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Stevedoring Services of America v. Director, Office of Workers' Compensation Programs 297 F.3d 797 (9th Cir. 2002) (Decided June 16, 1999)

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the decedent's heart attack was caused by the physical strain exerted in his attempt to overcome the boat's unseaworthiness. Plaintiff had also claimed that Maloney and A&H negligently failed to obtain the requested insurance and negligently made misrepresentations to the decedent that the insurance had been procured. Plaintiff further argued that Maloney and A&H negligently induced the decedent to remain in Brazil without insurance after mistakenly notifying the decedent that his valid application was pending with a second company because it had originally been denied.

The Appellate Division reversed the summary judgment orders dismissing the causes of action against Colvin, L&H, and Maloney and reinstated the actions against each. The summary judgment motion dismissing the complaint against A&H was affirmed on the law, without costs.

The Appellate Division concluded that there was sufficient evidence to create questions of fact as to whether (1) R.J. Maloney Agency negligently failed to procure life insurance and/or whether the decedent relied upon the false advice that the insurance was in effect; (2) whether Colvin is liable for the failure to procure life insurance; and (3) whether Colvin and L&H may be liable under maritime law, on the basis that the vessel was unseaworthy, or based upon negligence under the Jones Act. As to the claim against A&H the plaintiff failed to show that the defendant was the decedent's broker or had agreed to provide insurance.

Monica Brescia

HEARING LOSS UNDER THE "LAST EMPLOYER" DOCTRINE

An employer who is liable under the doctrine cannot escape liability because a second employer can also be held liable for a later, separate injury

Stevedoring Services of America v. Director, Office of Workers' Compensation Programs
297 F.3d 797 (9th Cir. 2002)
(Decided June 16, 1999)

Stevedoring Services of America ("SSA") and Eagle Pacific Insurance Co. ("Eagle") petitioned the United States Court of Appeals for the Ninth Circuit for a review of a decision of the United States Department of Labor Benefits Review Board ("Board") to award permanent partial disability benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA") to James Benjamin ("Benjamin") for a 34 percent hearing loss sustained during his employment.

Benjamin had worked as a longshoreman from 1969 to 1992. Like other workers in the industry, Benjamin did not have a single long-term employer but was assigned through a union hall. On February 4, 1991, while under the employment of Container Stevedoring Company, ("Container") Benjamin underwent an audiogram that showed a 28.5 percent binaural hearing loss. Based on this test, Benjamin filed a claim for benefits under LHWCA; however that claim was never independently adjudicated. Benjamin continued to work, despite the hearing loss, until April 3, 1992 and on his last day of

work he was employed by SSA. Benjamin later underwent two more hearing tests in 1994 and 1996; the latter of which showed that his hearing loss had worsened to 34 percent.

The Administrative Law Judge, ("ALJ") in determining Benjamin's claims for compensation under LHWCA, found that although the audiograms conducted in 1991 and 1996 both complied with all rules and regulations governing the measurement of hearing loss under the Act, that he was bound by the Ninth's Circuit's decision in *Port of Portland v Director, Office of Workers Compensation Programs,* 932 F.2d. 836, 841 (9th Cir. 1991) and *Ramey v. Stevedoring Servs. Of Am.,* 134 F.3d 954, 861 (9th Cir. 1998) to pick one test as the determinative audiogram. The ALJ also found that precedent dictated that the last employer before the determinative audiogram be liable for the claimant's entire injury. Thus, the ALJ found SSA solely liable for the full extent of Benjamin's hearing loss. However, this liability was mitigated when the ALJ granted SSA's application for Special Fund Relief under 33 U.S.C. § 908(f) which permits mitigation of employer liability because of an employees pre-existing condition. The ALJ found that SSA was only liable for the extent of Benjamin's hearing loss between 1991 and 1996 audiograms or 5.5 percent. The remaining 28.5 percent was to be paid by the industry's special fund that spreads the cost over the entire industry.

The Director, Office of Worker's Compensation Programs ("Director") and SSA appealed the ALJ decision to the Board. The Director claimed Benjamin suffered two distinct hearing losses, giving rise to two claims to be adjudicated separately, and that Container and SSA should have been found separately liable for the impairment caused by each injury. SSA argued that the Board should permit assessment of liability on the basis of more than one audiogram. The Board rejected their arguments and affirmed the ALJ.

The Court of Appeals for the Ninth Circuit, in reviewing the Board's decision, noted that decisions made by the Board are to be reviewed *de novo* for errors of law and adherence to the substantial evidence formula. The court made clear that the Board is required to accept the ALJ's findings unless they are contrary to law, irrational, or unsupported by substantial evidence. The court further noted that on issues of interpretation of LHWCA, the view of the Director, not the Board, is to be given considerable deference. However, the court must respect interpretations by the Board where they are reasonable and reflect the policy underlying the statute.

The Court of Appeals explained that the "last employer rule' was a judicially created doctrine where full liability for an occupational disease resulting from claimants exposure to injurious stimuli during more than one period of employment or insurance coverage is assigned to a single employer or insurer. The employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the occupational disease naturally arising out of his employment, should be liable for the full amount of the award. Under this rule full recovery is allowed in a single action, as opposed to piecemeal recovery against each contributing employer.

In the present case, the ALJ found that there were two valid audiograms, both of which established hearing loss due to employment. Although Benjamin filed separate claims, no action was taken on the first audiogram. Later the ALJ treated the two claims as merged placing full liability under the "last employer rule" on SSA.

The Court of Appeals found the ALJ interpretation of the "last employer doctrine" was a misreading of *Port of Portland* and *Ramey*; and the AJL erred when he merged these claims. The court noted that although the "last employer doctrine" involves a certain amount of arbitrariness, it does not extend to hold an employer liable for a claim that had first been filed against a separate employer, and was simply not resolved. Thus, had the first claim been dealt with expeditiously, the second claim would have been considered a separate injury. Here, the two reliable audiograms pointed to two separate injuries sustained while under the employ of Container and SSA. Under these circumstances it was error to treat the claims stemming from two valid audiograms as one undifferentiated injury.

The Court of Appeals concluded that in a hearing loss case where a claimant may continue to work despite being considered legally disabled, he may be exposed to additional injury over time. Thus, an employer who is liable under the application of the "last employer doctrine" should not be able to escape liability just because a second employer can also be held liable under the same doctrine for a later, separate injury. Therefore the Court of Appeals held that under the correct application of the "last employer doctrine" Container is liable for 28.5 percent of the hearing loss shown in the 1991 audiogram. The appellate court reversed the Board's decision and remanded it to the Board for consideration in light of its opinion.

Brian F. Allen

PERSONAL INJURY UNDER THE JONES ACT, LONGSHORE AND HARBOR WORKER'S COMPENSATION ACT AND NEW YORK LABOR LAW

A dockbuilder is not a seaman and therefore cannot sue under the Jones Act. A subcontractor's employee can sue a general contractor for negligence under the LHWCA. New York Labor Law §§ 200 and 240 (6) grant an injured worker recourse against general contractors who breach their duty to provide a safe workplace.

O'Hara v. Weeks Marine, Inc.
294 F.3d 55 (2d Cir. 2002)
(Decided April 1, 2002)

Plaintiff, Gerard O'Hara ("O'Hara"), a dockbuilder's union member, suffered a work-related injury while repairing a pier in Staten Island, New York. Two barges – a "materials barge" and a "crane barge"- were employed for the project and moored to bulkheads on the pier. Plaintiff was employed by Collazo Contractors, Inc. ("Collazo") and assigned to the crane barge where the injury occurred.

Plaintiff brought suit in the United State District Court for the Eastern District of New York against general contractor Weeks Marine, Inc. ("Weeks") and subcontractor Collazo, claiming damages under the Jones Act and the Longshore and Harbor Workers' Compensation Act ("LHWCA").