LMS International, Inc.

Average Weekly Wage and Last Responsible Employer in DBA and Longshore Act Cases

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In this paper, we explore the issues of average weekly wage and last responsible employer; two issues which can have a significant effect on the exposure of DBA and Longshore Act cases.

I. AVERAGE WEEKLY WAGE

The average weekly wage (AWW) in DBA and Longshore Act matters, is the foundation to establishing the worker's earning capacity at the time of injury. Ninety-Four years after the passage of the Longshore Act, parties, ALJs, and appellate courts continue to struggle to apply the Act's arcane AWW provisions. The wage earned at the time of injury is not always equal to the AWW. The job at time of injury might pay a wage lower than the worker is capable of obtaining elsewhere, or it might provide a high wage, but only for a limited period of time.

Section 10 of the Longshore Act identifies three methods that are used to calculate the AWW and provides special rules such as those for workers with an occupational disease which does not immediately result in death or disability.

A. Components of AWW.

Wages, holiday pay, vacation pay, container royalty payments/pay guarantee plan payments (paid in consideration of lost hours due to containerization) are considered when calculating the AWW because they readily converted into a cash equivalent and are based on the amount of actual work *Universal Maritime Service Corp. v. Wright*, 33 BRBS 14 (4th Cir 1998). Per Section 2(13) "wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

Section 2(13) also defines "wages" as including "the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [26 U.S.C. § 3101 et seq.] (relating to employment taxes)." The 9th Circuit, for example, takes a strict constructionist view of this statute. If the IRS treats a non-monetary allowance (the value of lodging) or a monetary allowance (a *per diem* payment or tips) as subject to withholding tax, it is considered part of wages for purposes of calculating the AWW. If the IRS does not view a payment as subject to withholding taxes, it is not considered part of wages. *Wausau Ins. Cos. v. Director, OWCP*, 31 BRBS 41 (9th Cir 1997). The 4th Circuit rejected this view in *Universal Maritime Service Corp. v. Wright*, 33 BRBS 15 (4th Cir 1998) and in *Custom Ship Interiors v. Roberts*, 36 BRBS 51 (4th Cir 2002), preferring instead to include such payments if part of the money rate under the contract of hiring. Thus, *per diem* was considered when a worker remodeling a Carnival Cruise ship was paid $77.50 per day for room and board but was allowed to sleep on board and was provided food. In *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (BRB 1998), the Board held that the 9th Circuit's opinion should not be extended outside of the 9th Circuit when such payments did not qualify as a fringe benefit.

B. Section 10(a) calculation.

Section 10(a) (33 U.S.C. §910(a)) provides that if an employee worked for any employer in the employment in which he was working at the time of injury for substantially the whole of the year preceding the injury the AWW should be calculated as follows:

- Calculate the gross earnings in the year before the injury;
- Determine the days worked in the year before the injury;
- Calculate the average daily earnings;
- Multiply by 260, if a five day per week worker; or
- Multiply by 300 if a six day per week worker;
- Divide by 52.

"Substantially the whole of the year" in the 9th Circuit means 75% or more of the workdays in the year preceding the injury (75% of 260 for a five day per week worker or 75% of 300 for a six day per week worker). *Matulic v. Director, OWCP*, 32 BRBS 148 (9th Cir. 1998). However, other circuits have not adopted the 9th Circuit's bright-line rule, and the 5th Circuit expressly rejected a strict 75% threshold. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 606 (Fifth Cir. 2004). As a result, it can be less clear whether a Section 10(a) calculation applies outside the 9th Circuit. The Benefits Review Board has found 33 weeks of employment to be less than substantially the whole of a year. *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148 (1979). But there is no definite number of weeks that automatically brings a claimant into Section 10(a) territory. *See Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (34.5 weeks is substantially the whole of the year where claimant's employment is permanent); *Hole v. Miami Shipyards Corp.*, 12 BRBS 38 (1980), *rev'd on other grounds*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981) (41 weeks with a 10-week absence is substantially the whole of the year).

Because Section 10(a) aims at a theoretical approximation of what a claimant could have expected to earn had he worked every available work day in the year. The Fifth Circuit found that Congress must have known that virtually no one works every working day of every week due to illness, vacations, strikes, etc., it is immaterial that a §10(a) calculation can and usually does result in an AWW that is higher than the worker's actual fifty-two week average earnings. *Gulf Best Electric, Inc. v. Methe*, 38 BRBS 99 (5th Cir 2004).

Some workers who receive vacation pay, holiday pay, or sick pay – compensation which should be considered when calculating AWW – are prohibited from working on days such payments are made. Others, at least with respect to vacation pay and holiday pay, are allowed to receive such payment and work for additional wages on the same days. When vacation pay, holiday pay, or sick pay is in lieu of working, with no double-dipping allowed, such payments arguably should be converted into an equivalent day of work for purposes of calculating the number of days worked. *Wooley v. Ingalls Shipbuilding, Inc.*, 33 BRBS 88 (BRB 1999); *Ingalls Shipbuilding, Inc. v. Wooley*, 34 BRBS 12 (5th Cir 2000). The more days worked, the smaller the average daily wage and the AWW.

C. Section 10(b) calculation.

Section 10(b) applies when a worker has not worked substantially the whole of the year in the type of employment he had at time of injury. 33 U.S.C. §910(b). The AWW can be calculated using the §10(a) formula by considering the earnings of an employee of the same class who worked substantially the whole of the preceding year in the same or in similar employment. This section is often applied to workers who received a promotion a short time before an injury or who began employment in covered employment a short time before an injury.

Section 10(b) is seldom used, however, because of the difficulty of finding earnings of other workers of the same class. Other workers might have different skills or different levels of seniority which place them in a different class of employment, or they might not have worked substantially the whole of the year in the same type of employment.

D. Section 10(c) calculation.

Section 10(c) applies when neither Section 10(a) or Section 10(b) cannot reasonably and fairly be applied. It allows the parties to use any method that reasonably and fairly calculates the worker's AWW. 33 U.S.C. §910(c)

Actual earnings in the year before an injury might not be representative of earning capacity. For example, the worker might have been unavailable for work due to an extended vacation, a temporary illness or injury, or a family emergency (*e.g.*, caring for an elderly parent after a stroke), or attendance in school. Earnings for most of the year might have been in a lower paying, less skilled position than the job at time of injury. The worker might have received a significant pay increase a short time before the injury.

Section10(c) permits the ALJ wide discretion to account for a worker's unique situation. For example, if a worker did not work for three weeks because of a relative's funeral, earnings in the prior year can be divided by 49 instead of 52. If there is a history of earnings for more than

one year, an ALJ can average earnings over several years. *New Thoughts Finishing Co. v. Chilton*, 31 BRBS 51 (5th Cir 1997); *Meehan Seaway Service Co. v. Gates*, 31 BRBS 114 (8th Cir 1997); *Hall v. Consolidated Employment Systems, Inc.*, 32 BRBS 91 (9th Cir 1998). There are no specific limits on what an ALJ can do based on Section 10(c) other than the requirement that the calculation be fair and reasonable.

If the worker is receiving an unscheduled PPD award when injured a second time, the AWW for the new injury should not, in theory, be greater than the residual earning capacity resulting from the prior injury. If real earning capacity has increased, the prior PPD award may be subject to modification. An increase in wages that is not due to an increase in earning capacity (*e.g.*, inflation) does not justify an adjustment. *SSA v. Price*, 38 BRBS 51 (9th Cir 2004).

E. Date of injury.

In most jurisdictions, the date of injury in an injury claim is the date of the injury rather than the date when the injury becomes disabling. The rule in the 9th Circuit is somewhat different. In *Johnson v. Director, OWCP*, 24 BRBS 3 (9th Cir 1990), claimant injured her hand in December, 1979 but worked intermittently until May, 1983 when she was forced to cease work due to pain and swelling. The Court held that the date of injury for purposes of calculating the AWW was the date of disability rather than the date the accident occurred. In *Deweert v. SSA*, 35 BRBS 120 (9th Cir 2001), as amended on denial of rehearing *en banc*, 36 BRBS 1 (9th Cir 2002), the court indicated that *Johnson* was applied in an exceptional case. Deweert injured his low back on October 31, 1993 but did not result in time loss until November 17, 1993. Claimant argued that the date of injury was November 17, 1993, and as a consequence his AWW should be increased $40.43. The court held that whereas Johnson's disability was latent and unknown for years, Deweert was aware of his injury on the day it occurred and made a doctor's appointment within the next few days. This was not the kind of exceptional case envisioned by the court in *Johnson.* Therefore the AWW should be based on earnings before October 31, 1993.

In *Todd Shipyards Corp. v. Black*, 16 BRBS 13 (9th Cir 1983), *cert. denied*, 466 U.S. 937 (1984), the 9th Circuit held that in an occupational disease claim involving a disease that did not immediately become manifest (*i.e.*, asbestos related disease), the date of injury should be the date when the occupational disease manifests itself through a loss of wage-earning capacity. Section 10(i) incorporates the 9th Circuit's line of reasoning. If an occupational disease does not immediately result in death or disability, the time of injury is the date on which the claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. As a practical matter, this means that the AWW should be based on earnings in the one year period before the occupational disease first caused a loss of earning capacity. Thus, a worker who develops cancer due to occupational exposure to asbestos that ended twenty years earlier is entitled to have the AWW calculated based upon earnings in the year before the cancer results in disability.

Disability, for purposes of an occupational disease/AWW analysis, need not be total disability. For example, in *Leathers v. Bath Iron Works,* 32 BRBS 169 (1st Cir 1998), claimant was removed from his regular job as of January 27, 1987 due to carpal tunnel syndrome but continued to work in another capacity until March 27, 1992, when employer eliminated his job. Because his injury was complete on January 27, 1987, when he was removed from his regular job, his AWW was calculated based on earnings before January 27, 1987.

F. Hearing loss claims.

Hearing loss caused by occupational noise is considered a traumatic injury rather than an occupational disease because the injury occurs when there is noise and does not develop later in the absence of noise. *Bath Iron Works v. Director, Office of Workers' Comp. Programs*, 506 U.S. 153 (1993). Therefore, the date of injury in a hearing loss claim is the last day the worker was exposed to injurious noise prior to a determinative audiogram, and the average weekly wage in a hearing loss claim should be based on the earnings in the one year period before the last covered employment that preceded the determinative audiogram.

G. Retired workers.

If a claim is based on an occupational disease, the date of injury is the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability first occurs after a worker retires from employment, the AWW is calculated as follows: If the date of injury is within one year of retirement, the AWW is 1/52 of earnings in the 52 weeks before retirement. If the date of injury is more than one year after retirement, the AWW is the national AWW at time of injury. This method of calculating the AWW does not apply to workers who sustain an injury, rather than an occupational disease, and it does not apply to workers who leave employment *because* of the disease. It therefore does not apply to retired workers who seek compensation for hearing loss, since hearing loss is a traumatic injury, but it clearly applies to retired workers who develop a disease such as mesothelioma when retired and long after their employment ended.

When the AWW is calculated using the special latent disease/retired worker method, the extent of PPD, both scheduled and unscheduled, is calculated according to the extent of impairment per the AMA *Guides to the Evaluation of Impairment* rather than the actual lost use or function (in which the AMA *Guides* can be considered but are not dispositive) or on the actual loss of earning capacity. The retired worker AWW/PPD rules represent a compromise between those who wanted retirees to receive no less than those who continued to work and those who argued that retired workers have no earning capacity and therefore should not receive any compensation.

H. Maximum and minimum compensation.

The maximum compensation rate for disability (temporary and permanent) and death is 200% of the applicable National Average Weekly Wage (NAWW). §6(b). The minimum compensation rate for *total* disability (TTD and PTD) is 50% of the NAWW unless the AWW is

less than 50% of the NAWW, in which event the compensation rate is equal to the AWW. There is no minimum compensation rate for payment of scheduled PPD. Thus, if two-thirds of the worker's AWW is less than 50% of the NAWW, the worker receives 50% of the NAWW for total disability but two-thirds of the AWW when scheduled PPD is paid.

The NAWW is adjusted every October 1. Section 6(c) states that determination of then NAWW under §6(b)(3) "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." The Board and the 5th Circuit have interpreted this section to mean that an award is granted long after the date of injury, compensation should not exceed the maximum compensation rate in effect at the time of the award. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 31 BRBS 150 (5th Cir 1997); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (BRB 1995).

I. Select Average Weekly Wage Cases

Gindo v. AECOM Nat'l Sec. Programs, Inc., 52 BRBS 51 (2018) reconsideration denied BRB No. 17-0418 (Mar. 2019) (unpublished):

The claim came before the BRB on claimant's appeal of the ALJ's decision and order. Claimant worked in Iraq as an advisor for AECOM from August 2010 to September 13, 2011, at which point his contract was terminated. He then returned to the U.S. and unsuccessfully searched for a job before going on unemployment. In March 2014, a doctor noted the claimant displayed psychological symptoms, and the claimant subsequently sought psychiatric treatment. The parties stipulated the claimant was temporarily totally disabled due to a work-related psychiatric injury beginning July 23, 2014. The ALJ classified the claimant's depressive disorder and PTSD as occupational diseases. He also found the claimant voluntarily retired from the workforce effective February 16, 2013, when the claimant last received unemployment benefits. The ALJ concluded the claimant's "date of awareness" for the psychiatric injuries was July 23, 2014, when a psychiatrist diagnosed totally disabling major depressive disorder and PTSD. Because the claimant voluntarily retired more than one year before the date of injury, the ALJ concluded his average weekly wage for the claim was the National Average Weekly Wage as of July 23, 2014 under Section 10(d)(2)(B). The ALJ also found the claimant was not entitled to disability compensation pursuant to Sections 2(10) and 8(c)(23) because he had not reached maximum medical improvement and did not have a permanent impairment rating. On appeal, the claimant challenged the ALJ's conclusion that his psychiatric conditions constituted an occupational disease, which impacted both his average weekly wage and entitlement to compensation. The BRB affirmed the ALJ's finding that claimant's conditions constituted occupational diseases, explaining the ALJ rationally found the claimant's working conditions were "peculiar to" his work in a war zone (i.e., they were not typical of the vast majority of jobs) and the claimant was not aware the stressful conditions to which he was exposed had harmed him until well after he last worked in Iraq (i.e., there was a delayed onset). The BRB also affirmed the ALJ's conclusion that the claimant was voluntary retiree, noting the ALJ found no evidence the claimant searched for work after his unemployment benefits ended, aside from the claimant's vague testimony that he continued looking for work.

Martin v. Aegis Defense Servs., LLC, BRB Nos. 18-0122 & 18-0122A (Jan. 28, 2019) (unpublished):

The claim came before the BRB on cross appeals from Aegis Defense Services, LLC/Allied World Assurance Company and the claimant. The claimant worked for Aegis as a Designated Defensive Marksman/PSS Personal Security Specialist at the U.S. embassy in Kabul, Afghanistan. Prior to deployment, the claimant fractured his neck while participating in an employer-sanctioned refresher training course in May 2012. The claimant's employment contract specified he would be paid a wage of $544.43 per day, but, due to staff shortages, Aegis later offered to increase daily wages first by $200 and then by $1,000 as an incentive to for employees to forgo scheduled leave. The claimant extended his tour of duty by five weeks and received increased daily pay. The ALJ incorporated the incentive pay into claimant's average weekly wage, rejecting Aegis's contention that the pay was a bonus that should be excluded. The BRB found substantial evidence to support the ALJ's determination that the additional pay was for actual work during an employee shortage and constituted wages within the meaning of the Longshore Act because the claimant "received extra pay for his services under the principles of supply and demand."

Taft v. Lockheed Martin Corp., BRB No. 18-0006 (Sept. 18, 2018) (unpublished):

The claim came before the BRB on the claimant's appeal of the ALJ's denial of claimant's motion for reconsideration. The claimant worked for Lockheed for over four years in Afghanistan as a field engineer and "experienced gun and rocket attacks and witnessed the shooting of his supervisor." He voluntarily left his overseas employment in September 2014 and later filed claims for bilateral shoulder injuries sustained in May 2014, hearing loss, and delayed-onset PTSD. The ALJ calculated the claimant's average weekly wage as $2,744.84 for the psychiatric injury, and the claimant contested that finding. The ALJ relied on Section 10(i) in calculating claimant's average weekly wage, concluding the date of injury was the date of onset for the claimant's disability, meaning the date on which the claimant's PTSD prevented him from returning to his usual work. The ALJ determined the date of onset to be January 1, 2015. He then divided claimant's earnings during the 52 weeks preceding January 15, 2015, by 49.29 weeks (subtracting 19 days that the claimant missed work due to an unrelated injury). The claimant argued his average weekly wage should instead by calculated based on his earnings prior to his last date of employment for Lockheed. The BRB rejected the claimant's argument and affirmed the ALJ's decision, explaining the ALJ permissibly gave weight to the claimant's testimony that he did not have psychological symptoms until two or three months after returning from Afghanistan. The BRB also affirmed the ALJ's decision to include a period from September 22, 2014, to January 1, 2015, in the divisor for the average weekly wage calculation, noting claimant did not dispute he voluntarily chose not to work during that period and was not prevented from working by the alleged injury.

Imel v. Triple Canopy, BRB No. 17-0679 (July 11, 2018) (unpublished):

The claim came before the BRB on Triple Canopy's appeal of the ALJ's decision and order. The claimant began work for Triple Canopy as an administrative and logistics security

specialist in Iraq in 2009. She went on leave in November 2011 and was not able to return to work again until May 2012 due to a delay with Iraq's visa processing system. In January 2013, the claimant sustained an injury to her foot when she slipped off the hood of a vehicle. After the injury, the claimant primarily worked desk jobs. She returned to the U.S. after a few months when her condition did not improve. The ALJ calculated the claimant's average weekly wage under Section 10(c), finding Section 10(a) and (b) did not apply. The ALJ also concluded the claimant's actual earnings during the 52 weeks before the injury did not reasonably represent her earning capacity, since the claimant was unable to return to Iraq for an extended period for reasons beyond her control (the via issues). The ALJ therefore excluded the four-month period in 2012 during which the claimant did not earn wages due to the via processing delay and relied on the claimant's earnings during the 26 weeks prior to the date of injury. The ALJ then doubled that amount to arrive at an average annual earning capacity and divided that figure by 52 weeks to reach an average weekly wage of $2,123.07. Triple Canopy argued the ALJ should have relied on the claimant's earnings during the full 52 weeks before the injury, including the period the claimant was off work due to the visa issues. The BRB affirmed the ALJ's calculation of the claimant's average weekly wage, noting Section 10(c) permits judges to take into account time lost due to periods of involuntary non-work.

Kallabat v. AECOM Technology, BRB No. 19-0442 (May 8, 2020) (unpublished):

The claim came before the BRB on AECOM's appeal of the ALJ's decision and order. The claimant worked as a linguist, cultural advisor, and analyst in Iraq and initially alleged he sustained a right leg injury as a result of a March 28, 2011, rocket attack. The claimant returned to the U.S. in April 2012 and reached maximum medical improvement for his right leg condition in September 2012. The claimant began looking for work one week after he returned to the U.S., but did not find work until April 2014, when he started work at a liquor store. While back in the U.S., the claimant began to have an "emotional reaction" to the rocket attack, including experiencing nightmares, depression, anxiety, and panic attacks. The claimant initially thought he could manage the psychiatric symptoms on his own, but eventually began seeing a psychiatrist in January 2016, at which time the psychiatrist diagnosed major depressive disorder and a single episode of PTSD. The psychiatrist opined the claimant had been totally disabled since January 2016. In August 2016, the claimant filed a claim for psychiatric injuries, as well as back pain, left leg pain, and type II diabetes. The ALJ concluded only the right leg and psychiatric injuries related to the claimant's work. On appeal, AECOM contended the ALJ incorrectly calculated the claimant's average weekly wage for his psychiatric injuries based on his earning capacity at the time of the March 2011 event, rather than the date claimant became aware of his disability in January 2016, arguing claimant's psychiatric injuries should have been treated as a delayed onset occupational disease. The ALJ concluded claimant's condition was not an occupational disease because it stemmed from a single traumatic event, rather than the cumulative hazards of his overseas work. The BRB distinguished the case from *Gindo*, in which the BRB affirmed an ALJ's classification of PTSD as an occupational disease, because the claimant's PTSD in *Gindo* was not due to a physical accident, but was the result of exposure to "the external environmentally hazardous conditions of his employment in Iraq." The BRB therefore affirmed the ALJ's determination that the claimant's psychiatric injuries in the case at

hand constituted a traumatic injury, meaning the claimant's average weekly wage must be calculated based on his earning capacity as of March 2011.

Sorace v. Aegis Defense Serv., 2018-LDA-01042 (ALJ Oct. 28, 2020):

The claimant injured his neck, shoulder, and upper extremity in July 2015, while working as a Senior Guard for Aegis in Afghanistan. The claimant initially received a job offer letter in May 2014. He was then scheduled for several different training sessions between May 2014 and March 2015, but each training session was canceled by Aegis. In the meantime, the claimant worked in temporary security positions within the U.S. The claimant eventually entered into an employment contract with Aegis in March 2015 and attended training that same month. He deployed to Afghanistan from April 2015 to May 2015, then had to return to the U.S. because his medical clearance had not been approved by the Department of State. Once the clearance issue was resolved, he returned to work in Afghanistan on July 8, 2015, and sustained the alleged injuries on July 28, 2015. The ALJ concluded Section 10(a) did not apply for calculating the claimant's average weekly wage. In determining whether to proceed under Section 10(b), the ALJ considered an affidavit and earnings statement from one of the claimant's coworkers, which detailed that coworker's earnings. However, the ALJ concluded the coworker's affidavit was insufficient to prove the two employees were similarly situated, as it did not state the coworker's job title, job duties, or how his pay was calculated. The ALJ instead calculated the claimant's average weekly wage under Section 10(c) based on his earnings at Aegis during the brief period he worked in Afghanistan. The ALJ calculated the average weekly wage based on the claimant's contractual daily pay rate multiplied by the six days per week the claimant worked.

Lovejoy v. Aegis Defense Serv., 2018-LDA-00436 (ALJ Aug. 13, 2020):

The claimant was injured while working for Aegis as a senior security guard at the U.S. embassy in Afghanistan when he slipped going down some steps and fell, hitting his head and back. The claimant worked only a short period for Aegis before the injury and had an extended period of unemployment before starting his overseas employment. Aegis argued in favor of a blended method of calculating the claimant's average weekly wage that incorporated the claimant's earnings while working in Afghanistan, while in training, and while working for other employers in the U.S. The ALJ first determined claimant's domestic work as a school resource officer and as a security guard for a restaurant were not the same type of employment he performed for Aegis overseas, meaning the claimant did not perform the same type of employment for substantially the whole of the year preceding the injury and Section 10(a) did not apply. The ALJ went on to reject a blended calculation and instead calculated the claimant's average weekly wage based on solely his earnings at Aegis in Afghanistan, reasoning the claimant was "enticed to accept a job in a war zone by its high rate of pay" and intended to work in that position for at least five years.

Jackson v. Island Operating Co., Inc., 2019-LDA-00531 (ALJ Apr. 28, 2020):

This claim was decided by an ALJ on the claimant's motion for modification of a previously issued compensation order approving the parties' stipulations regarding the claimant's average weekly wage. The parties previously stipulated the claimant's average weekly wage at

the time of an October 10, 2016, injury was $1,837.50. The claimant worked as a Process Coordinator-Instructor for Honeywell in Afghanistan beginning in August 2008, and transitioned to performing the same job for a new employer, Sentel, from August 2013 to June 2016 after Sentel was awarded the contract on which the claimant worked. Claimant then took a job with Infinite Services and Solutions ("ISS") in June 2016. His earnings decreased with each subsequent employer. The claimant sustained left shoulder and back injuries in October 2016, while employed by ISS. The claimant argued his average weekly wage should be calculated under Section 10(c) and could incorporate not only his earnings at ISS, but also his previous earnings in the same type of employment for Sentel. ISS argued the claimant's average weekly wage should be calculated based on only his earnings at ISS, including his earnings before he sustained the injuries through the date he first lost time due to the injuries. ISS argued the claimant voluntarily left his job at Sentel in 2016 to take a lower paying job with ISS in order to have better job security, so the reduced earnings at ISS were representative of his future earning capacity. The ALJ first determined claimant's average weekly wage should be based on his earning capacity as of October 2016, when the injury occurred, rather than January 2017, when he first lost time. The ALJ went on to find the claimants pay decreased while working for ISS due to a reduction in the number of hours he worked. The ALJ further concluded there was no evidence the claimant's reduction in pay was temporary or an aberration. The ALJ therefore relied on the claimant's actual earnings at ISS from when he began work for ISS through the date of injury when calculating the claimant's average weekly wage.

Robinson v. AC First, LLC, 2016-LDA-00771 & 2016-LDA-00772 (Apr. 25, 2019):

The claim came before the ALJ on remand from the BRB. The ALJ noted he previously classified the claimant's PTSD as an occupational disease. He went on to explain that, when an occupational disease does not immediately result in disability, the time of injury is the date on which the claimant became aware or should reasonably have become aware of the relationship between the employment and the disability. The ALJ concluded onset of the claimant's disability was when his PTSD prevented him from returning to his usual employment or to comparable overseas employment. The ALJ noted the claimant began experiencing nightmares, sweating, and trouble sleeping sometime before he sought psychiatric treatment. However, when the claimant began experiencing symptoms, he did not yet know the symptoms were a manifestation of employment-related PTSD. The ALJ proceeded to calculate claimant's average weekly wage under Section 10(c) and applied a blended approach to calculating the claimant's average weekly wage. The ALJ noted the claimant voluntarily left his overseas employment to obtain a job within the U.S., although he intended to return to overseas work in the future before his PTSD precluded him from doing so. The ALJ concluded a blended approach reasonably represented the claimant's actual annual wage earning capacity. In calculating the claimant's average weekly wage, the ALJ excluded periods the claimant was off work due to involuntary events (a layoff and a funeral), but included a period the claimant was voluntarily unemployed. The ALJ included the claimant's earnings prior to, during, and after employment with AC First when calculating the average weekly wage, all of which the claimant earned during the year preceding the onset of his PTSD.

II. LAST RESPONSIBLE EMPLOYER/CARRIER IN DBA AND LONGSHORE ACT CASES

The last responsible employer rules in Longshore Act and DBA matters, can place the entire liability on one employer/carrier in multiple employer cases.

On August 13, 2003, the United States Court of Appeals for the Ninth Circuit issued its decision in *Metropolitan Stevedore Company v. Crescent Wharf and Warehouse Company, et al*., 339 F.3d 1102 (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004). That decision followed a determination by Administrative Law Judge Paul Mapes in which he found that Metropolitan Stevedore Company, as the "last responsible employer," was liable for all benefits due to the employee, William Price. This determination was affirmed by the Benefits Review Board and the Ninth Circuit. The United States Supreme Court declined review of the case.

The determination, in Price, has influenced last responsible employer cases since it was issued in 2003.

Mainstream principles of the concept of last responsible employer were applied by the Ninth Circuit in the William Price case. The case did not establish any new law. Rather, the extraordinary facts of the William Price case, and the way that existing legal principles were applied to these facts, reveal the potential for the last longshore and DBA employer to be found liable for the entire claim in situations not previously imagined.

The last responsible employer rule has been applied in numerous claims brought under the Defense Base Act.

A. TRAUMATIC INJURIES VERSUS OCCUPATIONAL DISEASES

Under the Longshore Act, and by extension, the DBA, the term "injury" means both (1) an accidental injury or death arising out of or in the course of employment, and (2) an occupational disease or infection as arises naturally out of such employment. 33 U.S.C. § 902(2) (1984). A traumatic injury is defined as something which "unexpectedly goes wrong within the human frame." *Johnson v. Brady-Hamilton Stevedore Company*, 11 BRBS 427, 430 (1979).

A traumatic injury may include a distinct and identifiable event such as a back injury due to a fall. Traumatic injuries also include cumulative trauma injuries such as the knee condition, as in the William Price matter, where the claimant's knee gradually deteriorated to the point that a knee replacement was necessitated. *See Charles White v. CLD Pacific Grain, et al.*, 2008-LHC-01660, 02146, 02147, 02148 (September 23, 2011) (Judge William Dorsey finds a multiple employer knee injury claim to not be an occupational disease case); *Bath Iron Works v. Fields*, 599 F.3d 47 (1st Cir. 2010) (work which makes symptomatic an underlying disease process constitutes a traumatic industrial injury).

The last responsible employer rules differ for traumatic injury and occupational disease claims.

Congress did not define the term "occupational disease" for the purposes of the Longshore Act. Courts have found that any disease arising out of an exposure to harmful

conditions of the employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally, is an occupational disease. *Gencarelle v. General Dynamics Corporation*, 893 F.2d 173, 176 (2nd Cir. 1989); *Liberty Mutual Insurance Company v. Commercial Union Insurance Company*, 978 F.2d 750, 752 n.2 (1st Cir. 1992).

Asbestosis, other lung ailments, PTSD matters, and certain chemical exposures are examples of potential occupational diseases.

Traumatic injury cases do not require that the claimant be exposed to an injurious stimuli peculiar to the employment as in occupational disease cases. Rather, a traumatic injury is compensable even if it results from an injury during activities which are not peculiar to the employment such as walking through a shipyard. *Steed v. Container Stevedoring Company*, 25 BRBS 210 (1991); *Foundation Constructors, Incorporated v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991).

The responsible employer rule for successive traumatic injuries is discussed in detail below. In the case of an occupational disease, the responsible employer is the last maritime employer, which exposed the client to injurious stimuli, on the date that the claimant experiences a loss of wage earning capacity due to the occupational disease. *Cordero v. Triple A Machine Shop,* 580 F.2d 1331 (9th Cir. 1978); *Liberty Mutual Insurance v. Continental Union Insurance Company,* 978 F.2d 750 (1st Cir. 1992); *Argonaut Insurance v. Patterson*, 846 F.2d 715 (11th Cir. 1988).

Liability, in occupational disease cases, is not premised upon a showing of a claimant's awareness that he or she has a specific occupational disease. Instead, liability falls on the last employer/carrier who could have caused the disability as of when the claimant became aware of a disability as defined as a loss of wage earning capacity. *Stevedoring Services of America v. Director, OWCP*, 297 F.3d 797 (9th Cir. 2002); *Liberty Mutual*, *supra*, 978 F.2d at 753. As explained by the court in *Liberty Mutual Insurance,* "deficiencies in medical knowledge create choppy seas for a system in which awareness as opposed to disability determines carrier liability." The court concluded that the actual disability rather than the time of awareness of the nature of the disease should govern the application of the last insurer rule in occupational disease claims. *Id.*

In the William Price matter, the Ninth Circuit distinguished successive injury claims from occupational disease claims, noting that occupational disease claims involved continued exposure to injurious stimuli giving rise to "special problems in assigning liability." Citing the *Liberty Mutual case, supra,* 978 F.2d at 753, the Ninth Circuit held in Price:

> In occupational disease claims, it is necessary to define disability in terms of loss of wage earning capacity, because the lack of medical certainty with respect to these diseases makes it difficult to connect the progression of the disease with particular points in time or specific work experiences. However, cumulative trauma injuries are not necessarily fraught with the same inherent ambiguity and can be correlated more directly with identifiable work activities at particular times. It is unnecessary and

> undesirable to use diminished earning capacity as the identifying feature of disability in two-injury cases.

Price, 37 BRBS at 92 (CRT).

The longshore employer who employs a claimant just prior to the claimant experiencing a loss of wage earning capacity due to the occupational disease will have a difficult time disproving their liability for all compensation.

A claimant is required to carry their burden of establishing a *prima facie* case that conditions existed during the employment that could have caused the occupational disease to involve the Section 20 presumption. An employer may rebut this presumption by demonstrating that the exposure did not cause the harm. *Todd Pacific Shipyards Corporation v. Director, OWCP (Picinich)*, 914 F.2d 1317, 1320 (9th Cir. 1990); *Norfolk Shipbuilding and Drydock Corporation v. Faulk*, 228 F.3d 378, 385 (4th Cir. 2000) (noting that employer must prove that the exposure at the employer's workplace was not injurious). In both *Picinich* and *Faulk*, the last employer in an occupational disease case could avoid liability by proving that the exposure at the employer's workplace was not injurious.

The Fifth Circuit has departed from this reasoning finding the last employer before the disability to be the responsible employer without requiring that there be a true causal link between the decedent's exposure while working for that employer and the development of the decedent's mesothelioma due to asbestos exposure. *New Orleans Stevedores v. Ibos*, 317 F.3d 480 (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). In that case, the decedent worked for steamship and stevedoring companies for 50 years. He brought a longshore action for asbestos exposure against his last three employers including his last employer, New Orleans Shipyard. It was uncontroverted that the decedent was exposed to some asbestos at New Orleans Shipyard. Yet, the medical evidence supported New Orleans Shipyard's argument that the latency period for the development of the decedent's asbestos disease and mesothelioma was such that the employment at New Orleans Stevedores could not have caused the occupational disease. The Administrative Law Judge placed liability on New Orleans Stevedores as the last employer and the Fifth Circuit affirmed finding that it did not matter that there was no proven causal link between the decedent's exposure while working for New Orleans Stevedores and the development of his disease. The Fifth Circuit deferred to the Director's interpretation of Section 2(2) of the Act to require that conditions of employment be "of a kind that produces the occupational disease." *Ibos*, *supra*.

The Ninth Circuit has determined that, in multi-employer occupational disease cases, an Administrative Law Judge should conduct a sequential analysis when determining the last responsible employer. Specifically, the Ninth Circuit found that the Administrative Law Judge should consider sequentially, starting with the last employer, (1) whether the Section 20(a) presumption has been invoked successfully against an employer, (2) whether the employer has presented substantial, specific and comprehensive evidence so as to rebut the Section 20(a) presumption, and (3) if the answer to the second question is in the affirmative, whether a preponderance of evidence supports a find that the employer is responsible for the claimant's injury. The Ninth Circuit determined that the first employer in the analytical sequence, that is, the last employer in time, who was found to be responsible under this analysis shall be liable for

payment of benefits and that the Administrative Law Judge need not continue the analysis concerning the remaining employers. *Albina Engine and Machine v. Director, OWCP*, 627 F.3d 1293, 1302, 44 BRBS 89 (CRT) (9th Cir. 2010).

B. THE LAW BEFORE THE WILLIAM PRICE CASE FOR TRAUMATIC INJURY RESPONSIBLE EMPLOYER CASES

The last responsible employer rule places liability for the entire claim on the last employer to aggravate a successive trauma injury. If a second injury aggravates, accelerates, exacerbates, contributes to, or combines with the employee's first injury, the second injury is fully compensable and the last employer is responsible for the entire disability award. *The Employer's National Insurance Company v. Equitable Shipyards*, 640 F.2d 383 (5th Cir. 1981), *Kelaita v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986), *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), *Foundation Constructors, Incorporated v. Director, OWCP,* 950 F.2d 621 (9th Cir. 1991).

When an employee sustains a second work-related injury, that injury need not be the primary factor in the resultant disability for all compensation liability being placed upon the last employer. *Strachan Shipping Company v. Nash*, 782 F.2d 513 (5th Cir. 1986).

Further, the fact that the earlier injury was the "precipitant event" is not determinative. The determinative question is whether the employee's subsequent work aggravated or exacerbated the employee's condition. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 243 (3rd Cir. 2002). Prior to the William Price case, the Ninth Circuit explained that the "aggravation rule applies even though the worker did not incur the greater part of his injury with that particular (last) employer." *Foundation Constructors*, *supra,* 950 F.2d at 624.

It was in this legal environment that the Ninth Circuit considered the William Price case in 2003.

C. THE WILLIAM PRICE CASE

Mr. Price was employed in a waterfront job from the 1960s until 1996. He had pain in his knees to such an extent that he made efforts to limit his work to only forklift work as of 1990. In 1992, Mr. Price sought medical attention and was told in 1993 that he would eventually need bilateral knee replacement surgery. On December 16, 1994, Mr. Price asked his doctor to schedule a knee replacement procedure. His employer at that time was Crescent Wharf and Warehouse. His surgery was authorized and scheduled for April 24, 1995.

After the surgery was scheduled, Mr. Price decided to work for a different maritime employer for one day, April 22, 1995. He worked for Metropolitan Stevedore as a forklift driver on that date. He testified that his knee condition got "progressively worse" during that day. Nonetheless, claimant testified that once he decided to have the surgery, he never changed his mind of it. It is clear from the record that claimant would have undergone a knee replacement surgery whether or not he worked for Metropolitan Stevedore on that one day of April 22, 1995.

Claimant contended that Metropolitan Stevedore was the responsible employer. He relied upon the testimony of a Dr. Levine that he sustained additional trauma to his knees every

day he worked, including April 22, 1995. Dr. Levine testified that even if all the cartilage in Mr. Price's knees had been worn away by June of 1994, the knee condition would have continued to be aggravated by work. In particular, he opined that the knees continued to degenerate until the date of surgery including the formation of spurring on the articular surfaces. A Dr. Greenfield also opined that Mr. Price's work contributed to the deterioration of his knee condition and that the deterioration continued through the last day of employment. Dr. Greenfield testified that every day that Mr. Price worked "wore off a few more cells of cartilage and a few more cells of bone." *Price v. Metropolitan Stevedore,* 34 BRBS 489 (ALJ) (2000). Finally, a Dr. Williams testified that the deterioration process in Mr. Price's knees was a continuing process that did not stop until he underwent knee replacement surgery.

Metropolitan Stevedore relied upon the testimony of a Dr. London who testified that Mr. Price's work activities between September of 1993 and April of 1995 continued to exacerbate his symptoms but did not result in any permanent worsening or aggravation of the knee condition. He further opined that x-rays taken on April 18, 1995, confirmed that all cartilage was gone from Mr. Price's knees, and that none of the activities after that date in any way reduced his ability to work, increased the need for surgery, or changed the extent of Mr. Price's postsurgery disability. He testified that since surgery was already recommended, nothing in the subsequent work activities could have hastened the need for surgery which Dr. London characterized as "inevitable."

Judge Mapes credited the opinions of Drs. Levine, Greenfield, and Williams as sufficient to warrant the invocation of the Section 20(a) presumption that Mr. Price suffered a work-related injury while employed by Metropolitan Stevedore on April 22, 1995. While Judge Mapes found that Dr. London's testimony rebutted the presumption, he ultimately weighed the evidence in favor of determining that an aggravation occurred on April 22, 1995. Judge Mapes reasoned that although the knee replacement surgery was medically justified well before April of 1995, Mr. Price was nonetheless able to perform his usual longshore job two days before the surgery. Judge Mapes concluded that Mr. Price's knee condition had not progressed to the point of "maximum disability," i.e., to a point where the claimant had a total inability to use his leg. It was therefore reasonable to conclude, according to the ALJ, that even after the claimant's surgery had been scheduled, additional work-related aggravations of his knee condition were still gradually decreasing his ability to ambulate and thereby still permanently increasing the extent of his disability.

Judge Mapes also concluded that the work on April 22, 1995, "marginally increased" the need for knee replacement surgery, reasoning that claimant's medical experts credibly testified that claimant's work probably increased his knee pain and that the timing of the knee replacement surgery primarily depended upon how long the patient was able to tolerate his knee pain. The judge concluded that the work on April 22, 1995, permanently increased the presurgery disability and increased the need for the previously-scheduled surgery.

The Benefits Review Board affirmed the Administrative Law Judge and the issue went to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed noting that the Ninth Circuit had previously ruled that cumulative trauma cases are analyzed as two injury cases for purposes of the last responsible employer rule. *Kelaiti v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986). The court distinguished the injury to William Price from an occupational disease claim noting

the different rules for determining the responsible employer for an occupational disease claim. The court cited to the *Foundation Constructors*, *supra* opinion for the legal basis for its determination, i.e., that if "the disability is at least partially the result of a subsequent injury aggravating, accelerating, or combining with a prior injury to create the ultimate disability, we have held that the employer of the worker at the time of the most recent injury is the responsible and therefore liable, employer." *Metropolitan Stevedore Company*, supra, citing *Foundation Constructors, supra,* 950 F.2d at 624. The Ninth Circuit found that there was substantial evidence allowing the Administrative Law Judge to reasonably conclude that Mr. Price's work for Metropolitan Stevedore, even on that single day, aggravated his underlying knee condition. The court concluded that the judge properly credited the three doctors who concluded that a further aggravation to the underlying knee condition could occur even though all cartilage had been worn away.

The Ninth Circuit rejected an argument made by Metropolitan Stevedore that it was inappropriate for the Administrative Law Judge to assign liability to Metropolitan Stevedore as the last responsible employer because Mr. Price did not have any disability, i.e., diminished wage earning capacity, as a result of the one day of employment. The Ninth Circuit noted that it was immaterial to the analysis of the last responsible employer issue in traumatic injury claims whether a loss of wage earning capacity was due to the subsequent injury. The court noted that the cases cited by Metropolitan Stevedore from other circuits to support its contention that disability should be defined by diminished earning capacity were inapposite because the cases cited were occupational disease cases rather than two-injury cases.

Noting that the assignment of liability to Metropolitan Stevedore for one day of employment "might seem harsh," the court found, nonetheless, there was "inherent virtue" in the last responsible employer rule. The court concluded that each employer subject to the Longshore Act shares the risk that it will bear the burden of compensation at one point or another even if it was not predominantly responsible for the compensable injury. The court found:

> The unfairness to the last employer is mitigated by two factors: The spreading of the risk through mandatory insurance, and the availability of the Second Injury Fund to the last employer in some cases.

Finally, the court stated: "Having a bright line rule eliminates the need for costly litigation and helps insure that workers receive timely and adequate compensation for their injuries under the LHWCA."

The goal of promoting efficient judicial administration by means of this "bright line" rule has proven elusive.

D. SELECTED CASES POST-WILLIAM PRICE

1. Longshore Cases

Debra Reposky v. International Transportation Services, et al., 40 BRBS 65 (2006).

Claimant injured her right leg and back in January of 1995 while working for Metropolitan Stevedore. The MRI showed a four millimeter disk protrusion. The claimant returned to work without restriction at her request on September 1, 1995.

Claimant stopped work due to back pain after driving equipment for Marine Terminals (MTC) on September 10, 1995. She returned to work on October 4, 1995, in various longshore clerk and signaling jobs. She stopped working on October 23, 1995, due to leg and back pain. She was employed by International Transportation Services (ITS) as a key clerk/floor runner on that date. Her duties included driving a small pickup truck. An MRI done on December 5, 1995, showed an eight millimeter disk extrusion and a swollen S1 nerve root. Claimant returned to work on January 7, 1996, and worked for eight days until she stopped work due to back pain. She was employed as a signal person for ITS at that time.

Claimant underwent unsuccessful back surgery in February of 1996. She returned to work on March 26, 1997, at her own request. She stopped work on June 21, 1997, due to her back condition. She was employed by MTC on that date. On July 6, 1998, she underwent a two-level spinal fusion. That surgery was unsuccessful and she underwent additional surgeries in July of 1998 and April of 1999. In April of 2003, claimant returned to work as a clerk. In May of 2004, she began work an average of two to three days per week as a kitchen tower clerk.

Administrative Law Judge Anne Beyton Torkington found that work-related injuries took place with Metropolitan Stevedore in January of 1995, MTC in September of 1995, and with ITS on October 23, 1995 and January 15, 1996. She found Metropolitan Stevedore to be the responsible employer from January 12 to September 9, 1995, MTC to be the responsible employer from September 10 to October 22, 1995, and ITS as the responsible employer for claimant's continuing compensation and medical benefits from October 23, 1995.

She rejected an argument by ITS that Metropolitan Stevedore was barred by the doctrine of laches from joining additional employers, and that claimant was barred by Sections 12 and 13 of the Act from bringing a claim against ITS.

The Benefits Review Board affirmed the decision on the issues which concern the last responsible employer issue. The Benefits Review Board agreed with the Administrative Law Judge's finding that the time limitations of Sections 12 and 13 do not begin to run against subsequent employers until Metropolitan, against whom the claimant timely filed, was found to be not liable for claimant's benefits. The BRB found that: "In cases involving sequential traumatic injuries, as well as in occupational disease cases, the employer against whom a claimant files her claim must be able to join other potentially responsible employers in order to defend itself against the claim."

Likewise, the Benefits Review Board rejected the ITS argument that the doctrine of laches bars Metropolitan from shifting liability insomuch as Metropolitan waited four years from

the date of claimant's initial injury to join ITS. "Laches" is an equitable doctrine where a claim is barred if "stale," i.e., the complaining party did not diligently pursue the claim. The Administrative Law Judge found the doctrine inapplicable to the joinder of employers because the doctrine cannot be applied against a claimant due to the fact that the Act contains a specific statute of limitations for filing notices of injury and claims. Further, the Administrative Law Judge found that laches is an equitable doctrine and, as such, inapplicable to the Act. The Benefits Review Board agreed, noting that the only claim was claimant's claim against Metropolitan and that claim was not stale. The Benefits Review Board indicated that policy favored an employer defending the claim by asserting the liability of another employer and joining that employer to the proceedings.

On the responsible employer issue, ITS contended that the medical evidence established that claimant's back disability was caused solely by the initial work injury with Metropolitan Stevedore in January of 1995. Alternatively, ITS asserted that an aggravation occurred at MTC in June, 1997, following a surgery. The Benefits Review Board cited to the William Price decision and other Ninth Circuit authority for the proposition that a subsequent injury aggravates, accelerates, or combines with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. The Board found that ITS needed to establish that claimant's disability was due solely to the natural progression of the 1995 injury at Metropolitan (and/or MTC) in order to prove that it was not the responsible employer.

The Board found that the Administrative Law Judge properly credited the opinions of two doctors to find that claimant sustained work-related aggravations of her back condition after she returned to work in September of 1995. A doctor testified that the progression of claimant's back condition was due to a variety of activities such as sitting, bending, and lifting, and that claimant's work after January, 1995, "probably did contribute in some way to the progression of her condition." The Board found that the ALJ properly determined that there was no evidence that the postsurgery activities (at MTC in 1997) did not aggravate the condition insomuch as the MRI test results were unchanged, the symptoms remained consistent, and there was no specific report of injury or aggravation during that time. The Board affirmed the finding that ITS was the responsible employer.

Outland v. Cooper T. Smith Stevedoring, et al., 2006 WL 1669823 (April 19, 2006).

This case arose in Virginia and presented the question of whether the claimant's injury with Cooper T. Stevedoring (CTS) of June 1, 2002, was the cause of the ultimate disability beginning November 3, 2004, or whether this disability was a consequence of an aggravation and acceleration at several subsequent employers, including CP&O. Administrative Law Judge Daniel Sarno determined that the ultimate disability was the natural progression of the June, 2002 work injury.

The June 1, 2002, injury resulted from a fall of approximately seven feet when claimant hit his back and hip on some freight in a hold. Claimant returned to work in March of 2003 after conservative treatment. He was required to take a crane operator equivalency test but failed it. He then proceeded to accept jobs as a general longshoreman at the same time indicating that he preferred crane work because of the higher pay and less physical demands. Claimant

experienced back pain doing regular longshore work and generally felt worse at the end of the day than he did at the beginning of the day. Surgery was recommended in December of 2003 but did not take place evidently because CTS denied the surgery. Claimant took a leave of absence to give his back a rest and then returned to work in 2004. His treating doctor again recommended surgery which again was refused by CTS. On November 4, 2004, a doctor informed claimant that he both needed surgery and that he also needed to stop working immediately or risk becoming paralyzed. The surgery took place and claimant was released to light duty work in September of 2005.

The Administrative Law Judge summarized at length the opinions and testimony of a number of doctors, including a Dr. Pollak, who testified that the 2002 event was the cause for the need for surgery and that the subsequent activity did not change, in any way, the underlying condition after June, 2002.

The Administrative Law Judge cited the last responsible employer cases coming out of the Ninth Circuit including the William Price case. He noted that a claimant carried the burden of persuasion by showing that the employment caused him to become symptomatic.

Claimant contended that CP& O was the last employer to expose claimant's back to injurious stimuli and that CP&O was the responsible employer. Having carried his burden, the burden then shifted to the relevant employer to rebut the presumption with substantial countervailing evidence. CP&O offered the opinions of two doctors including Dr. Pollak who authored a detailed report regarding claimant's treatment and testified at hearing. The Administrative Law Judge credited the testimony of Dr. Pollak as explaining the natural progression of claimant's injury, and that claimant's work activities subsequent to 2002 did not aggravate or exacerbate the back injury. The Administrative Law Judge concluded that claimant's disability was the natural progression of the June, 2002 work injury and placed all of the liability on the initial employer. In so doing, the Administrative Law Judge found Dr. Pollak's "thorough explanation of macro and micro trauma very persuasive in understanding claimant's underlying condition. Dr. Pollak convincingly testified that claimant's x-ray and MRI films failed to show any evidence of micro trauma, which would serve as evidence that claimant's repetitive work activities caused an aggravation of his back injury." Also, the Administrative Law Judge distinguished this case from other cases in which the judge found an aggravation based upon a claimant's experience of flare ups of pain. *See, e.g., Kelaiti v. Director, OWCP,* 799 F.2d 1308 (9th Cir. 1986). That case and others were distinguished by the judge because the claimant experienced flare ups of pain whereas the claimant in the Morrison matter was in constant pain following the occurrence of the June 1, 2002, injury.

Blue v. Stevedoring Services of America, 38 BRBS 820 (ALJ) (2005).

Judge William Dorsey issued the decision in this claim which was initially heard by Judge Schneider. Judge Dorsey took over the responsibility of drafting the opinion upon retirement of Judge Schneider. The procedural history is complicated but the essential facts are that claimant suffered a herniated lumbar disk on September 21, 1992, while working for Stevedoring Services of America (SSA). SSA argued that a subsequent incident at Container Stevedoring on February 28, 1995, caused a separate injury to the L4-5 disk which was found to be abnormal on EMG and MRI exams. The disk herniation at L4-5 became larger over time.

While SSA argued that the enlarged herniation was the result of the 1995 incident at Container, Container countered that any small changes in the disk protrusion were inevitable because of the degenerative disk disease in claimant's spine. A number of doctors weighed in with opinions. Judge Dorsey rejected the opinion of one doctor who characterized the 1995 event as modest and the result of an ordinary activity of daily living. The Administrative Law Judge noted that the severity of the precipitating event did not determine whether an aggravation occurred, citing the *Foundation Constructors, supra*, case. The judge found that claimant's disability did not result from the natural progression of the 1992 event at SSA. He relied upon medical testimony that the 1995 incident at Container accelerated the degenerative disease process. The Administrative Law Judge characterized the William Price holding as stating that a claimant may "suffer an aggravation of a degenerative condition resulting in his disability." In such cases, the last responsible employer allocates liability to the employer at the time he becomes unable to continue work without regard to the degree to which the claimant's health had previously declined. The judge found that the claimant's condition had stabilized following the accident at SSA to the point that he was able to seek regular work in May of 1994. He found that the incident at Container caused an increase in pain symptoms, required additional surgery and medical treatment, and precluded claimant from his usual employment. In summary, the judge found that the injury at Container Stevedoring in 1995 aggravated the preexisting condition and constituted a new injury placing all liability on Container Stevedoring for claimant's disability and medical benefits from February 1998 and onward.

Lopez v. Stevedoring Svcs. of America, 39 BRBS 85 (2005).

Between 1999 and 11/29/01, Claimant operated a top handler which he alleged caused generalized pain in his shoulders, elbows, knees and back. On 11/29/01, Claimant sustained a specific injury to his knee while working for Eagle Marine. On 12/3/01, Claimant sustained injuries to his right shoulder and right elbow while working for Eagle Marine. Claimant subsequently obtained light duty work through the casual board from 1/7/02 through 4/8/03, including a stint with Maersk Pacific from 10/10/02 to 10/14/02. On 10/17/02, Dr. Delman opined that Claimant's recent work activities exacerbated his prior shoulder, elbow and knee symptoms. On 2/28/03, Dr. Gold scheduled Claimant for right shoulder surgery on 4/10/03. Claimant continued to perform light duty work up until the scheduled surgery. Claimant's last day of employment prior to surgery was with SSA on 4/8/03 as a signalman. Claimant underwent right shoulder surgery on 4/10/03, left shoulder surgery on 6/10/03, laparoscopic banding surgery on 9/23/03 and left knee surgery on 2/23/04.

The ALJ determined that SSA was the responsible employer as it was the last employer to have subjected Claimant to trauma that aggravated and accelerated his underlying bilateral shoulder, knee and elbow conditions. The ALJ relied on Claimant's undisputed testimony that his duties as a signalman required prolonged standing throughout his 5-hour shift as well as repetitive use of his arms at or above shoulder level, and that by the end of his work day on 4/8/23, he had increased pain in his shoulders and knees. The ALJ also found that Dr. Gold and Dr. Delman credibly testified that signal work contributed to the progression of Claimant's shoulder and knee conditions.

The BRB noted that SSA had to prove that Claimant's disability was due solely to the natural progression of his prior injuries in order to meet its burden of establishing that it was not

the responsible employer. The BRB affirmed the ALJ's finding that SSA was the responsible employer in light of the credited opinions of Dr. Gold and Dr. Delman, that the signal work performed by Claimant on 4/8/03 contributed to the progression of Claimant's shoulder and knee conditions, as well as Claimant's corroborating testimony that he sustained increased symptoms and pain while working for SSA on 4/8/03.

Marinette Marine Corp. v. OWCP, 431 F.3d 1032 (7th Cir. 2005).

Claimant injured his low back on 4/8/97 while employed by Marinette Marine/Crum & Forster and underwent back surgery in early 1998. Claimant stayed away from heavy work for the next year and half while his surgeon, Dr. Ots, monitored his condition. By mid-1999 Claimant was cleared to return to work with restrictions on the amount he could lift. Claimant still had some pain but Dr. Ots felt it was best to leave well enough alone barring a worsening of symptoms. On 5/22/01, Claimant's back locked up at work at Marinette Marine/Signal Mutual and his pain progressively worsened over the next couple of months. Dr. Ots opined that Claimant's low back condition had become more severe and that surgery was required. Dr. Yuska, Claimant's orthopedic expert, testified that Claimant's condition was caused by a combination of the April 1997 and May 2001, incidents, with the more recent one bearing 25% of the blame. Dr. Ots testified that the 1997 incident was the primary cause of Claimant's condition but that the May 2001 incident may have helped make the condition worse. The ALJ, relying on the opinions of Dr. Ots and Dr. Yuska, held that the May 2001 incident aggravated Claimant's earlier injury and therefore Signal was the responsible carrier. The BRB affirmed. The Ninth Circuit, in affirming the BRB's decision, stated: "[T]he aggravation rule does not require that a later injury fundamentally alter a prior condition. It is enough that it produces or contributes to a worsening of symptoms."

Charles N. White v. CLD Pacific Grain, et al., 2008-LHC-01660, 02146, 02147, 02148 (September 23, 2011).

The claimant injured his left knee on January 15, 2006, while working for CLD Pacific Grain. Claimant developed bilateral knee pain, left ankle and heel pain. He stopped work on August 23, 2006, had some treatment, and returned to work. Claimant eventually stopped work altogether on December 12, 2006, following two shifts of work for Knight, Inc. Knight argued that it was not the last responsible employer contending that there was no showing of an increased degree of disability as the result of the claimant's employment at Knight. Knight advanced an argument that claimant's knee injury constituted an occupational disease case. Administrative Law Judge William Dorsey rejected this argument noting that successive knee injuries are not considered occupational diseases but, rather, traumatic injuries. Judge Dorsey applied the last responsible employer rules for aggravation, that is, "two injury" cases. The claimant's brief work at Knight involved one or two shifts where he walked around the deck, stood and climbed a few steps involving weight-bearing activities. A Dr. Baum reported and testified that claimant's increased degree of pain at night aggravated the underlying knee and ankle conditions and contributed to the overall disability. Based upon this uncontroverted evidence, Judge Dorsey found Knight to be the responsible employer.

There are a series of unpublished BRB cases similarly finding that an aggravation does not require a significant progression of the underlying condition for responsibility to be placed

upon the last employer. The aggravation may occur where there is an increase in symptoms due to the claimant's employment. *Oberts v. McDonald Douglas Services*, BRB No. 05-0445 (2006). The most recent Board case to address the issue also indicates that a symptomatic flare-up is sufficient to change responsibility even without a change in condition. *See Weimer v. Todd Shipyards Corporation*, BRB No. 11-0694 (June 28, 2012) (court held: "Where claimant's work results in an exacerbation of his symptoms, the carrier at the time of the work events resulting in the exacerbation is responsible for any resulting disability."); *See Arnestad v. Husky Terminals, et al.*, ALJ No. 2008-LHC-02074, 02075, 02076 (November 15, 2011) (last employer to cause the underlying orthopedic condition to become symptomatic is the responsible employer).

Stamper v. Washington United Terminals, Inc., BRB No. 19-0364 (Sept. 9, 2020) (unpublished):

The claim came before the BRB on Washington United Terminals/American Longshore Mutual Association, Ltd.'s ("WUT/ALMA's") appeal of the ALJ's decision and order. The claimant initially injured his neck on April 17, 2016, in a motor vehicle accident while working for WUT. ALMA was WUT's Longshore Act insurance carrier at that time. The claimant eventually returned to work for WUT for eight shifts between January 3 and 16, 2017, then stopped working again due to his neck condition. Signal Mutual Indemnity Association, Ltd. ("Signal") was WUT's Longshore Act insurance carrier in January 2017. The claimant subsequently filed claims against both WUT/ALMA and WUT/Signal, alleging his ongoing neck problems related to either the original April 2016 injury during ALMA's coverage or an aggravation during Signal's coverage. The ALJ concluded the claimant's work in January 2017 temporarily aggravated the claimant's neck condition, but did not alter the claimant's underlying cervical condition. The ALJ therefore concluded ALMA was liable for the claimant's ongoing benefits beginning June 27, 2017, after the temporary aggravation ended. The ALJ determined the claimant's treatment records established the claimant sustained only a temporary exacerbation of symptoms as a result of his January 2017 work. The ALJ specifically noted that, while claimant's treating physicians sometimes referred to an "aggravation," there was no reason to believe the physicians used the term intending to invoke its legal definition under the Longshore Act. The ALJ also noted claimant's treating physicians did not alter their diagnoses or treatment recommendations after the claimant's January 2017 work. The ALJ also credited the opinion of WUT/Signal's medical expert that the January 2017 work caused only a temporary flare-up of symptoms. Finally, the ALJ discounted the fact the claimant performed poorer at a April 2018 functional capacities evaluation than he did at an earlier, December 2016 functional capacities evolution, explaining the claimant's poorer performance was attributable to multiple factors, including guarding of his neck during the evaluation, lack of effort, and long-term deconditioning. The BRB affirmed the ALJ's determination that claimant's January 2017 work did not contribute in any way to his ongoing cervical condition after June 27, 2017.

2. DBA Cases

Oberts v. McDonnell Douglas Serv., 39 Ben. Rev. Bd. Serv. 117 (ALJ) (2005).

In a case arising out of the Defense Base Act, the ALJ found that claimant's disability was solely the result of a natural progression of a 1996 bus accident in Saudi Arabia while working for McDonnell Douglas and not the result of a new injury or aggravation while working

for a second employer, Alsalam. Judge Mills found that there was no showing of an injury or aggravation to the claimant's neck with the second employer and placed liability on McDonnell Douglas. He characterized the holding in both William Price and another case as requiring that he determine the cause of the ultimate disability. That is, if the disability is at least partially the result of trauma sustained at employment with a subsequent employer, liability is placed with the subsequent employer. The judge characterized the medical testimony offered by McDonnell Douglas was speculation by doctors and that he found it significant that claimant's neck complaints continued to worsen even after all employment ceased. He found that the original injury alone caused the need for the neck surgery and placed liability on McDonnell Douglas.

Blaine Clark v. Computer Sciences Corporation/AIG, DynCorp International/AIG, 2011-LDA-00601, 00602 (August 20, 2013).

This case involved two injuries at DynCorp International at times when DynCorp was insured by AIG. What distinguished the injuries (with dates of injury in 2004 and 2005) was that DynCorp was owned by CSC for the first injury and by DynCorp International, Inc., at the time of the second injury in 2005.

The ultimate result of the claim was that Judge Russell Pulver found claimant entitled to permanent total disability compensation stemming from the body parts injured in 2005 when DynCorp International LLC was owned by DynCorp International, Inc. The responsible employer issue related to injuries to the left elbow and left shoulder in 2004 and whether those conditions were sufficiently aggravated during the months leading up to the last injury in 2005 to invoke the rule. Specifically, claimant worked seven months for DynCorp before the 2005 event and following the transfer of ownership of DynCorp International LLC to DynCorp International, Inc. Judge Pulver, citing to the William Price and other authority, described "any marginal but permanent increase in the extent of disability and need for treatment qualifies as 'an aggravation, acceleration or new injury.'" *Price*, 339 F.3d 1102. Claimant testified at hearing that during the seven and a half months he worked for DynCorp following it changing hands from CSC to DynCorp LLC, he was often asked to move heavy items, suffered swelling and flare-ups of pain of his left elbow, and noticed a large lump was forming at the fracture site in the elbow. The judge concluded: "Clearly, claimant continued to suffer from his left elbow injury after DynCorp took over as his employer and he had his second work incident. The question, then, is whether his employment with DynCorp aggravated his preexisting condition or whether he would have experienced his injury to the same degree regardless." The judge credited the testimony of a Dr. Capps, explaining that while a compressed ulnar nerve will naturally worsen over time independent of any other circumstance, it could worsen with time if a person was doing an "offending activity." The judge concluded that while the aggravating effect might be small, that the claimant's continued use of the left elbow during his last employment with DynCorp more than likely created a marginal but permanent increase in the extent of his disability and need for treatment. Based upon this finding, Judge Pulver placed the entire liability for compensation and medical care and treatment for the left elbow upon the last employer.

This was not the end of the effect of the last responsible analysis in this case. The District Director had previously indicated in a letter to Judge Pulver that if the claimant for a work-related permanent disability stemming from the July 16, 2004, incident, that the Director

agreed to the application of Section 8(f) and payment by the Special Fund. The judge analyzed the three elements of Section 8(f) and concluded that DynCorp as the second employer satisfied all three elements establishing ample medical evidence of a preexisting injury to the left knee and left upper extremity, the combined effect of the prior conditions and the 2005 work incident causing a much greater degree of disability, and the manifestation of the preexisting disability to the employer when owned by CSC in 2004. For this reason, DynCorp LLC was found entitled to Section 8(f) relief as a consolation prize to being found the last responsible employer.

The case illustrates how Section 8(f) relief is often part and parcel of the defenses alleged by the last employer and is an important alternative defense should the last employer lose the responsibility contest.

Daniel Brandon v. L-3 Communications Corporation/Vertex Aerospace, OALJ Nos. 2002-LDA-00020, 00021, 00022 (Sept. 10, 2013).

This case involved injuries on August 31, 2008, September 8, 2008, and October 9, 2009. Claimant was employed by L-3 for each accident. However, the insurance coverage switched from ACE on December 1, 2008 to AIG. The dispute involved the last responsible carrier. AIG was the carrier for the last two of the three back injury claims. The judge credited the testimony and reporting of two doctors who found that the initial 2008 injury was a temporary aggravation of a preexisting underlying degenerative lumbar spine disease and that the second and third injuries resulted in a permanent aggravation of the underlying degenerative disc disease. The judge also found that an alternative explanation of claimant's continuing complaints, that is, that his continued work after the 2008 event aggravated his back notwithstanding the later injuries would result in the same finding, that is, that AIG is the responsible carrier. The judge found that claimant had yet to reach maximum medical improvement. The claimant had found work at Walmart and was awarded temporary partial disability compensation.

Anthony McNeely v. Blackwater Security Consulting/Triple Canopy, Inc., 2011-LDA-00672, 00673 (May 1, 2013).

This case was determined by Administrative Law Judge Lystra Harris at the Cherry Hill, New Jersey, OALJ. The case involved assertions of back, spine, hip, and head injuries on two dates of injury, January 19, 2009 and March 21, 2010. Claimant was employed by Blackwater for the first injury and Triple Canopy for the second injury. The judge ultimately found that claimant failed to establish entitlement to disability compensation because he failed to show that he was unable to return to his former employment due to injury. However, there remained an issue of which employer was responsible for ongoing medical care and treatment. The judge applied the case law out of the Ninth Circuit, including the William Price case and the analysis. The judge concluded that as a two injury/aggravation case, the employers each bore the burden of persuasion that the disability was due to the injury with the other employer. The judge found that the preponderance of evidence supported a finding that the physical requirements of claimant's employment with Triple Canopy aggravated his back condition and placed liability for future medical care on Triple Canopy. Notably, the case was later resolved by means of a Section 8(i) settlement agreement with Triple Canopy paying $177,500 and Blackwater paying $37,500 to claimant. The claimant's attorney greatly benefitted. He obtained over $160,000 in fees and costs.

Khan v. Mission Essential Personnel, LLC, BRB No. 15-0492 (June 20, 2016) (unpublished):

The claim came before the BRB on Mission Essential/Ace American Insurance Company's appeal of the ALJ's decision and order. The claimant sustained a back injury as a result of a July 2010, improvised explosive device attack while working in Afghanistan as a linguist for Torres Advances Enterprise Solutions. The claimant eventually underwent surgery for an L5–S1 herniated disc in September 2010, then returned to work for Torres in December 2010. When claimant returned to work he was given a special chair and workstation to help accommodate his condition. In November 2012, Mission Essential took over the contract on which the claimant worked. The claimant's high-quality chair, work station, and mattress were then replaced with lower equality furniture. The claimant alleged his back symptoms worsened from December 2012 to January 2013, and he attributed the worsening to the change in furniture. Mission Essential switched Defense Base Act insurance carriers from Zurich American Insurance Company to Ace American Insurance Company in January 2103. The claimant notified Mission Essential on January 25, 2013 that he needed to quit his job due to his back condition. The claimant was subsequently diagnosed with a recurrent dis protrusion and was advised to undergo a repeat surgery. The ALJ concluded the claimant sustained an aggravation of his back condition while working for Mission Essential and placed liability on Mission Essential's most recent insurance carrier, Ace. Mission Essential/Ace argued the claimant's deterioration was the result of the natural progression of the 2010 injury sustained while working for Torres. Mission Essential/Ace argued the ALJ did not specifically address its argument that that the claimant's condition was only temporarily aggravated through the end of his employment with Mission Essential and thereafter returned to baseline. However, the BRB determined the ALJ acknowledged that argument and nevertheless found an aggravation occurred.

Nina v. Constellis Holdings, LLC, 2019-LDA-00852 & 2019-LDA-00853 (ALJ Oct. 21, 2020):

The claimant sought benefits in connection with physical and psychological injuries allegedly sustained while working for Triple Canopy in Iraq through March 3, 2011, and while working for SOC, LLC in Jordan on or about August 13, 2011. The claimant recalled several traumatic incidents in Iraq. In 2006, he and a coworker ran to a bunker to avoid a mortar attack. In May 2008, the claimant witnessed a rocket and mortar attack and saw explosions and a dead body. The claimant reported that event caused him to fear for his life. The claimant also reported the incident caused a buzzing in his ears and temporary hearing loss. The claimant also recalled experiencing a mortar attack in August 2010 during which a mortar destroyed the container claimant was in and claimant initially could not find his way out. The claimant also recalled being exposed to loud noises, including from the August 2010 attack and from other explosions. The claimant began to notice psychiatric symptoms while in Iraq, including difficulty sleeping, stress, fear, and altered behavior. The claimant also noted trouble hearing while working for Triple Canopy. The claimant left Iraq in 2011 and returned to Peru. The claimant then began training for SOC in Jordan in May 2011. He never actually deployed to Iraq for SOC. The claimant testified explosions he experienced during his training reminded him of his time in Iraq and caused anxiety and nightmares during his training. He left Jordan and returned to Peru in

August 2011. The ALJ concluded Triple Canopy failed to establish the claimant's psychiatric injury could have been caused by his work for SOC, noting the claimant acknowledged his symptoms probably did not worsen during his training and none of the doctors who evaluated the claimant attributed his psychiatric diagnoses to his time in Jordan. The ALJ likewise concluded the claimant failed to show his work for SOC could have caused his hearing loss, noting the claimant attributed his hearing loss to his work for Triple Canopy and the claimant wore hearing protection while training for SOC. Also, no doctor attributed the claimant's hearing loss to his work for SOC. The ALJ found Triple Canopy was liable for both the claimant's psychiatric and hearing loss injuries.

Garamendi v. Triple Canopy, Inc., 2018-LDA-00349 (ALJ Apr. 28, 2020):

The claimant worked for Triple Canopy as a security guard at the U.S. Consulate in Barash, Iraq from December 2005 to February 2007. His job involved inspecting people and vehicles at checks points, as well as manning a machine gun and surveillance towers. The claimant alleged he experienced panic attacks and feared for his life while working for Triple Canopy. He recalled his first traumatic experience was seeing a mortar attack in July 2006, which caused a serious injury to another worker. The claimant also recalled witnessing a mortar attack in September 2006 that killed an American. He also described incidents when a coworker's room and a helicopter were hit by RPGs. The claimant also fired his weapon at a suspected terrorist. The claimant's contract ended in 2007 and he returned home to Peru. The claimant was later hired as a security guard by SOC in 2011. He traveled to Jordan where he completed training and waited for a visa. The training included instruction on how to handle exposure to threats of war, and claimant experienced flashbacks about his prior experiences when working for Triple Canopy. While still in Jordan, the claimant developed appendicitis and underwent surgery, then returned to Peru after developing an infection related to his surgery. The ALJ concluded Triple Canopy was the last responsible employer for the claimant's psychiatric injury, applying the last responsible employer rule for occupational diseases: the last responsible employer is the last employer to expose the claimant to injurious stimuli prior to the claimant's awareness of his or her occupational disease. The ALJ reasoned that, although the claimant experienced nightmares while training for SOC, the claimant's nightmares were associated with the traumatic events he experienced while working for Triple Canopy. The claimant had no traumatic experiences while training for SOC and the claimant attributed the PTSD symptoms he experienced while training for SOC to his earlier work for Triple Canopy. The ALJ also found no basis to equate training with actual war hazards.

Guevara v. SOC-SMG, Inc., 2019-LDA-00209 (ALJ Jan. 10, 2020):

The claimant first began work in Iraq as a security guard for Triple Canopy in 2005. The claimant stated there were attacks on a daily basis, but he specifically noted some mortar attacks in November or December 2005, when he experienced a close call. The claimant further recounted there were daily attacks in June through August 2007. The claimant returned home to Peru in 2010 and worked there for a time. He later returned to Iraq in July 2011 for SOC, which had taken over the contract from Triple Canopy. The claimant recounted a day full of attacks around November 2011 that involved mortars and rockets, as well as an attack at an embassy in

late 2011 or early 2012. The claimant also explained there was a constant threat that any of the vehicles he searched could have a pipe bomb, and he feared for his life every day he worked for SOC until returning to Peru in 2013. The claimant was initially diagnosed with PTSD in November 2016. The ALJ determined the claimant was disabled due to injuries sustained working in Iraq. SOC argued Triple Canopy was the last responsible employer. The ALJ applied the aggravation rule for cases involving multiple traumatic injuries. The ALJ concluded the claimant experienced repetitive, stressful situations throughout his employment with both employers, and the claimant's condition was not the result of the natural progression of his psychological injuries sustained working for Triple Canopy. The ALJ acknowledged the claimant may have had PTSD while working for Triple Canopy, but the claimant's later employment with SOC aggravated, accelerated, or combined with any preexisting psychological issues, and the ALJ found SOC to be the last responsible employer.

Waziri v. Mission Essential Personnel, LLC, 2018-LDA-00034 (ALJ Fe. 15, 2019):

The claimant began work for Mission Essential as a translator/linguist in Afghanistan in 2009. In 2010, the claimant injured his left shoulder and subsequently underwent surgery. Before returning to work for Mission Essential. The claimant injured his left shoulder again in May 2012, when a truck in which he was riding rolled over. He again underwent surgery before returning to work in July 2012. On January 1, 2013, Mission Essential switched insurance carriers from Zurich America Insurance Company to Ace American Insurance Company. The claimant next injured his back while riding in a military vehicle over rough terrain at high speeds in May 2013. The claimant's employment was terminated in October 2104 and he returned to the U.S. Mission Essential and the claimant subsequently settled the claim for the back injury. The claimant's left shoulder began to bother him again in October 2015, and he underwent another surgery in November 2016. The ALJ explained a temporary exacerbation during work for a subsequent employer or carrier is not determinative of the last responsible employer/carrier issue. Rather, the responsible employer/carrier determination depends on the cause of the claimant's "ultimate disability." Mission Essential/Zurich argued claimant's left shoulder condition was aggravated by his employment during Ace's coverage, including the 2013 accident and claimant's continued performance of physically demanding work duties. Mission Essential/Zurich relied on *Price* to argue claimant's nearly two years of work during Ace's coverage caused a sufficient aggravation to shift liability to Ace. The ALJ distinguished the case at hand from *Price*, finding there was little to no evidence the claimant's work during Ace's coverage aggravated his shoulder injury. The ALJ opined, "Employer asks me to conclude that, because Claimant worked in a heavy-duty capacity for multiple years after the initial shoulder injury, he must have aggravated that shoulder injury. However, I cannot make that presumption in the absence of medical evidence that supports such a finding." The ALJ concluded Mission Essential/Zurich was the last responsible employer/carrier.

Zegarra v. SOC-SMG, Inc., 2017-LDA-00596 (ALJ Sept. 28, 2018):

The claimant started work in Iraq in 2009 as a security guard for Triple Canopy at the U.S. embassy in Baghdad. The claimant recounted there were frequent rocket attacks during that time, as well as times he had to seek cover all night because people were firing weapons. The

claimant claimed the experiences were stressful and made him fear for his life and the life of his brother, who also worked at the embassy. Two of the most stressful experiences the claimant recalled occurred while working from Triple Canopy, including a mortar landing in his bedroom while he was not present in the room and a bomb detonating close enough to the claimant's room for the shockwave to lift the claimant from his bed. In 2011, SOC took over Triple Canopy's contract and the claimant continued working as a security guard. His job for SOC involved searching cars and people. He was also exposed to rocket and mortar fire and found the job stressful. A 2012 car bombing at another location also made claimant fear for his life when inspecting vehicles. The claimant was fired in 2012 for drinking alcohol. The claimant alleged that, after leaving Iraq, he experienced poor sleep, nightmares, intrusive thoughts, and increased aggression. The ALJ applied the aggravation rule for cases involving multiple traumatic injuries. The ALJ concluded that, although most of the specific traumatic experiences that the claimant's doctors emphasized occurred during the claimant's work for Triple Canopy, the claimant was exposed to repetitive stressful situations while working for both employers. The ALJ concluded claimant's condition was not the result of the natural progression of injuries sustained during work for Triple Canopy, even if claimant had PTSD by the time his work for Triple Canopy ended. He concluded SOC was the last responsible employer.

*Keefer v. Triple Canop*y, 2015-LDA-00826 (ALJ May 31, 2017):

The claimant alleged he was injured in Baghdad, Iraq, on two separate occasions: on April 27, 2008, while employed by Blackwater Security Consulting and on June 21, 2009, while employed by Triple Canopy Inc. The dispute centered on whether the claimant's dental problems related to his workplace injuries and, if so, which employer was liable for benefits. The claimant recounted there was a rocket attack in April 2008 that struck close to the claimant, after which claimant list slivers from his teeth. In 2009, Triple Canopy took over the contract under which the claimant worked and became the claimant's employer. The claimant was injured in June 2009 when a bus transporting military personnel struck a speed bump and lurched, causing the claimant to fall down the bus stairs and hit his head, among other injuries. Two or three days after the fall, one of the claimant's teeth broke into pieces. The claimant later began waking up with a sore jaw from clenching his teeth due to pain. The claimant was eventually diagnosed with several dental problems. The claimant alleged his dental problems were initially caused by his work for Blackwater and where later aggravated by his employment with Triple Canopy. Despite an opinion from a medical expert that the claimant's dental problems could have been caused by non-work-related factors, the ALJ determined that doctor's opinions were not persuasive. The ALJ also noted there was a significant change in the claimant's dental condition that corresponded temporally with his work in Iraq and the claimant had credible complaints of grinding his teeth after the work accidents due to chronic pain. The claimant's complaints were also supported by medical evidence. The ALJ went on to conclude the case involved multiple traumatic injuries and the claimant's dental condition, including the teeth grinding, was aggravated his by work for Triple Canopy.

Aragon v. XE Cmopany, 2016-LDA-00496 & 2016-LDA-00552 (ALJ Dec. 28, 2017):

The claimant worked for XE from July 2008 through January 2010 and from September 2010 through January 2012. He sustained a left knee injury in May 2010, after which he was released to work in August 4, 2010, with a 12% permanent impairment rating. The claimant next worked for Osen-Hunter from March 2012 through July 2014, and he returned to that work again in August 2016. After the May 2010 knee injury, the claimant underwent four surgeries in April 2010, December 2014, February 2015, and October 2015. The claimant asserted he stopped working in 2014 because his left knee condition had become debilitating. The ALJ assigned substantial weight to the opinions of the claimant's treating physician, who concluded claimant sustained an aggravation of his left knee condition after beginning work for Osen-Hunter.

Susan Paul v. Global Linguist Solutions and ACE American Insurance/Zurich American Insurance, 2011-LDA-00294, 00295, 00296, 00297 (February 11, 2013).

This determination involves a claimant who worked as a linguist for Global Linguist Solutions (GLS) which switched carriers from ACE American to Zurich American during the pendency of her employment. ACE American paid certain payments for an undisputed injury. Zurich and ACE disputed responsibility for a number of injuries, most prominently the claim for posttraumatic stress disorder. The case went to hearing before Judge Webster who died shortly thereafter. The claimant did not attend the hearing due to a panic attack. Judge Dorsey was assigned the writing of the Decision and Order and used claimant's deposition testimony plus the thousands of pages of medical records and other documents in the record to arrive at a determination. Zurich initially attributed claimant's PTSD to her employment during the ACE coverage. Later, an expert retained by Zurich attributed some of the cause of the PTSD to claimant's employment while Zurich was on the risk. At this point, Zurich changed the nature of the defense to contend that claimant was lying about whether she suffered PTSD at all. Judge Dorsey found this position to "fly in the face" of the opinions of every psychiatrist and psychologist examined by claimant, including Zurich's own expert. As a consequence, Judge Dorsey found Zurich to be the last responsible carrier responsible for compensation and medical treatment for claimant's injuries not already paid for by ACE. Claimant had yet to reach maximum medical improvement. She was awarded temporary total disability compensation at the maximum compensation rate.