8(f).

In *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759 (5th Cir. 1989), the court held that the aggravation of an initial scheduled injury is fully compensable, subject to a dollar for dollar credit for any compensation paid on the initial claim. Significantly, in *Brown*, as in the instant case, the first claim remained pending during adjudication of the second, but that fact did nothing to alter the court's analysis. As in *Nash,* the court's conclusion was premised on the fact that the aggravation of a

[11] The Special Fund is financed by a yearly assessment on the maritime industry. *See* LHWCA § 44.

scheduled injury is itself a separate, fully compensable injury. Most importantly, the Fifth Circuit ruled that the filing of a second claim after aggravation of a scheduled impairment does nothing to affect the earlier employer's liability on the first claim.

Moreover, the *Brown* court grounded its ruling -- that the Special Fund, not the employer, was entitled to a credit for payment made on the initial scheduled award -- on the principle that an employer is always liable for the disability it caused, and its liability should not be spread out to the maritime industry through application of § 8(f). As the court observed,

> under [the employer-first] rule, in many situations the employer would actually pay less than the compensation due for the second injury *alone*… Unlike the employer-first rule … the fund-first rule advocated by the Director is consistent with the express language of section 908(f)(1). Section 908(f)(1) clearly contemplates that, at the very least, the employer … will always pay at least the amount that is related to the second injury.

868 F.2d at 762. The effect of the Board's ruling here, however, is that CSC escapes the liability for disability it caused – liability that clearly would have been assessed against it if Mr. Benjamin's first claim had fortuitously been adjudicated prior to the filing of his second. Instead, through application of § 8(f), the Special Fund, and thus the maritime industry, pays for CSC's liability. As the *Brown* court recognized, that is a perversion of § 8(f).

Conversely, if -- as the Director and SSA propose -- CSC is held liable for Benjamin's initial 28.5% hearing loss, the Fund would be entitled to a credit for those payments against its § 8(f) liability on the second claim. *See* discussion *infra* at 31.

D. **Disastrous Policy.**

The Board nevertheless defended its approach on policy grounds, stating that SSA was properly held liable in this case in order to compensate the worker fully and to avoid the "complexities of assigning joint liability." *DER 18.*

As a threshold matter, the Board's concern that applying the Director's approach will adversely affect Mr. Benjamin is misplaced. The resolution proposed by both the Director and SSA -- that the last employer rule be applied separately to each claim -- does nothing to affect Mr. Benjamin's entitlement to compensation. The issue presented is whether CSC -- within whose employ Mr. Benjamin's initial disability arose -- should remain liable for its portion of his current level of disability, notwithstanding the subsequent aggravation of his impairment.

The Board's purported reliance on administrative convenience, *DER 18*, is also unpersuasive. First, policy considerations are insufficient to extend a rule beyond its express language or to circumstances beyond those

to which it was intended to apply. Moreover, the administrative convenience rationale underlying the "last employer rule" was meant to address the difficulties inherent in allocating liability among multiple employers responsible for a worker's single, compensable disability. *Hearing of Committee on the Judiciary of the House of Representatives, on H.R. 9498, 69th Congress, 1st Sess., held April 8, 15, 22, 1926.* Thus, the rule requires that the time the disability arises or first becomes manifest be pinpointed, and the last exposing employer prior to that date is assessed full liability for the manifest disability. Where two manifest disabilities arise, there is no administrative inconvenience in identifying the last employer responsible for each disability.

In fact, the Board's approach in the present case -- that there can be only one determinative audiogram[12] and thus only one last employer --

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[12] The Board indicated that the Director's position that there can be two "determinative" audiograms was inconsistent with the law of this Circuit. *DER 17-18* (citing *Port of Portland*, 932 F.2d at 836). Although "determinative audiogram" has not been precisely defined, this Court has used the term to refer to "the most reliable audiogram (and thus determinative)" relied upon by the fact-finder to measure the worker's hearing loss at the relevant "time of injury." *Ramey v. Stevedoring Services of America*, 134 F.2d 954, 960 (1998). The Court however, has not considered application of the term where, as in the instant case, there are two claims and hence two "times of injury." The Director's position is, however, perfectly consistent with this Court's use of the term – in this case, the two relevant audiograms are each the most reliable (or determinative) measure of Mr.

undermines not only notions of administrative convenience, but another fundamental policy underlying the Act: the prompt payment of benefits. This Court has held that the plain language of the Act, together with the statute's legislative history, "unequivocally reflects a congressional desire that benefits be paid to deserving claimants as soon as possible." *Edwards v. Director, OWCP*, 932 F.2d 1325, 1328 (9th Cir. 1991). The Board's holding here, however, encourages an employer against whom a claim is filed to deny liability and delay adjudication of a claim until an aggravation of the worker's condition occurs in subsequent employment, in the hope that the aggravation will extinguish the earlier employer's liability. Such a delay is clearly inconsistent with the Act's policy of insuring the prompt payment of benefits. *See* 33 U.S.C. §921.

The incentive to delay the proceedings and escape liability is all the more inviting for employers because of the nature of maritime work. Many workers are hired through a union hiring hall, and may be employed by different employers on a weekly or even daily basis, as is common among longshoreman. *See generally Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 315 (4th Cir. 1998). In such instances, there is a reasonable

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Benjamin's hearing loss at the respective times each test was administered.

likelihood that, after the filing of a hearing loss claim, the worker will suffer further occupational noise exposure with a subsequent employer, giving rise to a new claim for aggravation of the condition. The first employer is thus encouraged to delay the adjudication of the claim against it in order to take advantage of the reasonable expectation that a subsequent aggravation and second claim filing will occur.

Similarly, the filing of hearing loss claims by shipyard workers frequently occurs during industry layoffs. Again, under the Board's rule, the liable employer will be encouraged to delay resolution and payment of the claim in the hope that the worker's subsequent job with a different employer will result in further occupational noise exposure, an aggravation of his disability and eradication of the earlier employer's liability. The Board's effective promise of a potential windfall to employers who can delay the proceedings provides an unwarranted incentive for delay in payment, unnecessary litigation and attorney's fees.

Moreover, in future cases, the violence that the Board's rule does to the procedural structure of the Act will create anomalous results and general confusion. Under the present system, a "last employer" who fails to file a timely controversion or who fails to pay benefits on an initial claim is liable not only for the basic compensation on the disabling condition, but also for a

ten percent increase in the amount of compensation. *See* 33 U.S.C. §914(e). If the Board's decision stands, thereby extinguishing the basic liability if the initial claim remains pending following the aggravation of the condition, arguably the ten percent augmentation of liability will likewise be extinguished as a corollary to the nullification of the initial claim. It would certainly be unreasonable for the second employer to be forced to assume liability for the first employer's failure to act in accordance with its procedural responsibilities. Accordingly, the Board's rationale will result in clear contravention of the statutory mandate and deprive the injured worker of a statutory right to be compensated for a delay in payment.

Finally, the Board's reasoning complicates the application of the LHWCA attorney's fees provision, raising several difficult questions. Would the second "last employer" be responsible for the attorney's fees reasonably incurred against the first liable employer? What if the second employer promptly paid the claim and thereby avoided the imposition of attorney's fees against it?[13] Would it nevertheless incur the attorney's fee liability of the prior employer? If not, would the claimant be responsible for payment of his or her own attorney's fees, notwithstanding the statutory

[13] Under the LHWCA, an employer may avoid imposition of attorney's fees by paying on the claim within 30 days of the receipt of a notice of the claim being filed. *See* 33 U.S.C. §928(a).

provision which mandates that a successful prosecution of the initial claim allows a claimant to recoup expenses? If the Board's ruling is upheld, there would appear to be no reasonable solution to these problems.

E**. The Remedy.**

The Board misapplied the "last employer" doctrine because the facts of this case demonstrate that Mr. Benjamin suffered two separate disabilities -- the first a demonstrated 28.5 percent binaural impairment, quantified while Mr. Benjamin was working for CSC – and the second for the aggravation of that impairment to a 34 percent binaural impairment, measured after he was employed by SSA. Thus this case presents two "last employers," both of whom are liable for the extent of the disabling impairment suffered by the claimant while working for that particular employer, subject to potential relief under § 8(f). Accordingly, this Court should modify the Board's decision as follows: The first employer, CSC, is liable for Benjamin's initial 28.5 percent binaural impairment**,** with interest from the time that compensation first became payable. The award made by the ALJ against SSA for Benjamin's full 34 percent hearing loss, which the ALJ deemed eligible for section 8(f) relief, should be modified to

allow SSA a credit for the amount that CSC should be required to pay on the first claim (excluding the interest payable by CSC). Thus, in effect, SSA would be liable to pay benefits for the 5.5 percent aggravation, based on the average weekly wage applicable to the 1994 injury. The Special Fund would be left to bear only the *additional* liability for the original impairment, beyond that for which CSC is liable, attributable to the higher average weekly wage at the time of the "second injury." Since the Special Fund has already paid benefits for the incremental difference between the hearing loss shown at the time of the 1991 claim and that shown at the time of the aggravation, CSC should be ordered to reimburse the Fund in the amount of CSC's basic compensation liability, with interest from the time of the Fund's payment, and to pay the interest from the time the compensation became payable by CSC in 1991 until the date of the Fund's payment to the claimant.

CONCLUSION

For all of the reasons stated above, the Director respectfully requests that this Court vacate the Decision and Order of the Benefits Review Board affirming the ALJ's Decision and Order and remand the case for further consideration.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Director is unaware of any related case now pending before this Court.

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 of this brief is of 14 points and is proportionately spaced. The word count according to the word processing system used to prepare the brief is 8078.

CERTIFICATE OF SERVICE

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