No. 09-60509

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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LOUISIANA INSURANCE GUARANTY ASSOCIATION, ET. AL
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR, ET. AL
Respondents.

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

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BRIEF FOR FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.2, the Director, OWCP, requests oral argument, which he believes would assist the Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

No. 09-60509

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA INSURANCE GUARANTY ASSOCIATION

and

BATON ROUGE MARINE CONTRACTORS, INC.,

Petitioners,

v.

ROBERT HARVEY,

NATIONAL BEN FRANKLIN INS. CO. OF PITTSBURGH, PENNSYLVANIA,

FIDELITY & CASUALTY COMPANY OF NEW YORK,

and

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

Respondents.

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

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from a claim filed by Robert Harvey for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2006) (Longshore Act or Act). The Administrative Law Judge (ALJ) had jurisdiction to hear the claim pursuant to sections 19(c) and (d) of the Longshore Act. 33 U.S.C. § 919(c), (d).[1] The ALJ's Decision and Order Granting Benefits (ALJ Decision) was issued April 30, 2008, and became effective when filed in the office of the District Director on May 1, 2008. Employer's Record Excerpts (ERE), Exhibit A; 33 U.S.C. § 921(a).

The Benefits Review Board has jurisdiction to review ALJ decisions that are appealed by a party in interest within thirty days of their filing by the District Director. In this case, the appeal deadline was May 31, 2008. 33 U.S.C. § 921(a), (b). Baton Rouge Marine Contractors, Inc. (BRMC), Mr. Harvey's employer, filed a Notice of Appeal of the ALJ's decision with the Benefits Review Board on May 13, 2008, and the Louisiana Insurance Guaranty Association (LIGA), National Ben

[1] Unless otherwise noted, all statutory references are to the Longshore Act, with section xx, for example, referring to 33 U.S.C. § 9xx.

Franklin Insurance Company of Pittsburgh, Pennsylvania, and Fidelity & Casualty Company of New York filed cross appeals on May 19, 2008. All of these appeals were timely, and invoked the Board's review jurisdiction pursuant to section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3). The Board issued its Decision and Order resolving all appeals and affirming the ALJ's decision on May 11, 2009. ERE Exh. C.

Section 21(c) of the Act provides that any party aggrieved by a final order of the Board may obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. LIGA filed its Petition for Review with this Court on July 8, 2009, and BRMC filed its Petition on July 9, 2009, both within the prescribed sixty-day period. The Board order appealed is final pursuant to section 21(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). Harvey was injured in Louisiana, within this Court's territorial jurisdiction. Thus, pursuant to section 21(c), this Court has jurisdiction over LIGA's and BRMC's petitions for review.

STATEMENT OF THE ISSUES

In Longshore Act claims involving long-latency occupational diseases, the "last responsible employer rule" dictates that full compensation liability rests with the employer and insurance carrier covering the employer's liability on the date of

the worker's last injurious exposure to the harmful stimuli. The ALJ, as affirmed by the Board, concluded that Mr. Harvey's last injurious exposure to asbestos occurred on his last day of employment with BRMC, who was at that time insured by Employers' National Insurance Company. Employers' National was a Louisiana insurer that became insolvent before Harvey filed his claim. The Louisiana Insurance Guaranty Association generally assumes all of the duties and obligations of an insolvent Louisiana insurer. But LIGA's enabling legislation provides that if other insurance covers the same claim for which recovery is sought from LIGA, that insurance must be exhausted before the claimant can recover from LIGA.

I. Where there is no other insurance available to pay Mr. Harvey's monetary compensation because the last employer rule places all liability on insolvent Employers' National, does LIGA remain liable for his monetary compensation?

II. Where Harvey is covered by a health insurance policy, but the record does not reveal whether that policy covers care necessitated by an employment-related occupational disease, should the Court remand for further fact-finding on whether that policy covers the same claim for medical benefits for which recovery is sought from LIGA?

STATEMENT OF THE CASE

Mr. Harvey filed a claim for benefits under the Longshore Act on July 12, 1996. Claimant's Record Excerpts (CRE) Exhibit A. He retired from all employment on May 13, 2005. On April 30, 2008, an ALJ awarded him compensation for permanent total disability beginning May 13, 2005 and continuing, payable by BRMC and LIGA. ERE Exh. A. BRMC and LIGA appealed to the Board, which affirmed the ALJ's decision on May 11, 2009. ERE Exh. C. LIGA and BRMC both timely petitioned this Court for review, on July 8, 2009 and July 9, 2009, respectively.

STATEMENT OF FACTS[2]

I. HARVEY'S EMPLOYMENT AND INJURY

Mr. Harvey worked as a longshoreman at the Port of Greater Baton Rouge from 1965 to 1977. His primary employer during that time was BRMC. He worked directly with asbestos, unloading bags of it from the holds of ships, stacking them on the docks, storing them in warehouses, and loading them onto trucks. Hearing Transcript (Tr.) 41-44. He began working as a crane operator in

[2] While the private parties have briefed additional issues, the Director's brief is limited to those legal questions that involve the interface between the Longshore Act and the Louisiana Insurance Guaranty Association Law. Thus, this statement includes only those facts relevant to those issues.

1970, and worked on cranes almost exclusively from 1972 until the end of his BRMC employment in 1977. During this time as a crane operator, he continued to pass through the warehouses where asbestos was stored in order to get to the cranes. Tr. 61.

Frank Parker, III, a board-certified industrial hygienist, testified that Mr. Harvey would have been exposed to asbestos whenever he handled the bags of asbestos, and any time he was in an area where asbestos had settled and was disturbed by him or others. Claimant's Exhibit (CX) 9 at 2, 31. Such exposure would have continued in the warehouses Mr. Harvey passed through unless and until the asbestos was eradicated through decontamination. CX 9 at 17, 26, 31. Parker testified that, without eradication, Mr. Harvey's last injurious exposure would have occurred on the last day he worked in the warehouses. CX 9 at 32. According to BRMC, there were no steps taken to eradicate asbestos from the warehouses. CX 10.

In 1977, Mr. Harvey began working for the State of Louisiana, first as a crane operator at the Baton Rouge Barge Terminal and then as a terminal manager on the Slack Water Canal. He eventually returned to the main port facility where he worked in warehouse and railroad maintenance. Mr. Harvey did no longshore work while employed by the State, Tr. 48-50, and did not pass through the warehouses where asbestos had been stored. Tr. 68.

While still employed, Mr. Harvey was diagnosed with pulmonary asbestosis on July 28, 1998. He retired from the State on May 13, 2005. Tr. 57-58.

II. BRMC'S INSURANCE COVERAGE

During Mr. Harvey's employment with BRMC from 1965 to 1977, a series of insurance carriers provided BRMC with Longshore Act coverage, each for a specific time period:

- October 31, 1960 to April 1, 1970 – The Fidelity and Casualty Company of New York;
- October 31, 1966 to April 1, 1970 – National Ben Franklin Insurance Company of Pittsburgh, Pennsylvania;
- April 1, 1970 to October 1, 1972 – Employers' Casualty Company
- October 1, 1972 to November 1, 1982 – Employers' National Insurance Company.

ERE Tab A, p. 9.

The State of Louisiana declared Employers' National Insurance Company insolvent and placed it into receivership in 1994. ERE Tab A, p. 30. As a result, LIGA appeared in place of Employers' National in these proceedings.

III. THE ALJ'S DECISION

The ALJ awarded Mr. Harvey compensation. He found that Mr. Harvey's asbestosis was causally related to his work for BRMC; that he was permanently and totally disabled; and that he was entitled to Longshore Act compensation. The ALJ also awarded Mr. Harvey reasonable and necessary medical care for services related to his asbestosis, including reimbursement of any past related medical expenses. ERE Tab A.

To determine which BRMC insurer should bear liability for the award, the ALJ applied the "last responsible employer" rule. The rule is used to assign liability in Longshore Act claims that are based on latent occupational diseases. Under the rule, which also applies to insurers, full liability is assigned to the employer and insurance carrier providing coverage at the time of the claimant's last injurious exposure to the harmful stimulus.[3] Based on the expert testimony of industrial hygienist Parker, the ALJ concluded that Mr. Harvey's last injurious

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[3] Specifically, the rule places liability on the last employer to expose the worker before he became aware of his employment-related disease. *Traveler's Insurance Company v. Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955). The ALJ found that Mr. Harvey was last exposed to asbestos in 1977 while working for BRMC. He was not diagnosed with asbestosis until 1998. Consequently, BRMC was the last employer to expose him to asbestos before he became aware of his disease.

exposure to asbestos occurred on his last day of work for BRMC in 1977. *Id*. at 28-29. Accordingly, the ALJ found BRMC and Employers' National – and, by extension, LIGA – liable for Harvey's compensation and medical benefits. *Id*. at 29, 30.

LIGA argued that, even if Employers' National was the responsible carrier, Mr. Harvey could not recover from LIGA pursuant to a Louisiana state statute, La. R.S. 22:1386(A), until he exhausted all other insurance available to BRMC. [4] *Id*. at

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[4] The Louisiana statute was renumbered in 2008, and is now section 22:2062. The title of the statute is "Nonduplication of recovery," and subsection A provides:

> Any person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy. Such other policies of insurance shall include but shall not be limited to liability coverage, uninsured or underinsured motorist liability coverage, or both, hospitalization, coverage under self-insurance certificates, coverage under a health maintenance organization or plan, preferred provider organization or plan, or similar plan, and any and all other medical expense coverage. All entities that are prohibited from recovering against the association, as specified in R.S. 22:2055(3)(b), shall also be considered insurers for purposes of this Subsection. As to the association, any amount payable by such other insurance shall act as a credit against the damages of the claimant, and the association shall not be liable for such portion of the damages of the claimant. In the case of a claimant alleging personal injury or death caused by exposure to asbestos fibers or other claim resulting from exposure to, release of, or contamination from any environmental pollutant or contaminant, such claimant must first exhaust any and all other insurance available to the insured for said claim for any policy period for which

30. The ALJ rejected this argument. He concluded that no other insurer provided coverage to BRMC in 1977, when Mr. Harvey's last injurious exposure occurred, and consequently there was no other available insurance for Mr. Harvey to exhaust. *Id*. at 30.

IV. THE BOARD'S DECISION

The Board affirmed the ALJ's decision. It held that substantial evidence supported the ALJ's finding that Mr. Harvey's last injurious exposure to asbestos occurred in 1977 while employed by BRMC, and that Employers' National was BRMC's insurance carrier at that time. *Id*. at 5-7.

The Board rejected LIGA's argument that, under La. R.S. 22:1386(A), BRMC's insurers from earlier periods should be required to pay Mr. Harvey's benefits before LIGA could be held liable. *Id*. at 7. Like the ALJ, the Board concluded that Employers' National was the only insurer that could be held liable for Mr. Harvey's benefits under the last responsible employer rule. *Id*. at 7-8.

(. . . continued)

> insurance is available before recovering from the association, even if an insolvent insurer provided the only coverage for one or more policy periods of the alleged exposure.

La. R.S. 22:2062(A).

Because Employers' National was insolvent, the Board held that LIGA was responsible for the carrier's liability.

The Board also rejected LIGA's reliance on *Southern Silica of Louisiana, Inc. v. LIGA*, 979 So.2d 460 (La. 2008), for the proposition that liability should be prorated among BRMC's carriers. ERE Exh. C at 7-8. There, the Louisiana Supreme Court held that LIGA was liable for an insolvent insurer's pro rata share of liability in a silicosis tort case. *Id*. at 468-69. The Board recognized that proration was appropriate in *Southern Silica*, because that was the method used to allocate liability in Louisiana tort cases involving occupational diseases. ERE Exh. C at 7. It noted, however, that under the Longshore Act, liability is not prorated among insurers, but assigned solely to the last insurer, here insolvent Employers' National. *Id*. at 7-8. Further, the Board recognized that the approach urged by LIGA – requiring BRMC's other carriers to "fill the gap" left by the insolvent carrier – was the approach rejected by the *Southern Silica* court. Because Employers' National was solely liable for Harvey's benefits under the last employer rule, the Board held that LIGA was solely liable in its stead. *Id*. at 8.

Rebuffing LIGA's additional argument that BRMC's other carriers had waived their insurance coverage defenses by assuming BRMC's defense, the Board noted that each insurer defended its liability for the specific time period it covered BRMC. *Id.* at 8, n. 2. The Board also rejected this argument because BRMC and

its carriers had separate counsel, thus indicating that the carriers were not acting solely on BRMC's behalf.

Finally, the Board affirmed the ALJ's finding that LIGA was liable for Mr. Harvey's medical benefits. *Id*. at 8. The Board noted that La. R.S. 22:1386(A) – upon which LIGA relied for the proposition that claims against medical insurers must be exhausted before LIGA's assumption of liability, *see* note 3, *supra* – was intended to avoid double recovery. From this proposition, the Board reasoned that double recovery was not a concern under the Longshore Act, where the employer and its carrier are fully liable for medical care related to a claimant's work-related condition, and any private insurer that pays for such care is entitled to intervene and recover those costs from the employer or insurer. *Id*. at 8.

SUMMARY OF ARGUMENT

In Longshore Act claims for long-latency occupational diseases resulting from workplace exposure to harmful stimuli such as asbestos, liability is assigned pursuant to the last employer rule. In cases where the last employer had successive insurers during the claimant's period of exposure, the rule assigns liability to the carrier that insured the employer at the time it last exposed the employee to the injurious stimuli. In this case, BRMC last exposed Harvey to asbestos in 1977, when BRMC was insured by Employers' National Insurance Company. Employers' National, therefore, is the liable carrier.

Employers' National, however, is an insolvent Louisiana carrier. Under Louisiana's Insurance Guaranty Association Law, R.S. 22:2051- 2070, LIGA is "deemed the [insolvent] insurer" and has "all rights, duties and obligations of the insolvent insurer" with regard to covered claims. La. R.S. 22:2058(A)(2). LIGA, therefore, is liable for Mr. Harvey's claim in place of Employers' National.

Contrary to LIGA's argument, LIGA cannot escape liability by requiring BRMC's other carriers to pay Mr. Harvey's compensation and "fill the gap" left by Employer's National's insolvency. Although state law provides that any other insurance covering the same claim must be exhausted before recovery can be had from LIGA, La. R.S. 22:2062(A), the state statute does not purport to determine whether other insurance policies cover the same claim being made against LIGA. In this case, that determination is made under the Longshore Act.

With regard to Harvey's Longshore Act monetary disability compensation, the last employer rule makes Employers' National solely liable among BRMC's carriers. Thus, there is no other insurance available for Mr. Harvey to exhaust. It is not clear from the record whether Mr. Harvey has rights to exhaust with regard to the medical benefits for which Employers' National was found liable. If his health insurance provides coverage for asbestosis that resulted from workplace exposure, then Harvey may have to exhaust the rights he has under that policy before he can recover medical benefits from LIGA. Because the record does not

include Harvey's health policy or otherwise reveal the parameters of its coverage, the Court may wish to remand this case for further evidentiary development on this point.

STANDARD OF REVIEW

In reviewing a decision of the Board, this Court's "only function is to correct errors of law and to determine if the BRB has adhered to its proper scope of review – *i.e.*, has the Board deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's." *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980). With regard to questions of law, the Court's review of the Board's decisions is de novo. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 483 (5th Cir. 2003). The Court's review is tempered by deference principles: the Director's interpretation of the Longshore Act is entitled to deference. *Id.* at 483.

ARGUMENT

I. BECAUSE EMPLOYERS' NATIONAL IS INSOLVENT AND NO OTHER INSURANCE POLICY COVERS THE SAME CLAIM, LIGA IS LIABLE FOR HARVEY'S MONETARY DISABILITY COMPENSATION.

A. THE LAST EMPLOYER RULE

The last employer rule (also referred to as the "last exposure rule") was adopted by the then-administrator of the Longshore Act. The administrator's view was first judicially recognized in 1955 in *Traveler's Insurance Company v.*

Cardillo, 225 F.2d 137 (2d Cir. 1955). There the court noted that during hearings before passage of the Longshore Act, Congress was made aware that a "last employer" could be held liable for the total amount of an employee's award for an occupational disease – even where the injury was caused largely during other employment – unless Congress adopted a provision calling for apportionment of liability between employers. *Id*. at 145. Despite that awareness, Congress declined to enact an apportionment provision. The *Cardillo* court thus concluded that Congress intended to hold the last employer who exposes the claimant to injurious stimuli liable for the full amount of any award:

> [I]t would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Id. The court held that the same rationale applied to the last employer's insurance carriers:

> [I]t would seem . . . in keeping with the Congressional recognition of the over-riding importance of efficient administration in this area, to conclude that the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the 'liable' employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of

> his employment, should be held responsible for the discharge of the duties and obligations of the 'liable' employer.

Id.

This Court has adopted the last employer rule. *Fulks v. Avondale Shipyards, Inc*., 637 F.2d 1008, 1012 (5th Cir. 1981); *see Argonaut Insurance Co. v Patterson*, 846 F.2d 715, 718 (11th Cir. 1988) (recognizing that prior to the split of the 5th and 11th Circuits, the 5th Circuit adopted the last employer rule in *Fulks*). It has also explicitly agreed with *Cardillo's* legislative interpretation of Congress' intent in refusing to include a proration provision in the Act. *Ibos*, 317 F.3d at 484-85.

The ALJ and Board properly applied the last employer rule here, placing liability on the last employer to expose Harvey to asbestos before he became aware of his disease – BRMC – and the carrier that insured BRMC at the time of that last exposure – Employers' National.[5]

[5] The Director's argument assumes that the ALJ's factual finding regarding when Mr. Harvey was last exposed to asbestos (i.e., on the last day of his employment with BRMC in 1977) is supported by substantial evidence. The private parties have fully briefed this question.

B. LIGA'S LIABILITY FOR HARVEY'S MONETARY COMPENSATION

No party to this litigation questions the validity of the last employer rule. LIGA argues instead that it is shielded from compensation liability under a Louisiana statute, La. R.S. 22:2062(A), which LIGA asserts requires BRMC's other carriers to pay Mr. Harvey's compensation before LIGA can be held liable in Employers' National's place. Like the ALJ and the Board below, the Court should reject LIGA's argument because it is contrary to the Longshore Act and the Louisiana Supreme Court's interpretation of the state statute.

LIGA is an insurance guaranty association created by statute. Its purpose is "to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer . . . ." La. R.S. 22:2052. LIGA's authorizing legislation states that LIGA shall "[b]e deemed the insurer to the extent of its obligation on the covered claims and to such extent *shall have all rights, duties and obligations of the insolvent insurer* as if the insurer had not become insolvent . . . ." La. R.S. 22:2058(A)(2) (emphasis added). Louisiana's courts have held that "the provisions of [LIGA's enabling legislation] must be interpreted to protect claimants and policyholders and to advance their

interests rather than the interests of [LIGA]."[6] *Morris v. East Baton Rouge Parish School Bd*., 826 So.2d 46, 51-52 (La. App. 2002), *citing Senac v. Sandefer*, 418 So.2d 543, 545-46 (La. 1982); *Hickerson v. Protective Nat'l Ins. Co. of Omaha*, 383 So.2d 377, 379 (La. 1980).

Section 2062(A) contains two sentences on which LIGA relies in an attempt to avoid fulfilling the obligations of insolvent Employers' National. The first states:

> Any person *having a claim* against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust *his rights under such policy*.

The second provides:

> In the case of a claimant alleging personal injury or death caused by exposure to asbestos fibers . . ., such claimant must first exhaust any and all other insurance *available to the insured for said claim* for any policy period for which insurance is available before recovering from the association, even if an insolvent insurer provided the only coverage for one or more policy periods of the alleged exposure.

La. R.S. 22:2062(A) (emphasis added).

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[6] This interpretation is important here because BRMC is also liable for Harvey's monetary compensation and medical benefits. *See B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 724, 726 (1st Cir. 1989). Because it is the policyholder, the state statute should be interpreted to protect BRMC rather than LIGA.

As these provisions make clear, the only insurance from which a claimant must recover, before recovering from LIGA, is insurance *that covers the same claim for which recovery is sought from LIGA*. The mere fact that other policies exist, in other words, is irrelevant unless those policies actually cover the relevant claim.

Nothing in section 2062(A) or LIGA's enabling statute in general purports to determine – or even provides a mechanism for determining – whether other existing policies cover the same claim that is being made against LIGA. That determination is made under the law of allocation applicable to the type of case being litigated.

This principle – that the initial determination of liability is made under the law of allocation applicable to the type of case being litigated – was made clear by the Louisiana Supreme Court in *Southern Silica*. There, 500 employees sued Southern Silica in tort alleging that they suffered from silicosis, a long-latency occupational disease. 979 F.2d at 462. The employees based their claims on exposure to silica between 1965 and 2003. For part of that time, from 1977 through 1982, Southern Silica was insured by Reliance Insurance Company. But Reliance had since become insolvent, and Southern Silica sought a declaration that LIGA owed it indemnity and defense for exposures that occurred during Reliance's period of coverage. *Id.*

LIGA argued that Southern Silica's other carriers – those who had insured Southern Silica at times other than 1977-1982 – should be required to "fill the gap" left by Reliance's insolvency, thus allowing LIGA to escape liability entirely. *Id.* at 463-64. The Louisiana Supreme Court rejected that argument. Under a judicially-created rule, Louisiana law places partial liability on every insurer that insured the liable employer during the entire period over which an employee was exposed to the disease-causing substance. *Id*. at 465. The Court held that LIGA was liable for Reliance's pro rata share of liability under that rule. *Id.* at 468-69.

LIGA argued that it should not be held liable in place of Reliance, relying on section 2062(A) (then 1386(A)). The court held that neither of the relevant sentences of the provision supported LIGA's argument. It addressed the first sentence of section 2062(A), which requires a claimant to exhaust his rights under policies other than the one issued by the insolvent carrier before he recovers from LIGA. Previously, the court had determined in *Hall v. Zen-Noh Grain Corp*., 787 So.2d 280 (La. 2001), that the mere existence of other solvent carriers would not protect LIGA from liability where the solvent carriers did not cover the period for which the defendant was seeking recovery from LIGA. 979 So.2d at 468-69. Under such circumstances, the court held that defendant Zen-Noh had no claims against the solvent carriers, and no rights to exhaust under their policies.

The *Southern Silica* court next addressed the portion of section 2062(A) that requires a claimant alleging injury from asbestos or another environmental contaminant to "first exhaust any and all other insurance available to the insured for said claim," and held that the provision did not eliminate LIGA's liability in place of Reliance.

> The above provision merely states the order in which a claim must be handled. The claimant must "first" collect other insurance "available to the insured" before the claimant can collect from LIGA. What is "available" is the pro rata share of each insurer for each year that insurer was on the risk.

Id. at 468. In other words, the court determined what other insurance was "available" by applying the law of allocation applicable in Louisiana tort cases involving long-latency occupational disease.

The same rationale applies here. The applicable law of allocation, the last employer rule, places liability on the carrier that insured the employer when it last exposed the claimant to asbestos. In this case, the ALJ properly placed all liability on Employers' National. Because the last employer rule places *full* liability on Employers' National, and LIGA has *all* the duties and obligations of Employers' National, La. R.S. 22:2058(A)(2), the last employer rule places *full* liability on LIGA. There is, consequently, no other insurance "available" to BRMC or Mr. Harvey, and no other policies under which Mr. Harvey has any rights to exhaust. In both *Southern Silica* and here, the outcome is the same: if the applicable law of

allocation dictates that the insolvent insurer is liable, LIGA bears that same liability.

Although LIGA attempts to cast this result as the Longshore Act "trumping" state law, *LIGA's Brief* at 27, it is nothing of the sort. It is simply a matter of sequence: the Longshore Act must be applied first to determine which carrier is liable under the last employer rule. Only if an insolvent Louisiana carrier is found liable under that rule is LIGA then potentially liable for the entire award in place of the insolvent carrier. The insolvent carrier – and by extension LIGA – is treated no differently than any other carrier under the last employer rule. It is either fully liable for the claimant's compensation or not liable at all, as Congress intended. *See Cardillo*, 225 F.2d at 145; *Ibos*, 317 F.3d at 484-85; *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1983) (an underlying rationale for last employer rule is that all employers will be liable as the last employer a proportionate share of the time).

Nor can LIGA rely on the intent of the Louisiana legislature to avoid liability in this case. Indeed, one of the reasons the Louisiana Supreme Court rejected LIGA's attempt to escape liability in *Southern Silica* was because, had such an escape been allowed, "the risk of insolvency would be borne by the handful of insurers that wrote policies for Southern Silica instead of being borne by the entire Louisiana insurance industry, *as was intended when LIGA was created*

by the legislature." 979 So.2d at 469 n.4 (emphasis added). The same is true here. LIGA's efforts to avoid fulfilling the duties and obligations of Employers' National would place the liability of the insolvent Employers' National on three insurers that did not insure BRMC at the time of Harvey's last exposure, rather than spreading the insolvent insurer's liability across the entire Louisiana insurance industry as intended by the state legislature.

Finally, LIGA's argument that BRMC's other carriers waived their defenses to liability by not specifically denying coverage for Harvey's injury simply ignores the reality of Longshore litigation over injuries involving a long-latency occupational disease such as asbestosis. In such cases, two of the primary purposes of the litigation are to determine: (1) when the employee was last exposed to asbestos; and (2) which insurer covered the employer at the time of that exposure. It is only after those determinations are made that it can be known which policy period is implicated. Thus, none of the insurers can deny coverage based on policy periods before or during the litigation, because it is only after the litigation is concluded, and a decision is issued, that any single policy period is implicated.

The case on which LIGA relies, *Steptore v. Masco Construction Co. Inc*., 643 So.2d 1213 (La. 1994), implicitly makes this point. Steptore involves the situation in which "an insurer, *with knowledge of facts indicating noncoverage*

under the insurance policy, assumes or continues *the insured's defense* without obtaining a nonwaiver agreement to reserve its coverage defense . . . ." 643 F.2d at 1217 (emphasis added). As stated above, none of the carriers here could have had knowledge of the "fact indicating noncoverage" during the litigation because that fact – the date of Harvey's last exposure to asbestos – was determined only after the litigation was concluded. *Steptore* is distinguishable from this case in another way, as well. As the Board noted, the attorney for the insurance company in *Steptore* represented both the carrier and the insured in the litigation. ERE Exh. C at 8 n.5. Consequently, as the quoted language above makes clear, the insurer "assume[d] or continue[d] *the insured's defense*." 643 F.2d at 1217. Here, by contrast, BRMC was represented by separate counsel, and assumed its own defense.

Because insolvent Employers' National insured BRMC on Mr. Harvey's last day of employment and last day of exposure to the injurious stimuli, LIGA is liable for all of Mr. Harvey's compensation. No other carrier's coverage is "available" for this same period and no other carrier can be made to "fill the gap" left by Employers' National's insolvency. The Court should affirm the decisions below holding LIGA liable for Mr. Harvey's compensation.

II. BECAUSE THE RECORD DOES NOT REVEAL THE LIMITS OF HARVEY'S HEALTH INSURANCE POLICY, IT IS UNCLEAR WHETHER LIGA IS LIABLE FOR MR. HARVEY'S MEDICAL BENEFITS.

As noted above, the first sentence of La. R.S. 22:2062(A) provides that "[a]ny person having a claim against an insurer under any provision in an insurance policy, other than a policy of an insolvent insurer which is also a covered claim, shall be required first to exhaust his rights under such policy." The other policies that must be exhausted before recovery from LIGA include "hospitalization, . . . coverage under a health maintenance organization or plan, preferred provider organization or plan, or similar plan, and any and all other medical expense coverage." *Id.*

The record alludes to Mr. Harvey's health insurance policy. But it does not include the policy and does not reveal the parameters of its coverage. Thus, it cannot be determined whether Mr. Harvey has a claim against his health insurer, or rights under his health policy, for expenses arising from his work-related condition. Commonly, health policies exclude coverage for workplace injuries.[7] In that

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[7] If Mr. Harvey's health policy is a benefit of his Louisiana State employee retirement package, then it likely excludes coverage for medical expenses otherwise compensable under a workers' compensation law. *See generally* https://www.groupbenefits.org (follow "Quick Links Health Plans") (plan documents note exclusion when workers' compensation law covers expense).

event, there is no other "available" coverage and Mr. Harvey has no rights to exhaust before LIGA can be held liable. But the record evidence does not allow that determination.

Despite any existing health insurance coverage and LIGA's liability, BRMC remains responsible for Mr. Harvey's medical benefits. 33 U.S.C. §§ 904, 907; *See B.S. Costello*, 867 F.2d at 724, 726. But BRMC is the very policyholder whose interests LIGA is charged to protect. *Morris*, 826 So.2d at 51-52. Given the lack of evidence, however, the Court may wish to remand this case for a determination of the coverage that Mr. Harvey's health policy provides.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's decision that LIGA is liable for Harvey's monetary compensation. The Court should remand for further factual findings to determine whether LIGA is liable for Mr. Harvey's medical benefits.

Respectfully submitted,

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COMBINED CERTIFICATES OF COMPLIANCE

I certify that:

1. Pursuant to Fed.R.App.Proc. 32(a)(5), (6) and (7)(B) and (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 6164 words;

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