## APPENDIX TABLE OF CONTENTS

### OPINIONS AND ORDERS

## APPENDIX TABLE OF CONTENTS (Cont.)



### STATUTORY AND REGULATORY PROVISIONS INVOLVED



### OTHER DOCUMENTS

**MEMORANDUM* OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (JANUARY 20, 2023)**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE DUTRA GROUP, INC.;
ENSTAR (US) INC., DBA Enstar Administrators for Seabright Insurance Company,

*Petitioners,*

v.

KELLY ZARADNIK; DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Respondents.*

No. 21-71411

BRB No. 26-0128

On Petition for Review of an Order of the Benefits Review Board

Before: BERZON, R. NELSON, and BADE, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

**MEMORANDUM**

The Dutra Group and Enstar (US) Inc. (collectively "Dutra") petition for review from a decision of the Benefits Review Board ("Board") concluding that the Board lacked jurisdiction to grant a motion filed by Dutra in the absence of a timely-filed appeal. "We review the Board's decision for errors of law," *Nealon v. Cal. Stevedore & Ballast Co.*, 996 F.2d 966, 969 (9th Cir. 1993) (citing *Chavez v. Dir., Off. of Workers Comp. Programs*, 961 F.2d 1409, 1413 (9th Cir.1992)), applying a de novo standard of review to the legal questions Dutra raises in this petition, including questions involving the interpretation of the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), *see Jordan v. SSA Terminals, LLC*, 973 F.3d 930, 936 (9th Cir. 2020). We deny the petition.

1. The Board correctly held that it lacked jurisdiction to grant Dutra's motion. The Longshore Act provides that "unless proceedings for the suspension or setting aside of" a compensation order "are instituted" in an appeal to the Board, the order "shall become final at the expiration of the thirtieth day" after it is filed. 33 U.S.C. § 921(a); *see also* 33 U.S.C. § 921(b)(3). Thus, a party "has a thirty-day period within which an appeal" to the Board "must be taken, or it is lost." *Nealon*, 996 F.2d at 969. Accordingly, "[a]ny untimely appeal will be summarily dismissed by the Board for lack of jurisdiction." 20 C.F.R. § 802.205(c).

As the Act specifies that the court of appeals has jurisdiction to review "final order[s] of the Board," 33 U.S.C. § 921(c), a party seeking judicial review under the Longshore Act ordinarily must first file a timely

appeal to the Board. Where there is a remand to the Administrative Law Judge ("ALJ") for resolution of specified issues, an aggrieved party may file a petition for review in the court of appeals after the Board issues a final order following the ALJ's resolution of the remanded issues. *See Rhine v. Stevedoring Servs. of Am.*, 596 F.3d 1161, 1165 (9th Cir. 2010); *see also Nat'l Steel & Shipbuilding Co., Inc. v. Dir., Off. of Workers' Comp. Programs* ("*McGregor*"), 703 F.2d 417, 419 n.3 (9th Cir. 1983). So here, after the ALJ issued its order resolving the issues on remand, Dutra could have preserved its ability to obtain judicial review of the Board's 2016 order by timely obtaining a final order from the Board. But Dutra did not take any action before the Board until after the 30-day deadline for a Board appeal had expired. *See* 33 U.S.C. § 921(a).

Dutra also could have filed a timely petition for review in this court directly from the ALJ's order on remand but did not do that either. A party aggrieved by an earlier Board order after remand to an ALJ may bypass Board review and file a petition for review in the court of appeals within 60 days from the ALJ's final order on remand. *See McGregor*, 703 F.2d at 418-19; 33 U.S.C. § 921(c). Where the Board has already determined the contested issue in an earlier decision, "requiring an appeal to the [Board]" after the ALJ's remand order "would [be] futile; a summary affirmance adhering to a previous ruling in the same case may properly be viewed as a purely ministerial act." *McGregor*, 703 F.2d at 418. In such circumstances—which are those here—we have jurisdiction where a party timely petitions for review

directly from the ALJ's order on remand. *See id.* at 418-19.

Rather than filing an appeal to the Board within 30 days of the ALJ's decision or petitioning for review in this court within 60 days, Dutra waited until both deadlines had passed to file its motion asking the Board to deem its 2016 order "final." Because the Board's decision had already become final under the statute 30 days after the ALJ order on remand, *see* 33 U.S.C. § 921(a), (b)(3), the Board correctly determined that it lacked jurisdiction to grant Dutra's motion.

2. Dutra's arguments to the contrary do not change our conclusion. Dutra contends that it could not have appealed the ALJ's order to the Board because it was not aggrieved by the order. But Dutra was aggrieved by the overall result of the ALJ order combined with the earlier 2016 Board order, and so it could have appealed. Dutra also could have filed, within 30 days of the ALJ order, the motion it did file and asked that it be considered an appeal. Or it could have proceeded directly to our court pursuant to the procedure we approved in *McGregor*. Regardless, absent any form of a timely appeal, the Board did not err in denying Dutra's motion.

Nor could the Board appropriately have treated the joint stipulation the parties filed with the ALJ as a notice of appeal to the Board. Dutra relies on Board regulations that allow "any written communication which reasonably permits identification of the decision from which an appeal is sought" to satisfy the requirement of a notice of appeal to the Board, 20 C.F.R. § 802.208(b), even where the notice is filed with the wrong entity, 20 C.F.R. § 802.207(a)(2). But

although the joint stipulation discussed Dutra's intent to proceed to the Ninth Circuit, it said nothing about any intent to appeal to the Board. *See Porter v. Kwajalein Servs., Inc.*, 31 Ben. Rev. Bd. Serv. 112 (1997).

Dutra also asserts that, because Zaradnik agreed in the stipulation that it could proceed to the Ninth Circuit and did not oppose Dutra's motion to declare the Board's 2016 decision "final," she has waived any argument that Dutra's Board appeal was untimely. As noted, Dutra indeed could have proceeded to the Ninth Circuit directly, had it done so within 60 days of the ALJ decision; Zaradnik's agreement to that effect did not waive the issue of the timeliness of Dutra's motion to the Board. And regardless, the Board had authority to "raise and decide [] sua sponte" the jurisdictional question whether it had authority to act on Dutra's motion after the ALJ decision had become final under the statute. *See Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1100 (9th Cir. 1982).

**PETITION DENIED.**

# ORDER OF THE BENEFITS REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF LABOR (JULY 27, 2021)

NOT-PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
200 CONSTITUTION AVE. NW
WASHINGTON, DC 20210-0001

KELLY ZARADNIK,

*Claimant-Respondent*
*Cross-Petitioner,*

v.

THE DUTRA GROUP, INCORPORATED

and

SEABRIGHT INSURANCE COMPANY,

*Employer/*
*Carrier-Petitioners*
*Cross-Respondents.*

BRB Nos. 16-0128 and 16-0128A

Date Issued: 07/27/2021

Before: Judith S. BOGGS, Chief Administrative Appeals Judge, Jonathan ROLFE, Daniel T. GRESH, Administrative Appeals Judges.

## ORDER

On June 1, 2021, Employer filed a motion requesting the Benefits Review Board declare its decision in *Zaradnik v. The Dutra Group, Inc.*, BRB Nos. 16-0128/A (Dec. 9, 2016) (Boggs, J., concurring and dissenting), *aff'd on recon.* (Sept. 22, 2017) to be "final," thereby enabling it to appeal that decision to the United States Court of Appeals for the Ninth Circuit. Claimant has not responded. We deny Employer's motion.

After the administrative law judge issued a decision awarding Claimant benefits in 2015, both parties appealed to the Board. The Board, *inter alia*, affirmed the administrative law judge's findings that Claimant's orthopedic and respiratory injuries are work-related but remanded the case for him to reconsider the nature of Claimant's disability. The Board denied Employer's subsequent motion for reconsideration en banc. Employer appealed to the Ninth Circuit, and Claimant filed a motion to dismiss the appeal because the Board's decision was not final. The court granted Claimant's motion to dismiss for lack of jurisdiction. *The Dutra Group, Inc. v. Zaradnik*, No. 17-73093 (9th Cir. May 22, 2018).

While the case was on remand to the administrative law judge, the parties stipulated Claimant is permanently totally disabled and her condition reached maximum medical improvement on January 28, 2012. With input from the Director, Office of Workers' Compensation, the stipulations also included Employer's entitlement to Section 8(f), 33 U.S.C. § 908(f), relief from the Special Fund, commencing

104 weeks after January 28, 2012. The administrative law judge canceled the scheduled hearing and approved the parties' stipulations. Emp. Motion at Exh. B (Order dated March 12, 2021). The district director filed the administrative law judge's Order Approving Stipulations on March 17, 2021. No party appealed this Order.

With the issues on remand resolved, Employer asserts the stipulations also included an agreement that it would proceed with its appeal of the causation issue, which the Board had affirmed, to the Ninth Circuit. Emp. Motion at Exh. A.[1] To do so, it asks the Board to issue an order declaring its prior decision "final."

Contrary to Employer's assertion, an agreement between the parties does not give the Board authority or discretion to bypass statutory rules of procedure. *See Hamer v. Neighborhood Housing Srvcs. of Chicago*, ___ U.S. ___, 138 S.Ct. 13 (2017). The Board obtains jurisdiction over a case upon receipt of a timely notice of appeal. The timeliness of a notice of appeal is jurisdictional. 33 U.S.C. § 921(a); *Jeffboat, Inc. v. Mann*, 875 F.2d 660, 22 BRBS 79(CRT) (7th Cir. 1989); *Ins. Co. of N. Am. v. Gee*, 702 F.2d 411, 15 BRBS 107(CRT) (2d Cir. 1983); 20 C.F.R. § 802.205. The Board obtains jurisdiction if an aggrieved party files an appeal within 30 days of the date that the district director files the administrative law judge's decision or order. 33 U.S.C. §§ 919(e), 921(a); 20 C.F.R. § 802.205(a). Failure to file a notice of appeal

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[1] The stipulations state, "The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit."

with the Board within the 30-day period "shall foreclose all rights to review by the Board with respect to the case or matter in question." 20 C.F.R. § 802.205(c).

In this case, the administrative law judge's Order Approving Stipulations resolved all remaining issues on remand. It was filed in the district director's office on March 17, 2021. Therefore, Employer had until April 16, 2021, to file an appeal with the Board. 33 U.S.C. § 921(a); 20 C.F.R. § 802.205(a). Employer did not file a timely notice of appeal, or any document that could be perceived as a timely notice of appeal. Its motion to the Board is dated May 28, 2021. Consequently, the administrative law judge's order, and the non-final orders preceding it, became final as of April 16, 2021, and the Board cannot address matters determined therein.[2] 33 U.S.C. § 921(a); 20 C.F.R. § 802.205(c). Because the Board now lacks jurisdiction to address the administrative law judge's order, and by extension the prior non-final orders, we cannot issue a decision or order declaring the prior decision "final."

Accordingly, we deny Employer's motion.

---

[2] Employer should have filed a timely appeal of the administrative law judge's Order Approving Stipulations seeking summary affirmance of this decision and noting the appeal was for the purpose of preserving its right to appeal the underlying Board decision. *See, e.g.*, *Morganti v. Lockheed Martin Corp.*, BRB No. 04-0407 (Feb. 17, 2004) (unpub.) (affirming underlying decision based on law of the case doctrine and granting motion for summary affirmance of decision after remand, so that further appeal could be taken).

SO ORDERED.

/s/ Judith S. Boggs
Chief Administrative Appeals Judge

/s/ Jonathan Rolfe
Administrative Appeals Judge

/s/ Daniel T. Gresh
Administrative Appeals Judge

**ADMINISTRATIVE JUDGE ORDER APPROVING STIPULATIONS AND VACATING HEARING (MARCH 12, 2021)**

---

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516
(415) 625-2200 (415) 625-2201 (FAX)
oalj-sanfrancisco@dol.gov

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In the Matter of
KELLY ZARADNIK,

*Claimant,*

v.

THE DUTRA GROUP, INC., and
SEABRIGHT INSURANCE COMPANY

*Employer and Carrier,*

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

*Party-in-Interest.*

---

Case No.: 2012-LHC-00988
OWCP NO.: 18-099601
Issue Date: 12 March 2021

Before: Christopher LARSEN,
Administrative Law Judge.

---

**ORDER APPROVING STIPULATIONS AND VACATING HEARING**

This is a claim for benefits under the Longshore Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* ("the Act" or "LHWCA"). This matter is currently set for further hearing by video on April 7, 2021.

Claimant and Employer/Carrier have filed written stipulations executed by counsel on their behalf on March 11, 2021. Those stipulations are approved, and incorporated by this reference into this Order. The parties stipulate:

1. The claimant, Kelly Zaradnik, is permanently and totally disabled.

2. The claimant reached maximum medical improvement on January 28, 2012.

3. Pursuant to agreement with the Director, confirmed by e-mail dated March 3, 2021, Employer/ Carrier will receive Special Fund relief, with interest, commencing 104 weeks after the maximum-medical-improvement date of January 28, 2012.

Because these stipulations dispose of the issues before me on remand from the Benefits Review Board, the videoconference hearing on July 10, 2021, is vacated.

SO ORDERED.

Digitally Signed by John C. Larsen
DN:CN=John C. Larsen

OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=San Francisco, S=CA, C=US
Location: San Francisco CA

CHRISTOPHER LARSEN
Administrative Law Judge

**DOL OWCP CORRESPONDENCE**
**(MARCH 17, 2021)**

---

U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAM
DIVISION OF LONGSHORE AND
HARBOR WORKERS' COMPENSATION
400 West Bay Street, Suite 63A, Box 28
Jacksonville, FL 32202

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OALJ File No: 2OL2-LHC-00988
OWCP Case: LS-18099601
OWCP Office:
Long Beach Suboffice of the Western District
Injured Employee: Kelly Zaradnik
Date of Injury: 09/01/2010
Employer: Dutra Group
Act: LHWCA

Dutra Group
2350 Kerner Blvd. #200
San Rafael, CA 94901

Barry W Ponticello, Esq.
Law Offices of England, Ponticello & St. Clair
701 "B" Street, # 1790
San Diego, CA 92101

SeaBright Insurance Company
P.O. Box 91107
Seattle, WA 98111

Kelly Zaradnik
P.O. Box 863
Carlsbad, CA 92018

Eric A Dupree, Esq.
The Law Offices of Eric Dupree
1715 Strand Way, Ste. 203
Coronado, CA 92118

Dear Ladies and Gentlemen:

The enclosed Order Approving Stipulations and Vacating Hearing ("Order") of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at formal hearing, and on the assumption that all available evidence has been submitted.

The Order have been dated and filed in the District Director's Office. Procedures for appealing are described below.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits, the filing of a motion for reconsideration or an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/ insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within 10 days, notwithstanding the filing of a motion for reconsideration or an appeal, unless an order staying payments has been issued by the Benefits Review Board.

Sincerely,

/s/ Marco A. Adame, II
District Director
Western Compensation District

---

A petition for reconsideration of a decision and order must be filed with the Office of the Administrative Law Judges, which issued the attached decision and order, within 10 days from the date the District Director files the decision and order in his/her office.

Any notice of appeal must be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in Washington, D.C., within 30 days from the date upon which the decision and order or an order deciding a timely filed petition for reconsideration has been filed in the Office of the District Director. If you file a notice of appeal by mail, the address for the Benefits Review Board is: U.S. Department of Labor, Benefits Review Board, ATTN: Office of the Clerk of the Appellate Boards (OCAB), Suite S-5220, 200 Constitution Ave. NW, Washington, DC 20210-001.

You may file a notice of appeal electronically through the Board's electronic filing system. For details on electronic filing, please see the enclosed information sheet.

If a timely notice of appeal is filed by a party, any other party may initiate cross-appeal or protective appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed or within the 30 day period described above, whichever period last expires. A copy must be served upon the

District Director and on all other parties by the party who files a notice of appeal. Proof of Service shall be included with the notice of appeal.

The date compensation is due is the date the District Director files the decision and order in his/her office.

---

Re: Kelly Zaradnik

OWCP Case: LS-18099601
OALJ Case: 2012-LHC-00988

**CERTIFICATE OF FILING AND SERVICE**

I certify that on 03/17/2021, the foregoing Order Approving Stipulations and Vacating Hearing was filed in the Office of the District Director, 18 Compensation District, and a copy thereof was mailed on said date by certified mail to the parties and their representative at the last known address of each as follows:

Dutra Group
2350 Kerner Blvd. #200
San Rafael, CA 94901

Barry W Ponticello, Esq.
701 "B" Street, # 1790
San Diego, CA 92101

SeaBright Insurance Company
P.O, Box 91107
Seattle, WA 98111

Kelly Zaradnik
P.O. Box 863

Carlsbad, CA 92018

A copy was also served electronically to the following:

Dupree Law
EDupree@DupreeLaw.com
CBentley@dupreelaw.com

/s/ Marco A. Adame II
District Director
Long Beach Suboffice of the Western District
U. S. Department of Labor
Office of Workers' Compensation Programs

Mailed: 03/17/2021

---

**IMPORTANT INFORMATION ABOUT FILING APPEALS ELECTRONICALLY**

The Benefits Review Board's former Electronic File and Service Request (EFSR) system at https://dol-appeals.entellitrak.com is offline permanently. A new electronic filing system is deployed, so please plan your filings accordingly.

Beginning Monday, December 7, 2020, the U.S. Department of Labor made available for use a new upgraded eFile/eServe system (EFS) at https://efile.dol.gov. If you attempt to use the website link, https://dol-appeals.entellitrak.com, you will be directed to the new upgraded system, Information on how to register for EFS, as well as user guides, video tutorials, and FAQs, is available at https://efile.dol.gov/support.

You must register with EFS to use the system, by setting up an account and a user profile. First, all users will need to create an account at login.gov. (You may already have an account if you are a registered user of the former EFSR system.). Second, users who have not previously registered with the EFSR system will need to create a profile with EFS using their login.gov username and password. Existing EFSR system users will not have to create a new EFS profile. All users can learn how to file an appeal to the Board using EFS by consulting the written guide at https://efile.dol.gov/system/files/2020-11/file-new-appeal-brb.pdf and the video tutorial at https://efile.dol.gov/support/boards/new-appeal-brb .

> BE SURE TO REGISTER AS SOON AS POSSIBLE! *The deadline for filing an appeal is jurisdictional and cannot be waived*. We recommend that you set up your EFS profile to be able to file your appeal on time. It should take you less than an hour to set up your EFS profile, but you should allow more time to review the user guides and training materials. If you have trouble setting up your profile, you can find contact information for login.gov and EFS at https://efile.dol.gov/contact.

The Department will provide webinars on the new e-filing system. Dates for the webinars will be announced on the websites of the Office of Administrative Law Judges (www.dol.gov/agencies/oalj), Benefits Review Board (www.dol.gov/agencies/brb), and the upgraded Electronic Filing System (https://efile.dol.gov).

If you file your appeal online, you do not need to also file paper copies. The Board will electronically serve a copy of the notice of appeal on the district

director who filed the decision or order being appealed and the Associate Solicitor for Black Lung and Longshore Legal Services. You are still responsible for serving the notice of appeal and other documents on the other parties to the case. Proof of service of the notice of appeal on the other parties must be included with the notice of appeal. *See* 20 C.F.R. § 802.204.

After an appeal is filed, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

Registered users of EFS will be electronically served with Board-issued documents via EFS; they will not be served by regular mail. If you file your appeal by regular mail, you will be served with Board-issued documents by regular mail; however, on or after December 7, 2020, you may opt into electronic service by establishing an EFS account, even if you initially filed your appeal by regular mail.

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516
(415) 625-2200 (415) 625-2201 (FAX)

MEMORANDUM FOR:
Long Beach District Director
Long Beach, CA

FROM
John C. Larsen
Administrative Law Judge

SUBJECT:
ZARADNIK KELLY V. DUTRA GROUP
Case No. 2012LHC00988, OWCP No. l8-099601

In accordance with the Regulations implementing the Longshore and Harbor Workers' Compensation Act, I am transmitting herewith my signed document this 12th day of March, 2021.

Five (5) Business Days from today, this Decision and Order will be posted on our website (www.oalj.dol.gov); however, under the Act and regulations such posting will NOT constitute official service, which is to be effected by your office.

FORWARDED:

Digitally Signed by Maryanne B. Ballard
DN:CN= Maryanne B. Ballard
OU=Legal Assistant, O=US DOL Office of Administrative Law Judges,

L=San Francisco, S=CA, C=US
Location: San Francisco CA

MARYANNE B. BALLARD
Legal Assistant

Enclosure

cc: Clm Atty (w/o encl)
Emp Atty (w/o encl)
Sol (w/o encl)

*THE OFFICE OF ADMINISTRATIVE LAW JUDGES SHOULD NOT BE CONTACTED REGARDING SERVICE OF THE ABOVE DOCUMENT.

**STIPULATIONS OF CLAIMANT AND RESPONDENT AND REQUEST FOR ORDER (MARCH 11, 2021)**

---

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

---

KELLY ZARADNIK,

*Claimant,*

v.

THE DUTRA GROUP; ENSTAR (US) INC., DBA ENSTAR ADMINISTRATORS FOR SEABRIGHT INSURANCE COMPANY

*Respondent.*

---

OALJ No: 2012-LHC-00988

OWCP No:18-099601
BRB Docket No. 2016-0128; 2016-0128A
Ninth Cir. No.:18-72307
SE000801715

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Comes Now CLAIMANT ZARADNIK and RESPONDENT THE DUTRA GROUP/ENSTAR ("The parties") and STIPULATE as follows, and REQUEST and ORDER consistent with these STIPULATIONS:

**PROCEDURAL POSTURE**

This matter proceeded to Trial, at which time the assigned ALJ made a finding of industrial injury.

The matter was appealed to the BRB on a number of issues, with the BRB affirming the industrial injury finding. RESPONDENT appealed the causation issue to the 9th Circuit, who found the issue premature, as the BRB had remanded issues back to the Trial level. It is the parties' understanding that the Trial level issues need to be resolved before the 9th Circuit can take up the causation appeal. The parties' come forth and stipulate as to the pending Trial level issues.

**STIPULATIONS**

1. CLAIMANT ZARADNIK is permanently and totally disabled.

2. CLAIMANT ZARADNIK was MMI (maximum medical improvement) on January 28, 2012 (01/28/2012).

3. The parties have both discussed the Special Fund issue with the Solicitor and Director, and the Solicitor has advised (including via email of 03/03/2021) that the Director would NOT oppose Special Fund relief if the parties stipulated to permanent and total disability and an MMI date of 1/28/12. The parties have considered this representation as to Special Fund relief in reaching these stipulations.

4. The parties acknowledge that the Respondent may now proceed on the causation issue to the 9th Circuit.

**REQUESTED ORDER**

The Parties request an Order as follows:

I. CLAIMANT ZARADNIK is permanently and totally disabled.

II. CLAIMANT ZARADNIK was MMI (maximum medical improvement) on January 28, 2012 (01/28/2012).

III. RESPONDENT THE DUTRA GROUP/ENSTAR shall receive Special Fund relief, with interest, commencing 104 weeks after the MMI date of January 28, 2012 (01/28/2012).

IV. With the conclusion of remand issues, the Trial level issues are complete such that the previously filed appeals can proceed.

V. IT IS SO STIPULATED

DUPREE LAW

By: /s/ Eric A. Dupree
Attorney for Claimant

Dated: 03/11/2021

ENGLAND, PONTICELLO & ST. CLAIR

By: /s/ Barry W. Ponticello
Attorney for Respondent

Dated: 03/11/2021

**PROOF OF SERVICE**

COURT: U.S. Department of Labor, Office of Administrative Law Judges
CASE TITLE: Kelly Zaradnik v. The Dutra Group; SeaBright Insurance Company
OWCP NO.: 18-99601
OALJ NO: 2012-LHC-00988
BRB NO.: 2018-0124
NINTH CIR. NO.: 17-73093

I, the undersigned, an employee of ENGLAND PONTICELLO & ST.CLAIR, located at 701 B Street, Suite 1790, San Diego, California, 92101 declare under penalty of perjury that I am over the age of eighteen (18) and not a party to this matter, action or proceeding. On March 12, 2021, I served the foregoing document(s), described as:

**STIPULATIONS OF CLAIMANT AND RESPONDENT AND REQUEST FOR ORDER dated 03/11/2021**

in this action by placing ☒ true copies of the document(s) addressed to the following party(ies) in this matter at the following address(es):

HONORABLE CHRISTOPHER LARSEN
OFFICE OF ADMINISTRATIVE LAW JUDGES

(*Via Email:OALJ-SanFrancisco@dol.gov*)

STEVE WIPER
ENSTAR (US) INC., DBA ENSTAR
ADMINISTRATORS FOR
SEABRIGHT INSURANCE COMPANY

(*Via Email & U.S. Mail Only*)

ERIC A. DUPREE, ESQ.
DUPREE LAW
(*Attorney for Claimant, Kelly Zaradnik*)
(*Via Facsimile Only: (619) 522-8787*)

DANIEL CHASEK, ESQ.
OFFICE OF THE SOLICITOR
350 SOUTH FIGUEROA STREET
SUITE 370
LOS ANGELES, CA 90071
(*Via U.S. Mail Only*)

☒ BY EMAIL. I caused the above-referenced document to be transmitted via email to the parties as listed on this Proof of Service.

☒ BY U.S. MAIL. I deposited such envelope in the mail at San Diego, California. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with ENGLAND PONTICELLO & ST.CLAIR's practice of collection and processing correspondence for mailing. Under that practice, documents are deposited with the U.S. Postal Service on the same day which is stated in the proof of service, with postage fully prepaid at San Diego, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated in this proof of service.

☒ BY FACSIMILE. I caused the above-referenced document to be transmitted via facsimile to the parties as listed on this Proof of Service.

I declare under penalty of perjury under the laws of the state of California, that the above is true and correct.

Executed March 12, 2021 in San Diego, CA

/s/ Leanne Sun
Leanne Sun

**ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MAY 22, 2018)**

---

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

THE DUTRA GROUP, INC. and
SEABRIGHT INSURANCE COMPANY,

*Petitioners,*

v.

KELLY ZARADNIK and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,

*Respondents.*

---

No. 17-73093

BRB No. 16-0128
Benefits Review Board

Before: THOMAS, Chief Judge, W. FLETCHER and CALLAHAN, Circuit Judges.

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**ORDER**

Appellee's motion to dismiss this appeal for lack of jurisdiction (Docket Entry No. 11) is granted. *See* 33 U.S.C. 921(c); *Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 1138 (9th Cir. 1989) (the court lacks jurisdiction over an appeal of a Benefit Review

Board order remanding to an administrative law judge for further proceedings).

**DISMISSED**.

**DECISION AND ORDER OF THE BENEFITS REVIEW BOARD (DECEMBER 9, 2016)**

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NOT PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
200 Constitution Ave. NW
Washington, DC 20210-0001

---

KELLY ZARADNIK,

*Claimant-Respondent*
*Cross-Petitioner,*

v.

THE DUTRA GROUP, INCORPORATED

and

SEABRIGHT INSURANCE COMPANY,

*Employer/Carrier-*
*Petitioners*
*Cross-Respondents.*

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BRB Nos. 16-0128 and 16-0128A

Date Issued: Dec 9 2016

Appeals of the Decision and Order Granting Benefits and Order Granting Reconsideration of William Dorsey, Administrative Law Judge, United States Department of Labor, and the Order Ruling on

Claimant's Motion to Continue and Employer/
Carrier's Motion to Change Location of Hearing of
Steven B. Berlin, Administrative Law Judge,
United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge,
BOGGS and GILLIGAN,
Administrative Appeals Judges.

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HALL, Chief Administrative Appeals Judge:

Employer appeals, and claimant cross-appeals, the Decision and Order Granting Benefits and Order Granting Reconsideration (2012-LHC-00988) of Administrative Law Judge William Dorsey, and claimant challenges the Order Ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing of Administrative Law Judge Steven B. Berlin rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. § 921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that she sustained cumulative injuries to her left hip, back, hands, and lungs, over the course of her work as a union pile driver which began in 1991. Prior to her work for employer, claimant had been diagnosed with several pulmonary and ortho-

pedic conditions.[1] *See* HT at 47-50, 199-201, 232-233, 236-237; CX 23. Claimant worked for employer for parts of 48 days, from July 23 until September 20, 2010,[2] when her entire crew was laid off due to the completion of the job. HT at 56. Claimant subsequently worked in non-covered employment for Stone & Webster (S & W) on two separate occasions,[3] with the second job ending with a lay-off on or around January 27, 2012. Claimant stated she thereafter unsuccessfully looked for work until September 2012, when she received notice that she would receive

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[1] 'Claimant's prior health concerns included diagnoses of asthma, bilateral hip osteoarthritis, multiple back strains and two hospitalizations for silica exposure. CX 23.

[2] Claimant's duties for employer included lifting and carrying objects, such as 50-pound sand jacks, sheets of plywood, and supporting timbers, across uneven ground; loading and unloading trucks; operating forklifts; and operating and refueling other equipment such as compressors, Hole-Hawg drills, welders, chainsaws and beam saws. HT at 81, 88, 100-102, 106, 112, 124-125, 285; CX 24. Claimant stated she typically wore a tool belt, weighing roughly 30 pounds, all day, and that she occasionally carried an additional tool bag which might weigh between 60-65 pounds. HT at 110, EX 3 at 40-43, 49-50. Claimant further stated that she was regularly exposed to airborne particulate matter in her work with employer, including dust generated from sandblasting and concrete pours, and fumes from glues used to laminate the plies of plywood, and from diesel fuel expelled from various tools and vehicles. HT at 88-90, 92-92, 95-99, 123.

[3] Claimant served as a lead person for S & W, doing concrete and form work at the San Onofre Nuclear Power Facility, in October and November of 2010. Claimant returned to work for S & W in late October 2011, assembling office furniture, until she was laid off.

Social Security disability benefits. She retired from the union that same month.

Claimant filed a claim for benefits under the Act against employer on October 12, 2011, seeking compensation for cumulative trauma injuries to her hips, back, and hands, and for her pulmonary conditions, alleging that her work for employer contributed to, aggravated and/or accelerated her underlying orthopedic and respiratory conditions. Employer controverted the claim.

In his decision, the administrative law judge found that claimant provided timely notice to employer of her injuries under Section 12 of the Act, 33 U.S.C. § 912, and that the claim was timely filed under Section 13 of the Act, 33 U.S.C. § 913. The administrative law judge found claimant entitled to the Section 20(a) presumption that all of her claimed orthopedic and respiratory conditions are related to her work for employer, and that employer established rebuttal thereof. 33 U.S.C. § 920(a). Addressing the evidence as whole, the administrative law judge found that claimant's work for employer as a pile driver aggravated, accelerated, and/or contributed to her overall orthopedic and respiratory conditions. The administrative law judge rejected employer's contention that claimant's subsequent employment with S & W is the cause of her disabling conditions. Thus, the administrative law judge found claimant entitled to, and employer liable for, ongoing temporary total disability benefits commencing January 28, 2012, 33 U.S.C. § 908(b), and medical benefits for her work-related conditions. 33 U.S.C. § 907(a). The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's findings that claimant provided timely notice of her injuries, that she timely filed her claim for benefits, and that, on the merits, claimant's orthopedic and respiratory conditions are related to her work with employer. BRB No. 16-0128. Claimant responds, urging affirmance of the administrative law judge's award of benefits. Employer has filed a reply brief On cross-appeal, claimant challenges the administrative law judge's finding that her total disability is temporary rather than permanent. Claimant also challenges Judge Berlin's pre-hearing Order denying an attorney's fee for claimant's response to employer's motion for a change in venue. BRB No. 16-0128A. Employer responds, urging rejection of claimant's contentions. Claimant has filed a reply brief

**Timeliness**

Employer contends that claimant's notice of injury and claim for compensation dated October 12, 2011, were untimely filed. Employer maintains that the administrative law judge's findings that claimant became "aware" of her hip injury on August 29, 2011, and her respiratory condition on November 9, 2012, are contrary to the evidence and law. Employer states that the record is replete with statements from claimant that she was aware of the relationship between her work activities with employer and her allegedly worsening hip and respiratory conditions prior to her last day of work in that job on September 20, 2010.

Section 12(a) of the Act, 33 U.S.C. § 912(a), requires that claimant must, in a traumatic injury

case, give employer written notice of her injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and her employment. *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). In the absence of substantial evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, 33 U.S.C. § 920(b), that employer has been given sufficient notice of the injury pursuant to Section 12(a). *See Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994). "Awareness" in a traumatic injury case occurs when the claimant is aware, or should have been aware, of the relationship between the injury, the employment, and an impairment of her earning power, and not necessarily on the date of the accident, or in this repetitive trauma case, the date of the last trauma. *See Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *J.M Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990) (discussing same standard in 33 U.S.C. § 913). In a case involving an occupational respiratory disease which does not immediately result in disability, claimant must give employer notice of her injury within one year of her awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. § 912(a).

The administrative law judge found that it was only after Dr. Ezzet, on August 29, 2011, explained that claimant's hip problems were work-related and advised her to leave her career as a pile driver, that

claimant became aware of the full extent, character, and impact of her hip injury. Decision and Order at 25; Order on Recon. at 2. Specifically, the administrative law judge found that by August 29, 2011, claimant knew she had a hip injury, that her work over the years had made it worse, and that her symptoms had increased while working for employer. Additionally, the administrative law judge found that August 29, 2011, represents the first time claimant became aware that she suffered an "impairment of earning power," as that is when Dr. Ezzet told her to quit working as a pile driver. He thus concluded that claimant's inability to return to her usual work as a pile driver on August 29, 2011, initiated the Section 12(a) statute of limitations. With regard to claimant's respiratory conditions, the administrative law judge found there was nothing during claimant's work for employer which alerted her to the possibility that her work may have aggravated or accelerated her pre-existing respiratory conditions until she received a medical opinion to that effect from Dr. Harrison on November 9, 2012.

Substantial evidence supports the administrative law judge's findings that claimant first became aware of the relationship between her hip and respiratory injuries, her work for employer, and an impairment to earning power on August 29, 2011 and November 9, 2012, respectively. In his report dated August 29, 2011, Dr. Ezzet diagnosed osteoarthritis and "had a lengthy and frank discussion" with claimant informing her that he "does not think construction work is in her best interest any longer," because of her left hip condition. CX 23. Specifically, Dr. Ezzet stated that claimant "does not tolerate [construction work] well

with her arthritic hips and would not be a good candidate for that kind of work if she has her hip replaced." *Id.* Drs. Harrison and Greenfield each agreed that Dr. Ezzet's August 29, 2011 report represents the first time any doctor declared claimant disabled as a result of her hip condition. CX 21 at 59; Post-Hearing Dep. of Dr. Greenfield at 25. The opinions of Drs. Ezzet, Harrison and Greenfield thus support the administrative law judge's finding that claimant first became aware, or should have been aware, of the relationship between her hip injury, her work for employer, and an impairment in her earning capacity, on August 29, 2011. *See SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); 932 F.2d 819, 24 BRBS 130(CRT); *see also E.M. [Mechler] v. Dyncorp Int'l*, 42 BRBS 73 (2008), *aff'd sub nom. Dyncorp Int'l v. Director, OWCP*, 658 F.3d 133, 45 BRBS 61(CRT) (2d Cir. 2011); *Hodges v. Caliper, Inc.*, 36 BRBS 73 (2002).

Moreover, Dr. Harrison's November 9, 2012 report, in which he diagnosed asthma/chronic obstructive pulmonary disease (COPD) and opined that claimant's occupational exposures, specifically to diesel exhaust, silica, welding fumes, and construction dust, contributed to her respiratory conditions,[4] CX 14, represents the first medical opinion tying claimant's respiratory conditions specifically to her work for employer. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J.,

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[4] Dr. Harrison reiterated in his testimony that claimant's asthma and COPD are "a result of cumulative exposure" to respiratory toxins while on the job, and specifically, that claimant's work for employer "contributed to the cumulative injury to her lung that occurred over the duration of her employment as a pile butt." CX 21 at 13.

concurring in the result only) (in occupational disease cases the time limitations do not begin to run until the claimant is aware of the relationship between covered employment, the disease, and the disability). The administrative law judge's date of awareness findings are, therefore, affirmed as they are supported by substantial evidence. *J.M. Martinac Shipbuilding*, 900 F.2d 180, 23 BRBS 127(CRT). Consequently, we affirm the administrative law judge's finding that claimant's notice to employer, filed on October 12, 2011, of her respiratory condition was timely. *Id.*

Because claimant did not gain "awareness" of her hip condition until August 29, 2011, the administrative law judge, on reconsideration, correctly determined that claimant's notice to employer, which occurred as a result of the filing of her claim on October 12, 2011, was 14 days late and, thus, untimely. As such, he considered, but rejected, employer's arguments that it was prejudiced by that untimely notice. Claimant's failure to give her employer timely notice of her injury pursuant to Section 12(a) of the Act is excused if the employer had knowledge of the injury or was not prejudiced by the claimant's failure to give proper notice or if the district director excuses the failure to file on grounds provided by the statute. 33 U.S.C. § 912(d). Pursuant to Section 20(b) of the Act, the employer bears the burden of producing substantial evidence that it did not have knowledge of the injury and was prejudiced by the late notice. *Kashuba v. v. Legion Ins. Co.*, 139 F.3d 1273, 32 BRBS 62(CRT) (9th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991); *Bivens*, 23 BRBS 233. Prejudice under Section 12(d)(2) may be established where the employer pro-

vides substantial evidence that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the illness or to provide medical services. *See Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *Vinson v. Resolve Marine Services*, 37 BRBS 103 (2003); *Bustillo v. Southwest Marine, Inc.*, 33 BRBS 15 (1999).

Contrary to employer's contention, the administrative law judge correctly determined that the prejudice inquiry is limited to the period between claimant's date of awareness and the employer's receipt of notice or knowledge of the injury. Thus, prejudice cannot be established by the fact that claimant worked for S & W in 2010 after she left employer, because this employment was before her date of awareness. Nonetheless, we reject employer's contention that the opinion of its expert, Dr. Greenfield, was adversely affected by claimant's late notice because he could not garner sufficient information on claimant's hip condition prior to the start of her work for S & W. The record establishes that Dr. Greenfield did not find a lack of this information hindered his ability to provide an opinion regarding the cause of claimant's hip condition. In this regard, Dr. Greenfield testified at deposition that while a medical examination of claimant immediately after she stopped working for employer "would have" provided him with more "insight into [claimant's] condition at that time," he was able to use "secondary information, such as [claimant's] complaints and the actual functional capacity she demonstrated at these jobs for consideration" in forming his opinion that claimant's orthopedic conditions are related to activities of daily living and the continuing trauma of her last work with S & W.

Greenfield's Dep. at 24-25. Employer's conclusory allegation of an inability to investigate the claim when it was fresh is insufficient to establish prejudice. *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *Kashuba*, 139 F.3d 1273, 32 BRBS 62(CRT); *Vinson*, 37 BRBS 103; *Bustillo*, 33 BRBS 15; *see also Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). As the administrative law judge's finding that claimant's untimely notice to employer did not prejudice employer is rational, supported by substantial evidence, and in accordance with law, we affirm his conclusion that claimant's failure to comply with Section 12(a) does not bar the claim for her hip injury.[5] *Id.*

**Section 20(a): Causation**
**Orthopedic Injuries**

Employer contends the administrative law judge erred by not requiring claimant to establish, based on the evidence as a whole, that her orthopedic conditions are work-related. Employer maintains that the administrative law judge, instead, erroneously

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[5] Moreover, we reject employer's general contention that claimant's claim is barred pursuant to Section 13 of the Act as the record establishes that claimant's October 12, 2011 claim, filed within one-year of her date of awareness, *i.e.*, August 29, 2011, for the hip condition and November 8, 2012, for the respiratory conditions, is timely pursuant to Section 13(a), (b)(2) of the Act, 33 U.S.C. § 913(a), (b)(2). *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); *J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982).

treated this case as a two-injury, multiple-employer matter, by applying *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004), to resolve the causation issue.[6]

Claimant asserted she sustained hip, back and bilateral hand injuries from her work with employer. Once, as here, the Section 20(a) presumption, 33 U.S.C. § 920(a), is invoked and rebutted, the Section 20(a) presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, with the claimant bearing the burden of proving on the record as a whole that her injuries are work-related.[7] *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, when the employment injury aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compens-

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[6] Employer concedes that claimant's work for employer could have aggravated her degenerative, arthritic, orthopedic conditions but asserts that there is no proof in the record that this work did, in fact, aggravate claimant's underlying conditions. In particular, employer maintains that there is no evidence of any change in claimant's underlying conditions as a result of her work for employer.

[7] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant is entitled to the Section 20(a) presumption that her orthopedic and respiratory conditions are related to her covered employment, that employer rebutted the presumption, and that claimant is totally disabled as a result of her work-related conditions. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

able. The relative contribution of the pre-existing condition and the aggravating injury are not weighed for purposes of this particular injury. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

We reject employer's contention that the administrative law judge failed to place the burden on claimant of establishing the work-relatedness of her orthopedic conditions. The administrative law judge's citation of *Price* was for the purpose of recognizing that a work-related aggravation of an underlying condition constitutes an "injury" under the Act. *See* Decision and Order at 41, 44-45; Order on Recon. at 5-6. Furthermore, the administrative law judge correctly recognized that it is immaterial to the causation inquiry whether claimant's injuries disabled her while she was working for employer. *See* 33 U.S.C. § 902(2); *see generally Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). The administrative law judge credited "much of claimant's account of her working conditions with employer, finding that "she remains the best source of information regarding the work she performed," and that "[h]er testimony is not so different from that of the managers." Decision and Order at 17. The administrative law judge then rationally credited medical evidence that claimant's work for employer aggravated, accelerated and/or contributed to her orthopedic conditions. In this regard, the administrative law judge rationally accorded greater weight to the opinions of Drs. Stark and Harrison than to that of Dr. Greenfield. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The administrative

law judge found the opinions of Drs. Stark and Harrison, that claimant's work as a pile driver, including her work with employer, in fact, caused, aggravated or accelerated her back, bilateral hip and carpal tunnel injuries, are better reasoned than Dr. Greenfield's.[8] Decision and Order at 47-48; CXs 3, 5, 7, 14 20 at 12-13, 21 at 28. As the administrative law judge's weighing of the evidence is rational and his conclusion is supported by substantial evidence of record, we affirm his finding that claimant sustained cumulative orthopedic injuries to her hips, hands and back as a result of her work with employer. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT).

**Respiratory Conditions**

Employer contends the administrative law erred in finding that claimant sustained a respiratory injury while in its employ.[9] Employer maintains that

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[8] The administrative law judge rationally found that Dr. Greenfield's opinion is based on an "erroneous premise," and his "reasoning is inconsistent with the treatment of cumulative trauma injuries." Decision and Order at 48. In particular, the administrative law judge found that Dr. Greenfield's opinion seems predicated on identifying the predominant cause of claimant's condition, rather than determining whether claimant's work with employer was a contributing factor to that condition. The administrative law judge also found that Dr. Greenfield's general finding, that every time claimant "loaded" her hip joint, which the administrative law judge found included regular movement while at work, there would be additional "fretting" of the cartilage cells, actually supports, rather than detracts, from a finding that claimant's work for employer aggravated her injury. *Id.*

[9] Employer contends the parties stipulated that claimant's respiratory condition did not worsen due to her work with employer. This "stipulation" contention is based on the following

the record contains no creditable evidence linking claimant's work for employer to any worsening of her respiratory conditions.[10]

Claimant stated that she was exposed to several forms of airborne particulate matter while working for employer, including sandblasting and concrete dust, as well as to diesel fumes. HT at 88-89, 96-99. Crediting this testimony, the administrative law judge found that claimant "was exposed to potentially harmful conditions" with employer, with the largest contributor to claimant's pulmonary problems being "her exposure to the numerous sources of diesel

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dialogue between attorneys during the cross-examination of Dr. Harrison at his deposition. Claimant's counsel, in an effort to "speed it along," stated that "I think [employer's counsel's] question is there's nothing in the medical record that identifies a permanent worsening associated with work at [employer]," to which employer's counsel responded, "I'll stipulate to that." CX 21 at 50. Claimant's counsel then replied, "I'll stipulate there's no record that says that." *Id.* This purported stipulation was never formally raised before, or recognized by, the administrative law judge either through pre-hearing filings or during the hearing. *See* Decision and Order at 2. In any event, Dr. Harrison's testimony that claimant's work for employer "contributed to the cumulative injury to her lung that occurred over the duration of her employment as a pile butt," CX 21 at 13, contradicts this alleged stipulation. Employer's "stipulation" contention is therefore rejected.

[10] Employer contends that Dr. Harrison's opinion should be accorded diminished weight because "every single time Dr. Harrison has been an expert, he has found the worker's condition to be industrially" related. Emp. Br. at 39 (emphasis in original). We reject employer's contention. Employer has not established the invalidity of this opinion nor does it establish bias. The administrative law judge found that Dr. Harrison, in this case, explained the underlying rationale for his opinion. CXs 14, 21.

fumes at the work sites."[11] Decision and Order at 11, 50.

The administrative law judge extensively reviewed the medical evidence relevant to the cause of claimant's respiratory conditions, including the underlying rationales provided by the physicians. *See* Decision and Order at 32-36, 41-43, 49-51. The administrative law judge credited Dr. Harrison's opinion, that claimant's work with employer, in fact, contributed to the cumulative injury to her lungs, CX 21 at 13, over the contrary opinion of Dr. Bressler, that claimant's work for employer did not contribute to her pulmonary disease, EX 1. Decision and Order at 51; *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). In reaching this conclusion, the administrative law judge found that Dr. Bressler's underlying reasoning is "unconvincing." Decision and Order at 50. Specifically, the administrative law judge found that, in contrast to Dr. Bressler's position, it matters little that claimant suffered no acute exacerbations or any worsening of her respiratory condition while with employer, as that does not preclude a finding that claimant's occupational exposures could have aggravated her respiratory conditions. The administrative law judge found that, by acknowledging that years of exposure to working conditions like those she experienced with employer could cause respiratory problems, Dr. Bressler "effectively concedes that exposure to those conditions for 48 days [while with employer] would also contribute to [the] harm, even if in a small way." *Id.* at 51; *see also* Dr. Bressler's Dep. at 40-41.

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[11] The administrative law judge found that claimant was exposed to diesel fumes, though she likely overstated the degree of that exposure. Decision and Order at 18-19.

The Board is not empowered to reweigh the evidence. *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994). In this case, the administrative law judge's weighing of the evidence is rational and his conclusion is supported by substantial evidence of record in the form of Dr. Harrison's opinion. Therefore, we affirm the finding that claimant's asthma/COPD is related to her work exposures with employer. *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT); *Duhagon*, 169 F.3d 615, 33 BRBS 1 (CRT).

**Intervening Cause**

Employer contends that claimant's subsequent work for S & W is the cause of her bilateral hand condition. Employer avers that Dr. Harrison did not address the effect of claimant's work at S & W, and thus maintains that Dr. Greenfield's opinion, that claimant's work at S & W resulted in a change in, and thus, contributed to, her bilateral hand condition, is sufficient to establish that claimant's work at S & W caused the entirety of that injury.

If a claimant sustains a subsequent injury outside of work or for a non-covered employer that is not the natural or unavoidable result of the original work injury, any disability attributable to that intervening cause is not compensable. *See J.T [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 133 S.Ct. 2825 (2013); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161 (1991), *aff'd mem. sub nom. Wright v. Director, OWCP*, 8 F.3d 34 (9th Cir. 1993); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991).

However, the covered employer remains liable for any disability attributable to the work injury, or for the natural progression or unavoidable result of the work injury, notwithstanding the supervening injury. 33 U.S.C. § 902(2); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). If claimant's disabling condition is due to both the work injury and the subsequent non-covered injury, the covered employer is relieved of liability for disability caused by the subsequent non-covered injury only if there is evidence apportioning the claimant's disability between the two injuries. *Id.* However, if there is no evidence of apportionment between the injuries, the covered employer is liable for the claimant's entire disabling condition. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en Banc*, 31 BRBS 109 (1997).

Contrary to employer's contention, Dr. Harrison addressed the relationship between claimant's bilateral hand condition and her work for S & W. Dr. Harrison conceded that claimant's work assembling office furniture at S & W might have contributed to her hand problem, CX 21, Dep. at 68, but he also stated that his "opinion doesn't change that the [claimant's] employment at [employer] was a significant contributing factor to the disability caused by her bilateral carpal tunnel syndrome. It is a factor in the cumulative trauma over a period of years."[12] *Id.*, Dep. at 69. Dr. Greenfield stated that claimant's work duties at S & W, "where she was putting together steel-case cabinets would be an activity that

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[12] Dr. Harrison additionally stated, "I'm not arguing that [claimant's work with employer] is the sole cause of her carpal tunnel, but [it] is a significant contributing factor in her carpal tunnel." CX 21, Dep. at 70.

would potentially aggravate her carpal tunnel." Dr. Greenfield's Dep. at 20. Dr. Greenfield, however, also stated that carpal tunnel is "most likely" related to genetics and a predisposition to develop it, particularly where, as in this case, there is nothing to suggest traumatic carpal tunnel syndrome. *Id.*, Dep. at 20-21. Nonetheless, Dr. Greenfield agreed that repetitive tasks could aggravate or worsen an individual's carpal tunnel syndrome. *Id.* The administrative law judge found, based on this evidence, that claimant's carpal tunnel syndrome is likely due to her work both with employer and with S & W. Decision and Order at 53.

The administrative law judge thus properly found that employer's intervening cause argument is flawed because a necessary element of its defense is missing, *i.e.*, evidence apportioning claimant's disability between her covered and non-covered employment. Decision and Order at 53; Order on Recon. at 6-8; *Plappert*, 31 BRBS at 15-16, 31 BRBS at 109-110. In the absence of such evidence, the last covered employer in whose employ the claimant sustained a disabling injury remains liable for claimant's entire orthopedic disability. *Tracy*, 696 F.3d at 838, 46 BRBS at 70(CRT). Therefore, we affirm the administrative law judge's finding that claimant's work with S & W after she left employer is not an intervening cause of claimant's orthopedic disability that relieves employer of liability. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 15 BRBS 120 (CRT) (5th Cir. 1983); *Cyr v. Crescent Wharf & Warehouse Co.*, 211 F.2d 454 (9th Cir. 1954).

**BRB No. 16-0128A**
**Nature of Claimant's Disability**

Claimant contends the administrative law judge erred in finding that the nature of her disability is temporary rather than permanent. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cent. denied*, 498 U.S. 1073 (1991), or when it has continued for a lengthy period and appears to be of lasting and indefinite duration, as opposed to one in which recovery merely awaits a normal healing period. *SSA Terminals v. Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT) (9th Cir. 2016); *Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has recently addressed the nature of a claimant's disability in a case like this one, where potential surgery is involved. In *Carrion*, the Ninth Circuit stated that the crux of the permanent versus temporary nature of a claimant's injury is "whether the disability will resolve after a normal and natural healing period. If the answer is yes, the disability is temporary. If the answer is no, the disability is permanent." *Carrion*, 821 F.3d at 1173, 50 BRBS at 63(CRT). In reaching a conclusion on this issue, the Ninth Circuit articulated, "the appropriate question to ask is not whether a future surgery would ameliorate [claimant's] knee condition, but whether there was actual or expected improvement to his knee after a normal and natural healing period. The impact of a future knee replacement should be assessed after the surgery, not in anticipation of such a contingency." *Id.*, 821 F.3d at 1174,

50 BRBS at 64(CRT); *see also Pacific Ship Repair & Fabrication, Inc. v. Director*, *OWCP [Benge]*, 687 F.3d 1182, 46 BRBS 35(CRT) (9th Cir. 2012).

Finding claimant has been "universally advised" that she requires a left hip replacement at some point, that claimant plans to undergo the procedure as soon as she is able, and that the surgery has the potential to substantially improve claimant's condition, the administrative law judge determined that claimant continues to seek treatment with a view toward improving her condition. The administrative law judge thus concluded claimant's disability remains temporary in nature. Decision and Order at 56. Given the Ninth Circuit's decision in *Carrion*, we vacate the administrative law judge's finding that claimant's disability remains temporary, and we remand this case for reconsideration of the nature of claimant's disability pursuant to *Carrion*.[13] *Carrion*, 821 F.3d 1168, 50 BRBS 61(CRT).

**Judge Berlin's August 13, 2012 Order**

Claimant challenges Judge Berlin's pre-hearing Order dated August 13, 2012, imposing attorney's fee sanctions against claimant's counsel for alleged "inconsistencies" in, as well as "frivolous" and "manipulative purposes" behind, claimant's opposition to employer's motion for a change of venue and her motion for a brief continuance.

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[13] The administrative law judge did not separately address whether claimant's work-related respiratory condition is permanent. On remand, the administrative law judge should address this issue. *See Misho v. Global Linguist Solutions*, 48 BRBS 13 (2014).

At claimant's counsel's request, this case was originally set for a hearing in San Francisco, California, on September 20, 2012. Employer, on August 9, 2012, moved to change the location for the hearing to San Diego, California. Claimant opposed employer's motion and simultaneously moved to continue the San Francisco hearing to a later date. Citing 20 C.F.R. § 702.337(a),[14] and noting that the only location on the record for claimant's residence is Encinitas, California, that the distance from claimant's residence to the OALJ's hearing location in San Diego is approximately 30 miles, and that the distance from claimant's residence to the OALJ's hearing location in San Francisco is about 476 miles, Judge Berlin stated that "the hearing must be set in San Diego unless Claimant can show good cause for the San Francisco location." Berlin Order date August 13, 2012 at 2. Judge Berlin, however, found claimant did not show good cause for holding the hearing more than 75 miles from her residence and thus, granted employer's motion to change the location to San Diego. *Id.* at 3. Judge Berlin then added that "given the inconsistencies in Claimant's counsel's arguments and his manipulative purposes, no fees will be awarded to Claimant's counsel for work performed on either of these two motions." *Id.*

We reject claimant's contention of error. Irrespective of Judge Berlin's imposition of a sanction, claimant's counsel is not entitled to a fee for his work opposing employer's change of venue motion because

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[14] Section 702.337(a) of the Act's regulations states: "Except for good cause shown, hearings shall be held at convenient locations no more than 75 miles from the claimant's residence." 20 C.F.R. § 702.337(a).

claimant's motions were entirely unsuccessful. *See Hensley v. Eckerhart*, 461 U.S. 424 (1983); *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161(CRT) (D.C. Cir. 1992) (the adjudicator may sever the services on the unsuccessful claims from those on the successful claims).

Accordingly, the administrative law judge's finding that claimant's disability is temporary in nature is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order Granting Benefits and Order Granting Reconsideration are affirmed. Judge Berlin's Order Ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing, including his denial of attorney's fees for work performed by claimant's counsel on the motions for a change in venue and for a continuance, is affirmed.

SO ORDERED.

/s/ Betty Jean Hall
Chief Administrative Appeals Judge

I concur:

/s/ Ryan Gilligan
Administrative Appeals Judge

## CONCURRING AND DISSENTING OPINION OF JUSTICE BOGGS

BOGGS, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to affirm the administrative law judge's findings that claimant's failure to comply with Section 12(a) does not bar the claim for her hip injury and that claimant sustained cumulative orthopedic injuries to her hips, hands and back as a result of her work with employer. I also concur with my colleagues' decisions to vacate the administrative law judge's finding that claimant's disability is temporary in nature, and to affirm Judge Berlin's Order ruling on Claimant's Motion to Continue and Employer/Carrier's Motion to Change Location of Hearing, including his denial of attorney's fees for work performed by claimant's counsel on the unsuccessful motions for a change of venue and for a continuance. However, I respectfully dissent from their decision to affirm the administrative law judge's findings that claimant's asthma/COPD is related to her work exposures with employer and that claimant's work with S & W after she left employer is not an intervening cause of claimant's bilateral hand condition. For the reasons set forth below, I would vacate these two determinations and have the administrative law judge, on remand, reconsider these issues in terms of the relevant evidence and applicable standard. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982).

The administrative law judge correctly determined that claimant was entitled to the Section 20(a) presumption that her respiratory conditions are related

to her work for employer and that employer established rebuttal thereof. Addressing the evidence as a whole, the administrative law judge credited claimant's testimony regarding her airborne work exposures, as well as Dr. Harrison's opinion,[15] that claimant's work with employer contributed to the cumulative injury to her lungs, to conclude that claimant "was exposed to potentially harmful conditions" with employer. Decision and Order at 11, 50. Thus, he concluded that claimant's respiratory injury is related to her work with employer.

In reaching this conclusion, the administrative law judge did not address whether the record establishes that claimant's work for employer actually aggravated her underlying respiratory conditions. Specifically, while the administrative law judge credited evidence showing that airborne exposures consistent with those claimant experienced with employer might aggravate her underlying respiratory conditions, he did not assess whether this evidence establishes that claimant's exposures actually aggravated her respiratory conditions. After the Section 20(a) presumption is rebutted, it is claimant's burden to establish "the necessary causal link between the injury and employment." *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651, 44 BRBS 47, 50(CRT) (9th Cir. 2010) (quoting *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 53, 44 BRBS 13, 15 (CRT) (1st Cir. 2010)). I would, therefore, vacate the administrative law judge's finding that claimant's asthma/COPD is related to her work

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[15] The administrative law judge also rejected Dr. Bressler's opinion, that claimant's work for employer did not contribute to her pulmonary disease, because the underlying reasoning of that opinion is "unconvincing." Decision and Order at 50.

for employer and require, on remand, that the administrative law judge analyze all of the evidence and make a specific determination, with claimant bearing the burden of persuasion, as to whether she sustained an actual respiratory injury due to her exposures with employer.

With regard to the issue of whether claimant's post-employer work with S & W constituted an intervening cause of claimant's bilateral hand condition, I believe the administrative law judge failed to address Dr. Greenfield's opinion that claimant's post-employer work with S & W, and not her work for employer, resulted in a change in her carpal tunnel syndrome. *See* Dr. Greenfield's Dep. at 20-21, 29-30. Because the administrative law judge did not address and weigh this evidence in relation to whether claimant's work at S & W alone caused her bilateral carpal tunnel syndrome, I would vacate the administrative law judge's finding that claimant's work with S & W is not an intervening cause of her bilateral hand condition and remand the case for further findings. *See generally Volpe*, 671 F.2d 697, 14 BRBS 538. Since claimant was not disabled prior to her work stints with S & W, the proper inquiry is whether claimant's bilateral hand disability and/or need for medical benefits is due to the natural progression of the condition caused by her work with employer, or whether the disabling injury is due solely to an intervening injury at S & W. *See* 33 U.S.C. § 902(2); *Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). As the administrative law judge did not address Dr. Greenfield's opinion under this standard, I would remand the case for further findings.

For the foregoing reasons, I would vacate the administrative law judge's causation finding with regard to claimant's respiratory condition, and the finding that claimant's S & W employment is not the intervening cause of claimant's bilateral hand condition, and remand the case for the administrative law judge to make specific findings with regard to these issues.

/s/ Judith S. Boggs
Administrative Appeals Judge

**ADMINISTRATIVE JUDGE'S DECISION AND ORDER GRANTING BENEFITS (AUGUST 25, 2015)**

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U.S. DEPARTMENT OF LABOR
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In the Matter of:
KELLY ZARADNIK,,

*Claimant,*

v.

DUTRA GROUOP, INC.,
SEABRIGHT INSURANCE CO.,

*Employer/Carrier.*

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OALJ Case No: 2012-LHC-00988

OWCP Case No: 18-099601

Issue Date: 25 August 2015

Before: WILLIAM DORSEY,
Administrative Law Judge.

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## DECISION AND ORDER GRANTING BENEFITS

Kelley Zaradnik seeks compensation under the Longshore and Harbor Workers' Compensation Act[1] ("Act") for cumulative trauma injuries to her bilateral hips, back, bilateral upper extremities, bilateral lower extremities, and lungs aggravated or accelerated by 48 days of work at Dutra Group, Inc. ("Dutra") between July 23 and September 20, 2010.[2] Though she worked for Dutra only briefly, she performed arduous labor that contributed to injuries caused, in part, by her long career as a pile driver. Dutra, her last maritime employer, is liable for disability benefits and medical care under the Act.

### I. Stipulations

1. Ms. Zaradnik was employed by Dutra Group at the time of her alleged injuries.[3]
2. The situs of the alleged injuries was maritime and Ms. Zaradnik was a maritime employee.[4]
3. Ms. Zaradnik's average weekly wage was $1,301.58.[5]

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[1] 33 U.S.C. §§ 901–950.

[2] Judge Russell Pulver heard this case on January 25, 2012 and December 14, 2012, but he was unable to issue a decision before his retirement.

[3] Tr. at 7–8.

[4] R. Pre-Hearing Statement at ¶ 4(a).

[5] Tr. at 234.

## II. Findings of Fact

Ms. Zaradnik was 49 years old at the time of trial.[6] She first became a union pile driver in 1991.[7] She completed her apprenticeship and became a journeyman pile driver around 1994 or 1995.[8]

Before her work for Dutra, the Claimant had a number of medical problems, many but not all of which were related to her profession. They included pulmonary impairments from airborne irritants (including cigarette smoke), drug and alcohol abuse, and orthopedic injuries to her hip and back.

### A. Pulmonary History

#### 1. Medications

Ms. Zaradnik has been diagnosed with asthma, bronchitis, and early-stage emphysema.[9] She has taken some form of medication for respiratory problems since she was first hospitalized for an asthma attack in 2000.[10] Medications she has been prescribed include Zithromax, Asthmacort, Albuterol nebulizers, Prednisone, Advair, Singulair, Combivent, and Proair.[11] She has also taken pleurisy root (an herbal supplement) for

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[6] Tr. at 40.

[7] Tr. at 44.

[8] Tr. at 44.

[9] C. Ex.-23 at 406, 448; Tr. at 198.

[10] Tr. at 199.

[11] Tr. at 252, 261; C. Ex.-23 at 156.

breathing issues.[12] Ms. Zaradnik has carried an inhaler since her second asthma attack in 2005.[13]

**2. Cigarette Use**

Ms. Zaradnik testified at trial that she has smoked since her "early 20s."[14] Her medical records, however, say she smoked at age 14.[15] She testified that, at her peak, she was smoking up to two packs per day.[16] Medical records describe her as a "heavy smoker" who had, as of September 2005, already accumulated 45 pack-years.[17] Her doctors have consistently, and unsurprisingly, told her to quit.[18]

I see no reason for Ms. Zaradnik to lie about her smoking history to her treating physicians, which would only serve to hinder their ability to effectively diagnose and treat her. She does, however, have an incentive in this case to downplay the effect that smoking has had on her current lung condition. The medical records convince me Ms. Zaradnik began smoking as a teenager, somewhat earlier than she testified to at trial.

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[12] Tr. at 262.

[13] Tr. at 202.

[14] Tr. at 198.

[15] C. Ex.-23 at 192, 255.

[16] Tr. at 198.

[17] C. Ex.-23 at 245.

[18] Tr. at 242.

### 3. Alcohol Use

Ms. Zaradnik uses alcohol, a risk factor for acid reflux, which in turn is a risk factor for asthma.[19]

A September 2003 medical report indicated Ms. Zaradnik had consumed three or four glasses of wine before her appointment "due to severe anxiety."[20] Although Ms. Zaradnik told the doctor her last drink had been about five hours earlier, and Ms. Zaradnik did not appear intoxicated at the appointment, the doctor nevertheless encouraged Ms. Zaradnik to spend two or three hours eating and shopping before driving home.[21]

An April 2005 medical record indicated Ms. Zaradnik was drinking "one to one and a half bottles of wine per day, sometimes more."[22] Another record that month noted Ms. Zaradnik was "not drinking as much during the day but is certainly drinking too much at night; and she is aware that is adversely affecting her health."[23] The record also noted she had recently been convicted of driving under the influence.[24] Yet another record from that month documented a diagnosis of alcoholism.[25] It indicated Ms. Zaradnik had "markedly reduced her alcohol intake,"

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[19] Bressler Dep. at 14.

[20] C. Ex.-23 at 259.

[21] C. Ex.-23 at 360.

[22] C. Ex.-23 at 334–35.

[23] C. Ex.-23 at 332.

[24] C. Ex.-23 at 332; Tr. at 254.

[25] C. Ex.-23 at 330.

but the doctor encouraged total abstinence.[26] A record from August 2005 indicated she was drinking one-half to one bottles of wine per day.[27]

A September 2009 medical record indicated she was having "2 drinks per day, and at times will binge on 4 to 10 a day."[28] A December 2010 record indicated she was drinking the same amount at that time.[29]

In October 2012, Ms. Zaradnik reported to Daniel Bressler, M.D. that she was drinking about two or three glasses of wine per month, and had consumed about the same amount in the past.[30] In November 2012, she reported to Robert Harrison, M.D. that she was drinking about eight glasses of wine per week.[31]

Ms. Zaradnik has attended Alcoholics Anonymous meetings and discussed her drinking with a psychologist or psychiatrist.[32]

Again, I see no reason for Ms. Zaradnik to overstate her alcohol consumption to her treating physicians. Doing so would undermine their ability to effectively treat her. While Ms. Zaradnik's alcohol use has varied over time, she sometimes consumed unhealthy quantities of alcohol. It's unclear whether her statement to Dr. Bressler was meant to convey

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[26] C. Ex.-23 at 330.

[27] C. Ex.-23 at 317.

[28] C. Ex.-23 at 167.

[29] C. Ex.-23 at 75.

[30] R. Ex.-1 at 4; Bressler Dep. at 14

[31] C. Ex.-14 at 670D.

[32] Tr. at 254.

that she has consistently consumed around three glasses of wine per month throughout her entire adult life, but I am convinced she drank substantially more at times.

**4. Illicit Drug Use**

Inhaled recreational drugs can cause pulmonary damage.[33] At trial, Ms. Zaradnik initially denied ever having used illicit drugs.[34] She then admitted to experimenting with drugs "once or twice" in high school, but claimed she had not used drugs since then.[35]

Several medical records contradict Ms. Zaradnik's testimony, however. A January 2000 medical record notes a history of "seizures with illicit drug use in the past."[36] A December 2001 medical record again noted a "history of 'seizures,' body flopped & could not control it–"10 years ago while on methamphetamine."[37] At trial, Ms. Zaradnik testified that she could not recall ever having a seizure or taking illicit drugs.[38]

A September 2003 medical record indicated Ms. Zaradnik was "apparently back to doing drugs."[39] When questioned about that record, Ms. Zaradnik explained that, at that time, she was—trying to get

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[33] Bressler Dep. at 15.

[34] Tr. at 250.

[35] Tr. at 250.

[36] C. Ex.-23 at 446.

[37] C. Ex.23 at 386.

[38] Tr. at 248–49.

[39] C. Ex.-23 at 359.

pregnant so I—I wasn't even drinking coffee at that time. I think they mean the ex-boyfriend."[40] She testified that any Scripps medical records indicating she had used illicit drugs were incorrect.[41]

Once again, I doubt that Ms. Zaradnik would overstate her illicit drug use to her treating physicians. Doing so would not only undermine the effectiveness of her treatment, but also implicate her in illegal activity. Were she to lie to her doctors, she would be more likely to underrepresent her drug use than overstate it. Ms. Zaradnik claims the comments in medical records referenced above were erroneous. I do not believe, however, that her treating physicians made multiple references to seizures and illicit drug use by mistake. Such information is an important part of her medical history. I find that she engaged in illicit drug use more recently than high school.

**5. Earlier Occupational Exposures**

Ms. Zaradnik experienced several occupational exposures to airborne toxins before her employment at Dutra.

Sometime around 1992, Ms. Zaradnik suffered from "galvanized poisoning" after inhaling vapors while cutting galvanized steel with a torch.[42] She reported her condition to her supervisor when she began having trouble breathing, but her supervisor just told her to "go home and drink milk, buttered

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[40] Tr. at 245.

[41] Tr. at 251.

[42] Tr. at 199–201.

milk, if you can."[43] She told the project manager about her symptoms around a month later, and was provided medical treatment.[44] She felt weak for about a month after the incident.[45]

In 2000, Ms. Zaradnik was hospitalized for about a week after sandblasting with silica while[46] she wore a bandana over her face, not proper respiratory protection.[47] At the hospital, she received "aggressive pulmonary care, including nebulized albuterol treatments regularly, intravenous steroids, and intravenous antibiotics."[48] She also initially required oxygen.[49]

In 2005, Ms. Zaradnik experienced breathing problems while working with "spun glass," which produced small plastic fibers as she cut, drilled, and screwed items into hardened plastic.[50] Ms. Zaradnik "recognized the signs, I was having problems breathing."[51] Nevertheless, she "continued to go to work and keep it incognito. But I was having problems climbing up the ladders and the stair towers, climbing the walls."[52] After five months of exposure to the

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[43] Tr. at 200–01.

[44] Tr. at 200–01.

[45] Tr. at 201.

[46] Tr. at 49.

[47] Tr. at 48–49.

[48] C. Ex.-23 at 413; Tr. at 236–37.

[49] C. Ex.-23 at 406.

[50] Tr. at 50.

[51] Tr. at 50.

[52] Tr. at 50.

spun glass, Ms. Zaradnik's asthma flared up[53] and she was admitted to a hospital for one or two weeks for "[o]ccupational lung exposure with silica and fiberglass, probably causing bronchitis."[54] She received "aggressive bronchodilator therapy."[55] Treatment included "[a]ggressive corticosteroid therapy both intravenous and inhaled."[56] Her doctor discussed with her "changing jobs to avoid toxic exposures."[57] She was also advised to use a respirator when exposed to particulate matter at work, given her medical history.[58]

Ms. Zaradnik acknowledged that, by 2005, a doctor a doctor had told her that her working conditions were contributing to her lung problems:[59] "We talked about it, but it wasn't presented that, because of the working conditions, that that was making my lungs worse."[60]

In 2006, Ms. Zaradnik experienced an exacerbation of her breathing problems, which may have been related to her work with cement.[61] She twice presented

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[53] C. Ex.-23 at 252–53, 255.

[54] C. Ex.-23 at 264.

[55] C. Ex.-23 at 317.

[56] C. Ex.-23 at 264.

[57] C. Ex-23 at 318.

[58] C. Ex.-23 at 253.

[59] Tr. at 205.

[60] Tr. at 205.

[61] C. Ex.-232–33.

to doctors "almost covered head to toe in dirt," on July 14 and July 21, 2006.[62]

In 2008, Ms. Zaradnik experienced increased tightness and wheezing after finishing a job which exposed her to metal fumes and treated wood.[63] She was diagnosed with an exacerbation of her asthma following occupational exposure and was again advised to wear a mask for respiratory protection.[64]

In 2008, medical records noted that Ms. Zaradnik had a history of "[a]sthma, likely exacerbated by her job inhaling concrete dust."[65]

### B. Orthopedic History

#### 1. Hips

Ms. Zaradnik has had left hip pain since at least 2007.[66] Before her work at Dutra, she had already been diagnosed with mild osteoarthritis of her left hip.[67] X-rays taken November 17, 2009 showed mild bilateral hip osteoarthritis, left greater than right.[68]

In April 2010, Ms. Zaradnik complained to her doctor of left side sciatica, which she attributed to "the long 4-hour car drive each way [to work for

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[62] C. Ex.-23 at 229, 233.

[63] C. Ex.-23 at 205.

[64] C. Ex.-23 at 206.

[65] C. Ex.-23 at 192.

[66] Tr. at 207.

[67] Tr. at 341.

[68] C. Ex.-23 at 147.

Flatiron in Big Bear, in San Bernadino County, California,] as it is intensely worse after each drive. She states she has an old truck with a clutch, which is why her left leg hurts."[69] The drive caused back and left hip pain.[70]

On July 16, 2010 (still before her work at Dutra), Ms. Zaradnik reported to a doctor that she had been experiencing pain in left hip and hip flexor area for around the past year.[71] In July 2010, Claimant also advised doctors at Scripps that lifting at work was contributing to her hip and back pain.[72]

Ms. Zaradnik had also developed a limp.[73] She explained that she started limping "quite a bit" while working for Flatiron.[74]

Ms. Zaradnik knew that her work prior to Dutra was aggravating her hip problem, which doctors had informed her.[75]

**2. Back**

Ms. Zaradnik has been involved in two motor vehicle accidents, and was injured in the first.[76] In

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[69] C. Ex.-23 at 144.

[70] Tr. at 274

[71] C. Ex.-23 at 142.

[72] Tr. at 274.

[73] Tr. at 366.

[74] Tr. at 366.

[75] Tr. at 341–42.

[76] Tr. at 205–06.

her early 20s, Ms. Zaradnik was ejected from a car during a collision.[77] She injured her back, head, and elbows.[78]

Ms. Zaradnik suffered a back strain at work in 2003.[79] In 2006, she again injured her back at work while carrying a heavy piece of lumber.[80] She saw a chiropractor for about three months after the incident, but did not miss any work.[81]

**C. Employment at Dutra**

During the 48 days Ms. Zaradnik worked for Dutra between July 23 and September 20, 2010,[82] she worked at Dutra's Berth 102 jobsite.[83] Located in the Long Beach/San Pedro area,[84] the Berth 102 project expanded a pier used to unload containers from ships.[85] She left Dutra when her entire crew was laid off because the job was coming to an end.[86]

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[77] Tr. at 206.

[78] Tr. at 205–06.

[79] C. Ex.-23 at 346–47.

[80] Tr. at 47.

[81] Tr. at 47–48.

[82] R. Ex.7.

[83] Tr. at 69.

[84] O'Sullivan Dep. at 5.

[85] Tr. at 69.

[86] Tr. at 56.

She would have continued working for Dutra if she had been given the option.[87]

Ms. Zaradnik did not have a well-defined set of duties while working for Dutra. She floated between different crews and assisted with tasks as needed. As a result, there is considerable disagreement and ambiguity regarding the specific physical activities she performed and the how long she spent doing various types of work. Even Ms. Zaradnik struggled to explain the full range work she had performed in a coherent manner.

### 1. Ms. Zaradnik's Testimony About Her Work for Dutra

Pile driving is heavy work. It involves preparation in a yard, as well as the act of driving piling. The testimony of Ms. Zaradnik confirms this. She initially reported to the yard crew for work,[88] but She "floated

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[87] Tr. at 296.

[88] Tr. at 290. Dutra seems eager to point out that Ms. Zaradnik was dating the foreman of the yard crew, Jack Kellison, during her employment at Dutra, and maintained a relationship with him through the time of trial. R. Post-Trial Brief at 6–7. Mr. Kellison assigned Ms. Zaradnik work in the yard and generally determined when she would work with other crews. Tr. at 285, 291. Dutra also notes Mr. Kellison has alleged that he too suffered lung and orthopedic injuries while working for Dutra, that he never reported any injuries, and that he is represented by the same counsel as Ms. Zaradnik. Tr. at 159, 345–46. I find little significance in these facts. There is no evidence to suggest Ms. Zardnik received lighter assignments because she was dating her foreman. Had he testified in this case, his credibility may have been suspect, but he did not. If his work duties were similar to those of Ms. Zaradnik, similar working conditions could well lead to similar injuries. His claim neither strengthens nor weakens Ms. Zaradnick's case.

between crews. So of course, if we're pouring and they needed something, needed an extra person, then I would go—whatever was more important."[89] Her specific assignments would typically come from the foreman she worked for at the time.[90] She estimated she spent about a third of her time in the yard.[91] She recalled also working with the false work crew, probably for less than five days; the deck crew, for more than a third of her employment at Dutra; and the wall crew, for an unspecified amount of time.[92]

Ms. Zaradnik spent most of her time on her feet, and estimated that she had walked on uneven surfaces around 70 percent of her time at Dutra.[93] She often had to walk on top of rebar poles, which had frequent changes in elevation.[94]

Her work led Ms. Zaradnik to carry a tool belt that she estimated weighed 30 pounds;[95] she also sometimes carried an additional tool bag (or bucket) weighing 60 to 65 pounds.[96] She would carry both her tool bag and tool belt, along with a canvass bag, and harness when transferring from crew to crew, all

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[89] Tr. at 289.

[90] Tr. at 289–90.

[91] Tr. at 284.

[92] Tr. at 287–89.

[93] Tr. at 88.

[94] Tr. at 100–02.

[95] Zaradnik Dep. at 40–41, Dep. Ex.-3.

[96] Tr. at 110.

of which had a combined weight of over 100 pounds.[97] She stored the items she didn't need for her current assignment close by where she was working.[98] Ms. Zaradnik typically wore the tool belt all day,[99] except when riding a forklift.[100] She sometimes carried the tool bag with her while working as well.[101]

While in the yard, part of Ms. Zaradnik's job was to ensure that other workers had the supplies they needed, but she would also

> go run and fuel the equipment, meaning like compressor, welder, things that took fuel, offloading trucks, fixing tools that were broken, skill saws and cords. Sometimes taking inventory of the materials that we had left to see if we needed to reorder. Possibly putting together for our—when we need concrete pours for our wash up, putting together our forms with plastic, Visqueen for the washouts.[102]

Ms. Zaradnik sometimes had to lift and carry 50-pound sand jacks across uneven ground.[103] She also sometimes operated Hole-Hawg drills, which

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97 Zaradnik Dep. at 49.

98 Zaradnik Dep. at 50.

99 Zaradnik Dep. at 43.

100 Zaradnik Dep. at 49.

101 Zaradnik Dep. at 42.

102 Tr. at 285.

103 Tr. at 102, 124–25.

required a lot of physical strength to control.[104] Operating such drills is hard on the user's hands.[105] She also used chainsaws and beam saws, which require forceful gripping.[106]

Her duties also included loading or unloading trucks.[107] Sometimes she would use a forklift, but other times she had to use "either a burke bar or two by six, whatever is laying around, a piece of dunnage, to pry up things, to get underneath, so you can actually pick it or even to pick with the crane."[108] She explained that she had to climb onto the flatbeds of trucks and then jump off.[109] Sometimes she used ladders, but most of the time she would climb up the back of the truck, over the tires.[110] Unloading trucks also involved using hand tools, or simply her hands, to tighten bolts.[111]

Ms. Zaradnik also did rigging with slings, which involved placing steel cables or ropes around heavy loads so a crane or forklift could move them.[112] The slings were generally about 20 to 30 feet in length and between a quarter of an inch and two inches

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[104] Tr. at 100–01.

[105] Tr. at 101.

[106] Tr. at 110–111.

[107] Tr. at 81.

[108] Tr. at 81.

[109] Tr. at 81.

[110] Tr. at 82.

[111] Tr. at 85.

[112] Tr. at 82.

thick.[113] Ms. Zaradnik could carry smaller slings, but heavier ones had to be dragged or carried by two people.[114]

Ms. Zaradnik also operated a forklift as part of her job in the yard, and sometimes had to climb on and off a forklift all day long to stack dunnage under loads, attach rigging, load and unload materials, and fuel machinery.[115]

She regularly carried two or three 4×8 plywood sheets, two or three twenty-foot 2×4s, or four or five four-foot 4×4s from the yard to various work areas.[116]

Work in the yard is a less demanding aspect of the work than the traditional crew work when driving the piling.[117]

Ms. Zaradnik's work with the deck crew involved lifting and carrying support timber for use as fill-in around piles.[118] She generally carried only cut segments of the timber, but sometimes had to move full 20-foot beams, either by driving them or carrying them with the help of another worker.[119] While on the deck crew, she also spent entire days handling plywood sheets that she placed on top of stringers.[120]

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[113] Tr. at 83.

[114] Tr. at 83.

[115] Tr. at 87–88.

[116] C. Ex.-24 at 4.

[117] Tr. at 286.

[118] Tr. at 106, 112.

[119] Tr. at 112.

[120] Tr. at 112–113.

Adjusting the location of heavy timber and plywood sheets sometimes involved beating them with a sledgehammer.[121] On the wall crew, Ms. Zaradnik also cut and placed portions of timber.[122]

On both the deck and wall crews, Ms. Zaradnik spent considerable time sinking nails.[123] In the trade it is customary to hammer while bending over, rather than getting down on one's knees.[124] She sometimes spent several consecutive hours hammering.[125] She also sometimes had to hammer in small, confined spaces.[126]

Ms. Zaradnik was exposed to several forms of airborne particulate matter in her work at Dutra. She was around dust in the yard all day long.[127] She was exposed to particles while sandblasting before concrete pours, and to concrete dust from frames after pours.[128] She was also exposed to fumes from the glues that laminate the plies of plywood while driving pile because the plywood cushion blocks would become heated.[129]

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[121] Tr. at 119–20; C. Ex.-24 at 5.

[122] Tr. at 116.

[123] Tr. at 108.

[124] Tr. at 108.

[125] Tr. at 110.

[126] Tr. at 114–15.

[127] Tr. at 88.

[128] Tr. at 88–89.

[129] Tr. at 123.

The largest contributor to Ms. Zaradnik's pulmonary problems seems to have been her exposure to the numerous sources of diesel fumes at the work sites. These included welders, pile drivers, power packs, air compressors, forklifts, two crawler cranes, a third crane on a floating barge, generators (also known as "light plants"),[130] chain saws, impact tools, and trucks.[131] Ms. Zaradnik worked in close proximity to many of these sources. She believes she worked

1. within 20 feet of welders around 50 percent of the time;[132]
2. near air compressors round 35 to 40 percent of the time;[133]
3. within 20 feet of the exhaust of cranes about 50 to 75 percent of the time;[134]
4. within 20 feet of a generator between 40 to 60 percent of the time;[135]
5. near someone using a chainsaw about 30 to 50 percent of the time;[136]
6. within 20 feet of concrete pumps about 50 percent of the time;[137] and

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[130] Tr. at 96–97.

[131] Tr. at 89–90.

[132] Tr. at 91.

[133] Tr. at 91–92.

[134] Tr. at 95–96.

[135] Tr. at 97.

[136] Tr. at 97.

7. occasionally within 20 to 25 feet of concrete trucks.[138]

The jobsite generally had six or more concrete trucks present at one time during a concrete pour.[139] The trucks would not shut down their engines because they had to keep their barrels turning to prevent the concrete from solidifying.[140]

She was also exposed to diesel fumes while operating a pile driver,[141] and while operating a forklift.[142] She claimed to have been only three to four feet away from the forklift's exhaust stack while operating it.[143]

Ms. Zaradnik also testified that diesel fumes were typically visible in the air,[144] but she could not point out any diesel fumes in a number of photographs of the Dutra jobsite shown to her at trial.[145]

During Ms. Zaradnik's employment at Dutra, her hip symptoms increased about 20 to 25 percent.[146]

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137 Tr. at 99.

138 Tr. at 98.

139 Tr. at 99.

140 Tr. at 99.

141 Tr. at 123.

142 Tr. at 92.

143 Tr. at 92–93.

144 Tr. at 164.

145 Tr. at 164–65, 179–80.

146 Tr. at 56.

She claimed she was nicknamed "Hippity Hop" by her coworkers there because she was always "limping around."[147]

Despite her increased pain, Ms. Zaradnik never reported a work injury to her managers at Dutra.[148] In fact, she tried to hide her injuries from them.[149]

**2. Testimony of Ronald Lindsey About Her Work for Dutra**

Ronald Lindsey was a field superintendent for the Berth 102 project,[150] responsible for supervising a total of 98 people, both foremen and workers.[151] As Mr. Lindsey explained it, he

> pretty much ran the whole job for the field aspect of it. I was overseeing all of the false work being put in on the piles that were driven. Oversaw some of the pile driving. At that point, we came in and built a false work plan to install all the collars, all the steel beams that would hold all the concrete rebar that we were going to pour on top of it. Would oversee that. Help with the scheduling and manpower and crews to do the individual job sites.[152]

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147 Tr. at 58.

148 Tr. at 56–57.

149 Tr. at 57.

150 Lindsey Dep. at 6.

151 Lindsey Dep. at 6–7, 25–26.

152 Lindsey Dep. at 7.

He saw Ms. Zaradnik at times while she worked.[153] On occasion, he personally assigned her tasks,[154] although normally the crew foremen did that.[155] He could not dispute Ms. Zaradnik's account of what she was doing on several specific days because he could not remember.[156] Mr. Lindsey could have determined which crew Ms. Zaradnik had worked with each day by looking at her time sheets. He did not do so.[157]

According to Mr. Lindsey, Ms. Zaradnik was a member of the yard crew and spent 80 to 85 percent of her time working in the yard.[158] He described the yard crew's responsibilities as "[r]eceiving material coming in off of semitrucks, small trucks. Getting it unloaded, positioning it, staging it, and getting it ready to go out into the field."[159] Ms. Zaradnik's job description was really just

> [t]o fill in. She was going to be a fill-in to help move and help with the light-duty work that we had going on, fill-in with crews that needed extra help here and there, just to help and just fill in with the light-duty work

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153 Lindsey Dep. at 14.

154 Lindsey Dep. at 77.

155 Lindsey Dep. at 77–78.

156 Lindsey Dep. at 45–47.

157 Lindsey Dep. at 25.

158 Lindsey Dep. at 13–14, 72–73.

159 Lindsey Dep. at 7.

we had in the backlands.[160]

Mr. Lindsey characterized her as a "helper."[161] Her specific responsibilities included assisting pile drivers involved in moving steel beams with forklifts and moving 6×12 timbers.[162] Mr. Lindsey thought about 75 percent of Ms. Zaradnik's time on the job would have been spent lifting, carrying, and placing six to eight foot long pieces of 4×4s and spotting for forklifts.[163]

There were also times that Ms. Zaradnik filled in on other crews to help them if they were falling behind.[164] Ms. Zaradnik spent 15 to 20 percent of the time doing more traditional pile driver work outside the yard, while helping out the other crews as needed.[165]

In Mr. Lindsey's opinion, the work of the yard crew was lighter than the work of other pile drivers on site.[166] Nevertheless, her job still involved physical labor, requiring her to lift, carry, bend, and tote.[167] He acknowledged that workers wore tool belts, but estimated that they weighed only 20 to 25 pounds because workers could change out the tools they carried

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[160] Lindsey Dep. at 10.

[161] Lindsey Dep. at 10.

[162] Lindsey Dep. at 12–13.

[163] Lindsey Dep. at 74–75.

[164] Lindsey Dep. at 13.

[165] Lindsey Dep. at 14.

[166] Lindsey Dep. at 8.

[167] Lindsey Dep. at 39.

to fit the needs of their particular assignment.[168] This does not cause me to doubt Ms. Zaradnik's testimony her tool belt was closer to 30 pounds. There were tool storage locations around the jobsite, where workers could store tools they did not need that day.[169]

Mr. Linsey agreed that there were numerous sources of diesel fumes at the jobsite. According to him, machinery and equipment on the jobsite included three cranes, two forklifts, somewhere between two and six generators, around four compressors, around three diesel powered welders, and a loader.[170] Concrete pours were conducted at the jobsite approximately once per month.[171] Close to 100 concrete trucks would come to the jobsite on days with a large pour,[172] and it was normal to have four or five mixer trucks at the jobsite at one time during a pour.[173] The trucks did not shut off their engines while on the jobsite.[174] Mr. Lindsey did note, however, that all of Ms. Zaradnik's work was done in the open air.[175]

Mr. Lindsey disputed some of the specific claims that Ms. Zaradnik made regarding her proximity to

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168 Lindsey Dep. at 17.

169 Lindsey Dep. at 17.

170 Lindsey Dep. at 29–30.

171 Lindsey Dep. at 31.

172 Lindsey Dep. at 30.

173 Lindsey Dep. at 75–76.

174 Lindsey Dep. at 31.

175 Lindsey Dep. at 21.

diesel fumes. He explained that the exhaust pipes on the two crawler cranes have engines behind the operator's seat.[176] The exhaust pipes run up through the roofs of the cranes, around 20 to 30 feet above ground level.[177] It's not possible for a worker on the ground to work within 20 feet of the exhaust of a crawler crane.[178] The exhaust of the smaller crane on the jobsite was 13 to 15 feet off the ground.[179] Furthermore, although there were generators on site, they were mobile and could be used up to 300 feet away with an extension cord (or even further with the use of a "spider box").[180] The generators were rarely close to the workers because the rebar on the deck prevented workers from moving the generators too close.[181] The exhaust from the generators could also be positioned in different directions.[182] Mr. Lindsey did not think it sounded accurate for Ms. Zaradnik to have spent 40 to 60 percent of her time within 20 feet of a generator.[183]

Mr. Lindsey also disputed other specific points of Ms. Zaradnik's testimony. According to him, workers very rarely climbed on top of a truck's load.[184] Drivers

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176 Lindsey Dep. at 18–19.

177 Lindsey Dep. at 19.

178 Lindsey Dep. at 19.

179 Lindsey Dep. at 49–50; C. Ex.-13 at 533.

180 Lindsey Dep. at 19–20.

181 Lindsey Dep. at 20.

182 Lindsey Dep. at 20.

183 Lindsey Dep. at 21.

184 Lindsey Dep. at 32–33.

who delivered lumber unlashed their own loads; the yard workers removed the lumber with forklifts and spotted the forklifts.[185] If the load was to be removed by a crane, the workers fed cables underneath the load and hooked the cables to the crane hooks.[186]

Finally, Mr. Lindsey never saw Ms. Zaradnik limping on the jobsite.[187] If he had, he would have asked her if she had been injured.[188] He explained that Dutra has an injury reporting requirement,[189] but Mr. Lindsey was never told that Ms. Zaradnik had suffered an injury.[190]

### 3. Testimony of Bryan O'Sullivan About Her Work for Dutra

Bryan O'Sullivan worked for Dutra as a project engineer at Berth 102.[191] Project engineers "do the initial submittal, order the materials, work plans, basically getting the superintendent everything they need to get the job done and interacting with the owner."[192] Mr. O'Sullivan was present at the jobsite on a day-to-day basis and was able to observe workers in action; occasionally he observed Ms. Zaradnik's

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[185] Lindsey Dep. at 32.

[186] Lindsey Dep. at 32–33.

[187] Lindsey Dep. at 14.

[188] Lindsey Dep. at 14.

[189] Lindsey Dep. at 14–15.

[190] Lindsey Dep. at 16.

[191] O'Sullivan Dep. at 5–6.

[192] O'Sullivan Dep. at 6.

work.[193] He was familiar with the kinds of assignments given to various types of workers.[194] Mr. O'Sullivan did not assign workers tasks on a daily basis.[195] He did, however, receive time cards every day with job codes indicating where the employees had worked.[196] Ms. Zaradnik's time cards would indicate which crews she worked with on different days.[197] Mr. O'Sullivan did not testify about the information contained in Ms. Zaradnik's time cards, however.

Mr. O'Sullivan stated that Ms. Zaradnik was hired as a pile driver to work in the yard.[198] He explained that a large portion of work in the yard consisted of moving materials around the jobsite, keeping crews supplied, and helping out various crews.[199] He acknowledged that work in the yard would require bending, lifting, and carrying materials, including 4×4s, wire slings, cables, and rigging.[200] Overall, however, he thought work in the yard was lighter than normal pile driver work.[201]

Mr. O'Sullivan contradicted Ms. Zaradnik's testimony on a few points. First, he estimated that

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193 O'Sullivan Dep. at 6–8.

194 O'Sullivan Dep. at 7.

195 O'Sullivan Dep. at 17.

196 O'Sullivan Dep. at 17.

197 O'Sullivan Dep. at 18.

198 O'Sullivan Dep. at 7.

199 O'Sullivan Dep. at 7–8.

200 O'Sullivan Dep. at 17.

201 O'Sullivan Dep. at 8.

workers' tool belts typically weighed only 15 to 20 pounds.[202] Apparently the higher up the chain of command you go, the less the supervisor thinks a worker carriers on the belt. Next, he explained that Ms. Zaradnik did not spend most of her time working within twenty feet of the exhaust of a crawler crane because the exhaust pipe is 15 to 20 feet off the ground, and there is generally a 20 to 30 foot perimeter set up around those cranes.[203] He also explained that the generators on the jobsite were mobile and could be moved out of the way. Alternatively, workers could plug tools in with an extension cord to get further away, or at least turn the exhaust stack away from them.[204] Finally, he explained that not all trucks on the jobsite kept their engines running. Trucks were required by law to shut down within five minutes of arriving on the jobsite unless they needed power for some reason.[205] The Port of L.A. was strict about such environmental regulations.[206] Mr. O'Sullivan did acknowledge that cement trucks kept running to power their mixers.[207] He noted, however, that Ms. Zaradnik and the other employees would not have been stationed near the cement trucks because that

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[202] O'Sullivan Dep. at 12.

[203] O'Sullivan Dep. at 12.

[204] O'Sullivan Dep. at 12–13.

[205] O'Sullivan Dep. at 13.

[206] O'Sullivan Dep. at 13.

[207] O'Sullivan Dep. at 14.

would have been unsafe.[208] Mr. O'Sullivan also noted that Ms. Zaradnik worked in a large open space.[209]

Mr. O'Sullivan further explained that Dutra has injury reporting requirements.[210] He also thought it was "standard knowledge" that injuries should be reported.[211] Nevertheless, he was not aware of any injury reports by Ms. Zaradnik.[212]

**4. Injurious Conditions at Dutra**

I accept much of Ms. Zaradnik's account of her working conditions at Dutra as true. However unreliable she may have been about her tobacco, alcohol, and illicit drug use, she remains the best source of information regarding the work she performed on the Berth 102 project. Her testimony is not so different from that of the managers.

I don't question that Mr. Lindsey offered his best recollection of Ms. Zaradnik's duties, but with responsibility for supervising up to 98 workers for that project,[213] he could not have monitored her daily tasks, nor was he responsible to do so. Unsurprisingly, he could not dispute Ms. Zaradnik's account of what she was doing on several specific days because he could not remember.[214] Had Mr. Lindsey used the data

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[208] O'Sullivan Dep. at 14.

[209] O'Sullivan Dep. at 13.

[210] O'Sullivan Dep. at 9.

[211] O'Sullivan Dep. at 9–10.

[212] O'Sullivan Dep. at 10.

[213] Lindsey Dep. at 25–26.

[214] Lindsey Dep. at 45–47.

from timesheets to determine which crew Ms. Zaradnik had worked with each day, I might have given more weight to his testimony. But for whatever reason, he elected not to do so.[215]

Similarly, Mr. O'Sullivan occasionally saw Ms. Zaradnik at work,[216] but it was not his responsibility to directly supervise her. I do not doubt that Mr. O'Sullivan testified honestly, but as a project engineer, he was more responsible for project as a whole than tracking assignments of individual workers.[217] He was not particularly familiar with Ms. Zaradnik's work. And like Mr. Lindsey, Mr. O'Sullivan acknowledged that Ms. Zaradnik's time cards would show which crews she had worked with at any given time.[218] Also like Mr. Lindsey, he offered no information about what her time cards show. Without examining the available time card data, Mr. O'Sullivan's testimony amounted to a broad generalization of the types of work he would have expected Ms. Zaradnik to have performed.

I do, however, accept that Ms. Zaradnik overstated her exposure to diesel fumes. For example, both Mr. Lindsey and Mr. O'Sullivan testified that the generators at the Berth 102 jobsite were mobile, could be used from significant distances with the aid of an extension cord, and were designed so that their exhaust could be directed away from workers.[219] That information

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[215] Lindsey Dep. at 25.

[216] O'Sullivan Dep. at 8.

[217] O'Sullivan Dep. at 6.

[218] O'Sullivan Dep. at 17–18.

[219] Lindsey Dep. at 19–20; O'Sullivan Dep. at 12–13.

does not change on an employee-to-employee basis. Mr. Lindsey and Mr. O'Sullivan did not need to closely supervise Ms. Zaradnik to know the functionality of the equipment on their jobsite. Accordingly, I find it implausible that Ms. Zaradnik worked within 20 feet of a generator between 40 to 60 percent of the time at Dutra, as Ms. Zaradnik claims.[220]

But this matters little. Ms. Zaradnik's claims are based on cumulative trauma and occupational disease. Cumulative trauma—which occurs through repetitive motions—can occur with the kinds of physical activities both Mr. Lindsey and Mr. O'Sullivan described. Similarly, though Ms. Zaradnik was exposed to fewer diesel fumes than she thinks, everyone agreed there were consistently numerous diesel powered engines running at the jobsite. There is no fixed quantity of particulate matter required for respiratory damage to occur, especially when the ultimate injury is alleged to have occurred over a lifetime.

**D. Work after Dutra and Medical Evaluations**

Ms. Zaradnik saw her pulmonologist, Jacqueline Chang, M.D., for her annual check-up on October 7, 2010.[221] Dr. Change noted that Ms. Zaradnik had "actually been doing quite well" on Symbicort (an asthma medication).[222] She was taking ProAir (another asthma medication) infrequently, generally when she forgot to take her medications or when she

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220 Tr. at 97.

221 C. Ex.-23 at 120–21.

222 C. Ex.-23 at 120.

was around a lot of pollen.[223] During physical examination, Dr. Chang found Ms. Zaradnik's chest "[s]urprisingly clear to auscultation" with "[n]o active wheezing and [g]ood breath sounds."[224] Dr. Chang diagnosed Ms. Zaradnik with asthma, though she also noted that Ms. Zaradnik was "doing reasonably well on the current program of Singular, Symbicort, and ProAir. . . ."[225] Dr. Chang also assessed tobacco abuse, noting Ms. Zaradnik was smoking one pack of cigarettes per day.[226]

In October 2010, about two weeks after being laid off at Dutra, Ms. Zaradnik began working at Stone & Webster as a lead person doing concrete and form work at the San Onofre Nuclear Power Facility.[227] She worked on a crew that did sidewalk repair.[228] Ms. Zaradnik was involved in the layout, grade, elevation, and forming up of new sidewalks.[229] The layout work involved holding up 2×4s and nailing them to stakes.[230] She also had to pound in stakes with a sledgehammer and cut plant roots out with a skill saw.[231] She spent most of the day standing,

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223 C. Ex.-23 at 120.

224 C. Ex.-23 at 121.

225 C. Ex.-23 at 121.

226 C. Ex.-23 at 120–21.

227 Tr. at 60, 296, 301; C. Ex.-10 at 439–46.

228 Tr. at 63.

229 Tr. at 63.

230 Tr. at 63–64.

231 Tr. at 64.

squatting, or kneeling.[232] Her work also involved using a hammer and nails, a small sledgehammer, a skill saw, sawzalls, drills, pry bars, a shovel, a cat's paw (nail puller), and a chainsaw.[233] She used her hands all day long.[234] The work at Stone & Webster was slower and lighter than her work at Dutra.[235] She was also able to take breaks when needed.[236] Overall, her job was "[m]uch easier at Stone & Webster."[237]

Nevertheless, Ms. Zaradnik felt increased pain in her back and hip while working for Stone & Webster, and the tools she used caused problems with her hands.[238] Because of the pain, she sometimes worked in a "lunge position," with one leg behind her so she could reach down lower.[239] She explained that she felt less pain while working at Stone & Webster than at Dutra because, at Stone & Webster, she was better able to adjust the positioning of her body when she felt pain.[240] She elaborated, however, that her injury "progressively was getting worse, that I felt more—more pain [at Stone & Webster], but I was able to adjust with it. So, it was, maybe, more a

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[232] Tr. at 299–300, 311.

[233] Tr. at 299, 309.

[234] Tr. at 300.

[235] Tr. at 65.

[236] Tr. at 360.

[237] Tr. at 65.

[238] Tr. at 310–11.

[239] Tr. at 309–10.

[240] Tr. at 66.

constant, but not as severe, when I was physically doing the work."[241]

Ms. Zaradnik's employment with Stone & Webster ended in November 2010 when her portion of the project concluded.[242] She would have kept working on that project if her role had gone on longer: "If there was more sidewalks to build, yes, I would have built more sidewalks."[243] She continued to seek pile driving and carpentry work.[244]

Ms. Zaradnik testified that her symptoms did not lessen after she left Stone & Webster in November 2010.[245] "It almost got worse."[246] She went on to testify, somewhat confusingly, that her symptoms were "[n]ot better. Not worse. Not the same. I mean, it has good days and bad days."[247]

Ms. Zaradnik underwent a complete physical examination with Debra Bement, M.D., on December 21, 2010.[248] Dr. Bement noted Ms. Zaradnik had a good range of motion in her extremities, a normal gait, and normal strength.[249] Dr. Bement also noted

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[241] Tr. at 66.

[242] Tr. at 318–19.

[243] Tr. at 318–19.

[244] Tr. at 319.

[245] Tr. at 312–13.

[246] Tr. at 313.

[247] Tr. at 314.

[248] C. Ex.-23 at 74–75.

[249] C. Ex.-23 at 75.

that a recent chest x-ray and chest CT with Dr. Chang showed some abnormalities, early emphysema, and an asymmetric thyroid.[250]

X-rays of Ms. Zaradnik's pelvis and left hip done May 10, 2011 were interpreted to show worsening osteoarthritis in her left hip.[251]

Adam Rosen, D.O., administered a left hip injection under fluoroscopy to treat Ms. Zaradnik's left hip osteoarthritis on August 3, 2011.[252]

Ms. Zaradnik saw Kace Ezzet, M.D., on August 29, 2011 for a second opinion on her left hip.[253] Dr. Ezzet interpreted x-rays of Ms. Zaradnik's hip to show "advanced left hip arthritis and what looks to be mild acetabular dysplasia."[254] He diagnosed osteoarthritis in her left hip.[255] Dr. Ezzet had a "lengthy and frank discussion" with Ms. Zaradnik and informed her that he did not "think that heavy construction work is in her best interest any longer. She does not tolerate it well with her arthritic hips and would not be a good candidate for that kind of work if she has her hip replaced."[256] Ms. Zaradnik contends she first became disabled within the meaning of the Act (*i.e.*, she first suffered a loss in earning

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250 C. Ex.-23 at 74.

251 C. Ex.-23 at 47.

252 C. Ex.-23 at 34.

253 C. Ex.-23 at 20.

254 C. Ex.-23 at 21.

255 C. Ex.-23 at 21.

256 C. Ex.-23 at 21.

capacity) and that she first became aware of the full extent and nature of her injury at the time of this appointment with Dr. Ezzet.[257]

Ms. Zaradnik began work for Stone & Webster a second time in late October, 2011.[258] The job involved assembling office furniture, sometimes for up to 11 hours per day.[259] Ms. Zaradnik also sometimes had to transport furniture, cables, and hardware on a dolly, and unload items from the dolly.[260] She worked in a variety of positions, including sitting, kneeling, standing, lying on her back, and bent over.[261] Her work involved the use of several hand tools, including screw guns, manual tools, nut drivers, and pry bars."[262]

Ms. Zaradnik could not sit "normally" with her legs crossed.[263] She had to position her body creatively to accomplish her tasks: "I used to have my little cheating ways, using my legs to like hold things up. So I often used what was around me to prop things up so I would be able to assemble them."[264] She had to change positions because of pain in her hip and back, and because of her hands "locking up."[265] She

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257 C. Post-Trial Brief at 5–6.

258 C. Ex.-11 at 447–62; Tr. 321.

259 Tr. at 323.

260 Tr. at 323–24.

261 Tr. at 325.

262 Tr. at 328.

263 Tr. at 327.

264 Tr. at 326.

265 Tr. at 327.

felt increased hip and back pain while working for Stone & Webster.[266] Gripping was also difficult and painful.[267] She felt worse at the end of her work days.[268] She used ice, heat, and medication to help manage her pain.[269]

Ms. Zaradnik worked for Stone & Webster the second time until she was again laid off around January 27, 2012.[270] She would have continued working there if she had not been laid off.[271] She considered her work at Stone & Webster to be a "gravy job" compared to her work for Dutra.[272] She resumed looking for work from January to September, 2012:[273] "[U]ntil I had gotten a medical disability when I was still on unemployment, knowing that it was going to run out, yes, I was looking for whatever kind of work I could get, union and non-union."[274] She stopped looking for work in September 2012, when she received notice that she would receive social security disability benefits.[275] She retired from

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266 Tr. at 310.

267 Tr. at 68.

268 Tr. at 327.

269 Tr. at 327-28.

270 Tr. at 321; C. Ex.-11 at 447.

271 Tr. at 330.

272 Tr. at 333–34.

273 Tr. at 335–37, 368–70.

274 Tr. at 335.

275 Tr. at 336–37.

the union that same month.[276] Ms. Zaradnik has not filed a workers' compensation claim against Stone & Webster.[277]

Ms. Zaradnik's pain has increased over time, whether working or not.[278] Her breathing problems have improved since she stopped working, however.[279] Her lung condition was better at the time of trial than it had been when working for either Stone & Webster or Dutra.[280]

## III. Ms. Zaradnik Gave Dutra the Necessary Notice of her Claims

Under § 12 of the Act, a claimant must give the employer notice within 30 days of an injury, or within 30 days after the claimant becomes aware of the relationship between the injury and the employment.[281] The Act presumes that "sufficient notice of a claim has been given" by a claimant.[282] "Therefore, the burden is on Employer to establish by

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276 Tr. at 333.

277 Tr. at 348.

278 Tr. at 66–67.

279 Tr. at 271.

280 Tr. at 271–72.

281 33 U.S.C. § 912(a) ("Notice of an injury . . . shall be given within thirty days after the date of such injury . . . or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury . . . and the employment. . . . ").

282 *Kashuba v. Legion Ins. Co.*, 139 F.3d 1273, 1275 (9th Cir. 1998).

substantial evidence that it was prejudiced by . . . failure to give timely notice of the injury."[283] Once the claimant knows his injury and employment are related, § 13 gives him one year to file the claim, or two years if the claim is for an occupational disease.[284]

The date of awareness matters to both the § 12 and § 13 analysis. The Act's awareness standard under both § 12 and § 13 is the same.[285] The way the Ninth Circuit articulated the standard in *Todd Shipyards Corp. v. Allan*,[286] a claimant is not "'injured' for purposes of the statute of limitations until 'he be[comes] aware of the full character, extent, and impact of the harm done to him."[287] The claimant

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[283] *Kashuba*, 139 F.3d at 1275. *See also* 33 U.S.C. § 912(d).

[284] 33 U.S.C. § 913(a) ("Except as otherwise provided in this section, the right to compensation for disability . . . under this chapter shall be barred unless a claim therefore is filed within one year after the injury. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury . . . and the employment"); 33 U.S.C. § 913(b)(2) ("[A] claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after 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, or within one year of the date of the last payment of compensation, whichever is later.").

[285] *Bivens v. Newport News Shipbuilding & Dry Dock Co*., 23 BRBS 233, 240 (1990).

[286] *Todd Shipyards Corp. v. Allan*, 666 F.2d 399 (9th Cir. 1982).

[287] *Allan*, 666 F.2d at 401 (emphasis removed) (quoting *Stancil v. Massey*, 436 F.2d 274, 277 (D.C. Cir. 1970)).

must know that the claim is compensable, and that there is an "impairment of earning power."[288] Additionally, a claimant is not aware of the full extent of the injury until he is properly diagnosed.[289]

Dutra argues Ms. Zaradnik failed to give timely notice because she filed her claim more than 30 days after her last day of work on September 20, 2010; she was aware she was injured by September 20, 2010; and Dutra was prejudiced by the alleged lack of notice.[290] Similarly it argues the claim is untimely (at least with respect to her orthopedic injuries) because it wasn't filed until October 12, 2011, over a year after she left employment at Dutra (though it was within the two year time limit for occupational diseases).[291] I find no evidence that Ms. Zaradnik was aware of the full character, extent, and impact of injuries that occurred to her at Dutra within either 30 days or one year of her last work at Dutra. Dutra argues "commonsense and facts dictate that claimant knew or with reasonable diligence should have known the relationship between her alleged injuries (if such in fact existed) and employment *during* her employment with Dutra."[292] How much time passes between the injury and claim is not what either § 12 or § 13 measure. The limitations periods did not begin to run until Ms. Zaradnik was aware of the full character

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288 *Allan*, 666 F.2d at 401–02.

289 *J.M. Martinac Shipbuilding v. Dir.*, OWCP, 900 F.2d 180, 184 (9th Cir. 1990).

290 R. Post-Trial Brief at 20–23.

291 R. Post-Trial Brief at 19–23.

292 R. Post-Trial Brief at 20.

and extent of the harm she suffered.[293] The Ninth Circuit has recognized that "[p]ublic policy is served by not discouraging workers' attempts to return to work and by not encouraging premature claims of permanent disability."[294]

Before beginning work at Dutra, in July 2010, Ms. Zaradnik knew that her work as a pile driver sometimes increased the pain in her back and hip.[295] The arduous work at Dutra was no exception; her hip symptoms increased 20 to 25 percent during her time there.[296] That pain wasn't career-ending, however, and did not provide the requisite notice that her symptoms of pain were work-related, as distinct from normal aspects of wear and tear from aging. The increase in symptoms did not alert Ms. Zaradnik that permanent damage was occurring. She managed to work through her pain until her employment at Dutra came to its natural end when the project was done. She managed to find work at Stone & Webster afterward.

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293 *Allan*, 666 F.2d at 401; *Martinac*, 900 F.2d at 183–84.

294 *Martinac*, 900 F.2d at 184.

295 Tr. at 274–75.

296 Tr. at 56. Dutra also argues that Ms. Zaradnik intentionally hid her injuries from Dutra management. R. Post-Trial Brief at 21; Tr. at 57. While I certainly do not condone such inaction, the question at issue here is not whether Ms. Zaradnik knew she had pain. The question is whether she knew she had an injury *caused by her employment at Dutra*. I find that she knew she had pain, not that she knew she was injured, nor the extent of any injury.

Ms. Zaradnik was also diagnosed with osteoarthritis in her left hip by May 10, 2011,[297] but that was likewise insufficient to trigger the notice and filing deadlines. Lawyers adept in this field easily recognize a claim for cumulative trauma. What is obvious to them isn't obvious to a construction worker. She had no knowledge that her condition had been caused, aggravated, or accelerated by her work, and even less reason to suspect that her work for Dutra, in particular, was responsible. It was only on August 29, 2011, after Dr. Ezzet explained Ms. Zaradnik's hip problems were work-related and advised her to leave her career as a pile driver,[298] that Ms. Zaradnik became aware of the full extent, character, and impact of her hip injury. Even then, it's not clear that she knew her specific employment at Dutra was responsible for any identifiable part of her injury.

Furthermore, the limitations periods did not begin to run until Ms. Zaradnik knew or reasonably should have known that she had sustained an injury likely to decrease her earning capacity.[299] Dr. Ezzet was the first doctor to advise her to stop doing pile driving work.[300] Because she went on to work for Stone & Webster again after that, August 29, 2011 is the earliest she could be found to have suffered a loss in earning capacity.

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297 C. Ex.-23 at 47.

298 C. Ex.-23 at 20–22.

299 *Bath Iron Works Corp. v. Galen*, 605 F.2d 583, 586 (1st Cir. 1979).

300 Tr. at 136, 329, 351.

No doctor opined on the cause of Ms. Zaradnik's other orthopedic injuries until substantially later.

Similarly, Ms. Zaradnik knew, by 2005, that her work as a pile driver was contributing in some way to her respiratory problems.[301] As Dutra is eager to point out elsewhere in its argument, however, she did not experience any flare-up in her respiratory problems during her time at Dutra. The §§ 12 and 13 time limitations do not begin until Ms. Zaradnik knew or should have known that she had a compensable claim against Dutra; knowledge that work for past employers had caused increases in symptoms does not suffice. Nothing alerted Ms. Zaradnik to the possibility that her specific employment at Dutra may have aggravated or accelerated her respiratory problems until she received a medical opinion to that affect from Dr. Harrison on November 9, 2012.

Ms. Zaradnik therefore gave notice and filed her claim before the limitations period even began to run for her respiratory and other orthopedic claims. This situation—a claimant giving notice of an injury and filing a claim before he is definitively aware, for purposes of the Act, that he has suffered a work-related injury—is not as odd as it may first seem. Precisely because a claimant's right to relief can be barred by untimely filing, claimants often pre-emptively file claims before they have medical confirmation that they suffered a work-related injury.[302] They do so to avoid the argument Dutra makes that they should have filed earlier. The Benefits Review Board has

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301 Tr. at 205.

302 *See*, *e.g.*, the reference to a protective claim in *Roush v Bath Iron Works,* BRB No.14-0221, slip op. at 1–2 (BRB Mar. 24, 2015).

agreed that this practice is appropriate when a claimant believes she might have suffered a work-related injury, but doesn't know because she hasn't received a medical opinion that explains whether there is a causal connection.[303]

Neither § 12 nor § 13 bar Ms. Zaradnik's claim. Notice was timely, so I have no occasion to reach Dutra's prejudice arguments.

## IV. Employment with Dutra Contributed to Ms. Zaradnik's Orthopedic Injuries and Respiratory Impairments

To establish a *prima facie* case under the Act, a claimant must show that she suffered harm or pain[304] and that an accident occurred at work or working conditions existed that could have caused the harm or pain.[305] "Once claimant has met this dual burden of establishing that [s]he has suffered harm and that the alleged accident in fact occurred or the alleged working condition existed, the Section 20(a) presumption of causal connection . . . applies."[306]

An employer rebuts the presumption "by evidence specific and comprehensive enough to sever the potential connection between the disability and the work environment."[307] When evaluating whether the

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[303] *See, e.g., Lopez v. Stevedoring Servs. of Am.*, 39 BRBS 85, 88–89 (2005).

[304] *Murphy v. SCA/Shane Bros.*, 7 BRBS 309, 314 (1977), *aff'd mem.* 600 F.2d 280 (D.C. Cir. 1979).

[305] *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326, 330–31 (1981).

[306] *Kelaita*, 13 BRBS at 331.

[307] *Parsons Corp. v. Dir., OWCP (Gunter)*, 619 F.2d 38, 41 (9th

employer has rebutted the presumption, "the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable factfinder that the claimant's injury was not work-related."[308] "The unequivocal testimony of a physician that no relationship exists between a claimant's disabling condition and the claimant's employment is sufficient to rebut the presumption."[309]

### 1. Medical Evaluation of Physiatrist James Stark, M.D.

Dr. Stark is a physician certified by the American Board of Physical Medicine and Rehabilitation, *i.e.*, a physiatrist.[310] He attended medical school at Far Eastern University in the Philippines and completed his residency at the University of California, Irvine.[311] He treats orthopedic and neurological conditions, but does not perform surgery.[312]

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Cir. 1980). *See also Dower v. Gen. Dynamics Cor*p., 14 BRBS 324, 326 (1981) ("The Section 20(a) presumption shifts the burden to the employer to come forward with substantial evidence countering the presumed relationship between the employee's injury and the work environment.").

[308] *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010).

[309] *Dearing v. Dir., OWCP*, 27 BRBS 72, 75 (CRT) (4th Cir. 1993) (unpublished) (citing *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129–30 (1984)).

[310] C. Ex.-8 at 392.

[311] C. Ex.-8 at 392.

[312] C. Ex.-20 at 5–6.

Dr. Stark examined Ms. Zaradnik at her request on April 19, 2012, took her medical history, and reviewed her medical records before authoring a May 26, 2012 report.[313] From his physical examination, Dr. Stark saw that Ms. Zaradnik had "a Trendelenburg type gait favoring the left hip with positive Trendelenburg testing on the left, negative on the right."[314] Ms. Zaradnik had a full range of motion in her shoulders, elbows, wrists, and hands.[315] She experienced no finger triggering at the time of the exam.[316] She reported sciatic pain with full extension of her left knee.[317] Her range of motion was more restricted in her left hip than her right, and a Patrick's test (used to evaluate pathology of the hip joint or sacroiliac joint) was positive, with greater limitation on the left than the right.[318] Abduction against resistance caused pain bilaterally, greater on the left than the right.[319]

Dr. Stark diagnosed:

1. bilateral left greater than right hip ostepoarthritis;
2. lower back pain—chronic—rule out left-sided intervertebral disc herniation versus stenosis;

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[313] C. Ex.-3 at 373.

[314] C. Ex.-3 at 376.

[315] C. Ex.-3 at 376–77.

[316] C. Ex.-3 at 377.

[317] C. Ex.-3 at 377.

[318] C. Ex.-3 at 377.

[319] C. Ex.-3 at 377.

3. bilateral, left greater than right carpal tunnel syndrome (confirmed by electrodiagnostic testing).[320]

Dr. Stark opined that Ms. Zaradnik had developed progressive bilateral hip pain from osteoarthritis during the course of her career.[321] "Early onset of hip arthritis relates to mild congenital acetabulum changes with aggravation as a result of heavy lifting and probably extensive climbing activities."[322] Dr. Stark believed that, although Ms. Zaradnik was predisposed to osteoarthritis because of congenital hip dysplasia,

> there can be no argument that Ms. Zaradnik would be less symptomatic today had she performed sedentary work as oppose[d] to work requiring heavy lifting.
>
> Said another way, work activity aggravated and accelerated bilateral, left greater than right, hip osteoarthritis through the last day of work.[323]

At his deposition, Dr. Stark explained that he had since retracted his finding of hip dysplasia after performing measurements on Ms. Zaradnik's x-rays.[324] His earlier finding of dysplasia had relied on Dr.

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[320] C. Ex.-3 at 378.

[321] C. Ex.-3 at 378.

[322] C. Ex.-3 at 378.

[323] C. Ex.-3 at 378.

[324] C. Ex.-20 at 7–8.

Ezzet's report.[325] Dr. Stark used a measurement called the "center edge angle," which involves marking the center of the ball and socket of the femoral head and drawing lines from that point vertically and to the edge of the acetabulum, creating angles.[326] The angle measured 35 degrees on Ms. Zaradnik's x-rays.[327] The angle would need to be less than 25 degrees to qualify as dysplasia.[328] Dr. Stark explained that x-rays have the appearance of a shallow acetabulum, which may have led Dr. Ezzet to diagnose dysplasia, but that appearance is misleading as proven by Dr. Stark's measurements.[329]

Based on her hip condition, Dr. Stark would prohibit Ms. Zaradnik's from squatting, climbing, pushing, pulling, and heavy lifting because those activities "are injurious to already symptomatic arthritic hips."[330] In his opinion, Ms. Zaradnik could not work as a pile driver with those restrictions.[331] Dr. Stark thought Ms. Zaradnik would require left and probably right total hip arthroplasties.[332] He recommended Ms. Zaradnik proceed with the left hip replacement immediately, partly because he thought her altered gait

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[325] C. Ex.-20 at 7–8.

[326] C. Ex.-20 at 8.

[327] C. Ex.-20 at 8.

[328] C. Ex.-20 at 8.

[329] C. Ex.-20 at 9–10.

[330] C. Ex.-3 at 378.

[331] C. Ex.-3 at 378.

[332] C. Ex.-3 at 378.

was contributing to her lower back pain.[333] He thought she should have an MRI done of her lower back.[334]

Dr. Stark also thought Ms. Zaradnik's carpal tunnel syndrome was work-related "because of the repetitive and forceful hand activities Ms. Zaradnik has performed over the years."[335] He thought she may need surgery in the future, and would prohibit her from performing repetitive gripping, power gripping, and more than four hours with manipulative activities such as data input."[336]

He concluded his report by reiterating that, in his opinion, the problems with Ms. Zaradnik's lower back, hips, and hands were caused, aggravated, or accelerated by her employment activities through her last day of work.[337]

Dr. Stark gave a supplemental opinion on August 9, 2012 after reviewing additional records, including an MRI of Ms. Zaradnik's lumbar spine done July 24, 2012 and the corresponding radiologic report.[338] The lumbar spine scans showed multi-level degenerative disc disease at L1 through S1, most marked at the L4-5 level, with central and lateral stenosis.[339] He described the L4-5 degenerative disc disease as "severe

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[333] C. Ex.-3 at 378.

[334] C. Ex.-3 at 378.

[335] C. Ex.-3 at 379.

[336] C. Ex.-3 at 379.

[337] C. Ex.-3 at 379.

[338] C. Ex.-5 at 382.

[339] C. Ex.-5 at 382.

with reactive bone marrow formation."[340] He concluded it was the L4-5 stenosis that had caused lower extremity symptoms.[341] He believed her degenerative changes had been aggravated "by years of hard work, including repetitive bending, lifting and working in awkward positions. Her chronic low back condition is largely the result of cumulative trauma from years of arduous work."[342]

Dr. Stark opined on Ms. Zaradik's work restrictions in an October 24, 2012 letter, explaining she should avoid sitting for more than 15 minutes at a time, and avoid standing or walking for more than 15 to 30 minutes at a time.[343] He was not sure whether she could work an eight-hour day without rest.[344]

Dr. Stark reexamined Ms. Zaradnik on November 6, 2012.[345] Ms. Zaradnik reported constant left hip pain causing difficulty sleeping, constant midline lower back pain with radiation to the buttock bilaterally, and bilateral thumb pain with a tendency for the thumbs to lock.[346] She was having trouble performing a number of tasks, including walking, climbing stairs, sitting for more than 15 to 30 minutes, repetitive hand activity, kneeling, bending, squat-

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[340] C. Ex.-5 at 382.

[341] C. Ex.-5 at 382.

[342] C. Ex.-5 at 382.

[343] C. Ex.-6.

[344] C. Ex.-6.

[345] C. Ex.-7 at 385.

[346] C. Ex.-7 at 386.

ting.[347] She rated her pain between six and nine on a scale of ten.[348]

Dr. Stark diagnosed:

1. Bilateral, left greater than right, hip osteoarthritis.
2. Lower back pain—chronic with radicular complaints, but without verifiable radiculopathy secondary to scan documented multilevel degenerative disc and joint disease with L4-L5 severe disc space narrowing, broad-based posterior disc spurring indenting the thecal sac causing mild spinal stenosis. The left foraminal stenosis and foraminal narrowing is moderate.
3. Bilateral, left greater than right, carpal tunnel syndrome.
4. Bilateral hand arthritis.[349]

Dr. Stark explained that "[b]y definition of osteoarthritis and its natural progression, even though not working, there has been worsening of the left hip condition because osteoarthritis is a progressive condition."[350] He went on to state: "There is simply no way of excluding the physical demands placed upon a pile driver/construction worker as having contributed to the hip arthritis."[351] He came to the same conclu-

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[347] C. Ex.-7 at 386.

[348] C. Ex.-7 at 386.

[349] C. Ex.-7 at 389–90.

[350] C. Ex.-7 at 390.

[351] C. Ex.-7 at 390.

sion with respect to Ms. Zaradnik's carpal tunnel syndrome in her hands.[352]

In Dr. Stark's opinion the only reliable treatment for her hip condition was a total hip arthroplasty.[353] He thought she was limited to sitting or standing a maximum of 15 minutes at a time because of her lumbar spine.[354] For her hands, he thought avoidance of pain precipitating activity would be sufficient for the time being, but she would at some point need interpositional arthroplasties.[355] Carpal tunnel release surgery was also an option.[356]

In his deposition, Dr. Stark addressed Ms. Zaradnik's time at Dutra more specifically. He thought her work at Dutra had contributed to the arthritis in her hips because that work involved lifting, carrying, and wearing a tool belt throughout her work shifts.[357] He explained that Ms. Zaradnik's activities at Dutra were "injurious activities. You can't say that during those months there was no contribution where in other months, even subsequent to her employment, there was contribution."[358] "You can't believe that her hip arthritis was progressing, and miraculously stopped progressing during those two months at Dutra,

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[352] C. Ex.-7 at 390.

[353] C. Ex.-7 at 390.

[354] C. Ex.-7 at 390.

[355] C. Ex.-7 at 390.

[356] C. Ex.-7 at 390.

[357] C. Ex.-20 at 12–13.

[358] C. Ex.-20 at 13.

and then started progressing again. It progressed during that timeframe."[359] "There's no doubt [Ms. Zaradnik's arthritis would have progressed regardless of her work at Dutra], but it would have progressed slower had she got office-type work than the work she did at Dutra."[360]

He also thought that her work at Dutra had contributed to her back problems.[361]

> [T]he same answer applies to the lower back with regard to injurious activities as with the hip. With the addition of repetitive bending and lifting, torqueing, twisting, jarring, all of those activities are injurious. There's some indication that vibration is injurious. And I know that she drove heavy equipment and bounced and jarred in those. That's all injurious activity.[362]

He thought her work with Stone & Webster would have also contributed to her arthritis.[363]

Dr. Stark was unaware that Ms. Zaradnik had been willing to work longer at Dutra if work had remained available, and that she continued to look for work as a pile driver after September 2010.[364] It's not clear that that the type of work she looked

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[359] C. Ex.-20 at 54.

[360] C. Ex.-20 at 54.

[361] C. Ex.-20 at 18.

[362] C. Ex.-20 at 18.

[363] C. Ex.-20 at 13.

[364] C. Ex.-20 at 41.

for, rather than what she actually did, would have altered his opinions in any way.

Dr. Stark also acknowledged that his opinions might change if Ms. Zaradnik's work at Dutra had been lighter than the usual work of a pile driver, but it would depend on how much lighter.[365] Nothing in the record convinces me that Dr. Stark would have changed his opinions even if he were to credit the testimony of Mr. Lindsey and Mr. O'Sullivan over the testimony of Ms. Zaradnik. The issue is academic, because I believe her testimony about the exertional requirement of her work for Dutra. The part I have doubts about was the intensity of her exposure to particulate matter. Dr. Stark's admission that his opinions may change based on new information does not render his opinions "underdeveloped and incomplete" as Dutra argues.[366] If Dr. Stark had testified his opinions would not change with new information, Dutra would doubtlessly have used that against as well.

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[365] C. Ex.-20 at 48. Dutra also notes that Dr. Stark "did not note or consider claimant's long-term steroid use in reaching his diagnosis," "did not address the impact of claimant's tobacco abuse on her orthopedic diagnosis," "neglect[ed] to note that claimant was ejected from [a] vehicle and required hospitalization" following her car accident, and did not address all of her prior industrial injuries. R. Post-Trial Brief at 38. Dr. Stark was hired to evaluate whether Ms. Zaradnik was injured at Dutra. He took her medical history, but likely found it unnecessary to address, in detail, all of the information he was provided, particularly if he thought certain information was irrelevant. I do not fault him for that.

[366] R. Post-Trial Brief at 38.

Dr. Stark opined Ms. Zaradnik should not return to work as a pile driver even after having a hip replacement performed for prophylactic reasons.[367] "The job involves working dangerous heights at times and the weights. Practically speaking she could do it, but it would be against medical advice."[368] Based on the medical record, Dr. Stark thought Ms. Zaradnik first became unable to return to her usual work as a pile driver after her August 29, 2011 evaluation with Dr. Ezzet.[369]

Dr. Stark's opinions are more than sufficient to raise the § 20(a) presumption of industrial causation.

**2. Medical Evaluation of Internist Robert Harrison, M.D.**[370]

Dr. Harrison is board certified in internal medicine by the American Board of Internal Medicine, and in occupational medicine by the American Board of Preventative Medicine.[371] He attended medical school

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[367] C. Ex.-20 at 16.

[368] C. Ex.-20 at 16.

[369] C. Ex.-20 at 26.

[370] Dutra argues Dr. Harrison's testimony on orthopedic, non-pulmonary issues should be excluded as duplicative and cumulative because Dr. Stark opined on the same issues. R. Post-Trial Brief at 40. Although Drs. Harrison and Stark both discussed Ms. Zaradnik's orthopedic conditions, their reports and testimony differ sufficiently that I do not regard them as cumulative.

[371] C. Ex.-15 at 671.

at Albert Einstein College of Medicine and completed his residency at Mount Zion Hospital.[372]

Dr. Harrison evaluated Ms. Zaradnik at her request on November 6, 2012.[373] He took her work history, did a physical examination, and reviewed records about her occupational and medical history before preparing his November 9, 2012 report.[374]

Dr. Harrison heard that Ms. Zaradnik's lungs were "[c]lear to auscultation and percussion without crackles, rhonchi, wheezes, or diminished breath sounds."[375] He diagnosed:

1. asthma/chronic obstructive pulmonary disorder ("COPD");
2. bilateral carpal tunnel syndrome;
3. bilateral basilar thumb osteoarthritis;
4. hip osteoarthritis; and
5. lumbar degenerative disc disease.[376]

Dr. Harrison opined that Ms. Zaradnik's work exposed her to "multiple ergonomic hazards including forceful hand activities; repetitive bending, stooping, and lifting; awkward postures; and exposure to

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[372] C. Ex.-15 at 671.

[373] C. Ex.-14 at 670A.

[374] C. Ex.-14 at 670A–L.

[375] C. Ex.-14 at 670F.

[376] C. Ex.-14 at 670L.

vibrating hand tools. In addition, Ms. Zaradnik had multiple exposures to particulates, dust, and fumes."[377]

Dr. Harrison concluded that Ms. Zaradnik's working conditions, including those at Dutra, had caused multiple orthopedic problems as well as asthma/COPD.[378] Among the factors contributing to her asthma/COPD were exposure to diesel exhaust, silica, welding fumes, and construction dust.[379] He explained at his deposition that medical literature suggests that when those airborne toxins are breathed into the lungs, they either cause or significantly contribute to lung disease, such as asthma or COPD.[380] According to Dr. Harrison, exposure to diesel exhaust increases the risk of respiratory problems, and specifically COPD.[381] "It causes lung inflammation and, over time, causes obstruction to the flow of air."[382] He explained that studies have shown diesel fumes are harmful to workers in or around equipment running on diesel, including workers who perform their job outdoors.[383] The danger from diesel fumes depends on "the quantity and magnitude, the direction of the air flow, not just the absolute number of feet that she's away."[384] Dr. Harrison did not believe that

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377 C. Ex.-14 at 670L–M.

378 C. Ex.-14 at 670M.

379 C. Ex.-14 at 670M.

380 C. Ex.-21 at 12–13.

381 C. Ex.-21 at 16.

382 C. Ex.-21 at 16–17.

383 C. Ex.-21 at 18.

384 C. Ex.-21 at 19.

progression of Ms. Zaradnik's lung disease was inevitable.[385] "There's no evidence I could find that she had progressive lung disease that was inevitable or that was going to somehow wind up in the shape that she's in. There's no evidence that that's the case."[386] He did, however, acknowledge that part of her lung disease had been cause by her smoking.[387] He did not consider Ms. Zaradnik's potential drug use relevant to her respiratory or orthopedic problems.[388]

Dr. Harrison believed Ms. Zaradnik required the medical treatment recommended by Dr. Stark for her orthopedic conditions (bilateral hip replacement and carpal tunnel release), as well as treatment for her respiratory problems, including "inhaled bronchodilators and corticosteroids, close monitoring of her pulmonary function, and emergency treatment for exacerbations with nebulizers, oral corticosteroids, and hospital admission if necessary."[389]

Dr. Harrison would prohibit Ms. Zaradnik from exposure to airborne contaminants, including wood dust, concrete dust, diesel exhaust, welding fumes, paint vapors, and other airborne chemicals.[390] "Those exposures would undoubtedly exacerbate Miss Zaradnik's respiratory condition, would worsen her problems breathing, could in fact cause her to go to

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385 C. Ex.-21 at 48.

386 C. Ex.-21 at 48.

387 C. Ex.-21 at 48–49.

388 C. Ex.-21 at 68–69.

389 C. Ex.-14 at 670M–N.

390 C. Ex.-21 at 21.

the hospital, be treated in the emergency room or even be admitted."[391] In his opinion, Ms. Zaradnik is unable to return to her usual employment in marine construction because of her respiratory problems.[392]

Dr. Harrison also concluded that Ms. Zaradnik's working conditions had contributed to her hip osteoarthritis, lumbar degenerative disc disease, bilateral carpal tunnel syndrome, and hand osteoarthritis.[393]

According to Dr. Harrison, "[c]arpal tunnel is a classic cumulative occupational disorder. . . . [A]ny job that requires repetitive or forceful or awkward postures using operating hand tools, for instance, Miss Zaradnik had clearly that risk over time."[394] Dr. Harrison thought that Ms. Zaradnik would need monitoring of her condition, anti-inflammatory medications, and wrist splints.[395] If her symptoms worsened, she may also need steroid injections in her wrists or carpal tunnel release.[396] In Dr. Harrison's opinion, Ms. Zaradnik's carpal tunnel syndrome would prevent her from returning to her usual work because that work would worsen the carpal tunnel syndrome.[397] She may also be unable to carry certain items, she could not perform repetitive gripping or grasping,

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391 C. Ex.-21 at 21.

392 C. Ex.-21 at 22.

393 C. Ex.-14 at 670M.

394 C. Ex.-21 at 22.

395 C. Ex.-21 at 23.

396 C. Ex.-21 at 23.

397 C. Ex.-21 at 23.

and she had problems with fine motor dexterity on her left side.[398] She may even pose a danger to herself or others if she returned to work as a pile driver.[399]

Dr. Harrison thought the osteoarthritis in Ms. Zaradnik's hands had also been caused by a combination of her age and her work.[400] He explained that the same type of cumulative trauma that causes carpal tunnel syndrome and median nerve damage also causes damage to the joint at the base of the thumb.[401] Dr. Harrison thought Ms. Zaradnik's osteoarthritis in her hand would prevent her from returning to her usual employment.[402] He thought she would require medical monitoring, anti-inflammatory medication, thumb splints, and, if her condition worsened, cortisone injections at the base of the thumb.[403] She may even, at some point, require surgery to clean out or fuse the joint.[404]

Dr. Harrison also opined that repetitive trauma from walking, climbing, stooping, and bending as a pile driver "significantly contributed" to the degenerative condition in Ms. Zaradnik's hips.[405] He explained

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398 C. Ex.-21 at 23–24.

399 C. Ex.-21 at 24.

400 C. Ex.-21 at 26.

401 C. Ex.-21 at 26.

402 C. Ex.-21 at 26.

403 C. Ex.-21 at 27.

404 C. Ex.-21 at 27.

405 C. Ex.-21 at 27–28.

that she had sustained those types of forces while working at Dutra, and he believed her time at Dutra had contributed to her condition.[406]

Dr. Harrison attributed Ms. Zaradnik's lumbar degenerative disc disease and joint disease (central and lateral foraminal stenosis) to cumulative trauma "to the disks and surrounding structures of the lower back caused by excessive forces from awkward postures, stooping, lifting, slowly leading to cumulative injury of the lower back."[407]

Dr. Harrison thought Ms. Zaradnik's orthopedic injuries precluded her from returning to work.[408]

Finally, Dr. Harrison explained that the nature of cumulative trauma means there may not be contemporary medical records during a period of time contributing the overall condition.[409] In cumulative trauma cases, it is common for the exposure to happen years before disability arises.[410]

### 3. Medical Opinions of Defense Examining Orthopedist Richard Greenfield, M.D.

Dr. Greenfield is a board certified orthopedic surgeon.[411] He attended medical school at the Uni-

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406 C. Ex.-21 at 28.

407 C. Ex.-21 at 29.

408 C. Ex.-21 at 30.

409 C. Ex.-21 at 62.

410 C. Ex.-21 at 76.

411 R. Ex.-4 at 53.

versity of California, Los Angeles[412] and completed his residency at the University of California, San Diego.[413] He has evaluated work injuries for over 30 years.[414]

Dr. Greenfield evaluated Ms. Zaradnik on Dutra's behalf on two occasions. He first examined her on April 2, 2012.[415] He diagnosed

1. progressive degenerative osteoarthritis of the left hip, nonindustrial;
2. history of back injury August 2006;
3. history of long-term steroid use;
4. history of tobacco use/abuse;
5. history of asthma;
6. history of sciatica secondary to car drive of April 2010; and
7. history of left hip pain reported on May 3, 2011, of four years' duration.[416]

Dr. Greenfield characterized Ms. Zaradnik's arthritis as "routine."[417] He found no indication that her hip problems were work-related.[418] "[T]here is no medical evidence submitted that indicates the claimant's condition arose out of her employment or

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[412] R. Ex.-4 at 53.

[413] R. Ex.-4 at 53.

[414] Greenfield Dep. at 23.

[415] R. Ex.-3 at 46.

[416] R. Ex.-3 at 50.

[417] R. Ex.-3 at 50.

[418] R. Ex.-3 at 50.

in the course of her employment. . . . Her problem is not a continuing trauma problem but is instead related to degenerative osteoarthritis."[419] Dr. Greenfield noted that Ms. Zaradnik experienced increased hip pain with certain activities, such as squatting, but determined that her increased pain constituted only an exacerbation of her underlying condition rather than an injury:[420] "This exacerbation would of course resolve as soon as she ceased the activities that produced the hip pain."[421] Dr. Greenfield thought Ms. Zaradnik was a candidate for future hip surgery, but was not ready for the procedure at that time.[422]

Dr. Greenfield reevaluated Ms. Zaradnik on October 31, 2012, after Ms. Zaradnik filed her second amended complaint alleging additional injuries.[423] As part of his examination of Ms. Zaradnik's upper extremities, Dr. Greenfield administered the Phalen test, which Dr. Greenfield thought could aggravate her median nerve.[424] Dr. Greenfield expected Ms. Zaradnik to experience "some sensory changes in the thumb, the index, and the long finger and perhaps part of the ring finger on the radial side."[425] "Unfortunately, rather than just involving the median nerve, [Ms. Zaradnik said] that the entirety of her

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419 R. Ex.-3 at 50.

420 R. Ex.-3 at 51.

421 R. Ex.-3 at 51.

422 R. Ex.-3 at 51.

423 R. Ex.-3 at 33; R. Ex.-10 at 124.

424 Greenfield Dep. at 11.

425 Greenfield Dep. at 11.

upper extremities to the elbows falls asleep with the Phalen test."[426] Dr. Greenfield explained Ms. Zaradnik's response was non-anatomic or non-physiologic.[427] Dr. Greenfield explained that such a response is not possible.[428] As a result, he thought Ms. Zaradnik had displayed some level of symptom magnification or embellishment.[429]

Dr. Greenfield diagnosed

1. progressive degenerative osteoarthritis of the left hip, nonindustrial;
2. history of back injury in 2006;
3. developmental or congenital spinal stenosis L4-5;
4. history of long-term steroid use;
5. history of tobacco use/abuse;
6. history of asthma;
7. history of left hip pain reported on May 3, 2011, of four years' duration.[430]

He later added to these diagnoses:

1. complaints of mild hip pain with probable early right hip degenerative arthritis, non-industrial, developmental;

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[426] R. Ex.-3 at 40.

[427] R. Ex.-3 at 40; Greenfield Dep. at 11–12.

[428] Greenfield Dep. at 12.

[429] Greenfield Dep. at 12.

[430] R. Ex.-3 at 50.

2. normal examination of the bilateral feet and ankles; and

3. bilateral carpal tunnel syndrome and trigger fingers of the ring and little finger related to activities of daily living and the continuing trauma of her last employment which would be Stone & Webster.[431]

During his deposition Dr. Greenfield clarified that his diagnosis for Ms. Zaradnik's left hip included

1. mild congenital dysplasia (confirmed by x-rays), and

2. progressive degenerative osteoarthritis.[432]

Dr. Greenfield objected to Dr. Stark's opinion that Ms. Zaradnik did not have general dysplasia ("CDH"). He thought Dr. Stark's conclusion that Ms. Zaradnik "didn't get down under 25 degrees on the hip" was wrong.[433] According to Dr. Greenfield, the left hip was "just about 25 or 24 degrees."[434] He explained that he made his measurements with "special rings that we use, circles, to go ahead and find the exact center of the hip and measure in degrees."[435] Based on his measurements, he diagnosed mild CDH, and the "[n]atural history of CDH is going to be progressive degenerative arthritis of the hip."[436]

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[431] R. Ex.-3 at 41.

[432] Greenfield Dep. at 15.

[433] Greenfield Dep. at 15–16.

[434] Greenfield Dep. at 16.

[435] Greenfield Dep. at 16.

[436] Greenfield Dep. at 16.

According to Dr. Greenfield, "it can be hard to make these determinations if you don't have skill in doing it, number one. Number two, if you don't have the proper type of measuring device, a goniometer. . . . "[437] Dr. Greenfield noted that Dr. Stark, who did not diagnose CDH, is not a surgeon and had reviewed only a picture of Ms. Zaradnik's pelvis instead of an actual x-ray film.[438] Dr. Greenfield had "no question whatsoever" that Ms. Zaradnik had hip dysplasia.[439]

Dr. Greenfield opined that, according to the medical literature, "the majority of hip arthritis is related to a developmental anatomy of the hip joints."[440] He found no evidence of a specific injury that could have caused her osteoarthritis, but explained that "[h]er work as a pile driver or crane operator or other jobs would probably be expected to produce osteoarthritis of the hip on the right and/or the left."[441] He maintained his opinion that there was no medical evidence to indicate that Ms. Zaradnik's condition arose out of her employment or in the course of her employment.[442] He explained that the bases for this conclusion included the fact that

1. Ms. Zaradnik reported no injuries;

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[437] Greenfield Dep. at 17.

[438] Greenfield Dep. at 16–17.

[439] Greenfield Dep. at 17–18.

[440] R. Ex.-3 at 41–42.

[441] R. Ex.-3 at 42.

[442] R. Ex.-3 at 42.

2. Ms. Zaradnik did not require any job modification;
3. there was no evidence that Ms. Zaradnik had sought timely medical care;
4. there was no evidence Ms. Zaradnik had to change what she was doing;
5. Ms. Zaradnik was able to go on and be gainfully employed elsewhere in a physically demanding job; and
6. Ms. Zaradnik asked for her job back at Dutra.[443]

The specific nature of Ms. Zaradnik's work at Dutra was irrelevant to Dr. Greenfield.[444] To find industrial causation, he would want to "see change in symptomatology, change in limits, and change in function," which he did not see in the record.[445] Although Dr. Greenfield acknowledged that a single day of work can constitute an injury in the context of cumulative trauma, for that to be true, that single day must be "the straw that broke the camel's back. And we don't have any evidence in this case that the camel's back broke. The camel continued to work."[446] In this case, the day that "broke the camel's back" was the day Dr. Ezzet found her to be disabled.[447]

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[443] Greenfield Dep. at 22.

[444] Greenfield Dep. at 28–29.

[445] Greenfield Dep. at 44–45.

[446] Greenfield Dep. at 63–64.

[447] Greenfield Dep. at 65.

He opined that Ms. Zaradnik's foot and ankle complaints were "of recent duration and certainly beyond any period of exposure with Dutra Group."[448]

Dr. Greenfield attributed Ms. Zaradnik's spinal problems to "developmental or congenital spinal stenosis" and her motor vehicle accidents, explaining that her employment may have caused a flare up of her underlying condition, but it was within reasonable medical probability that her symptoms would return to normal with "no residual disability nor deformity."[449] Later, he testified that her low back problems arose from car accidents, congenital narrowing of the spinal canal, and the normal aging process.[450]

Dr. Greenfield also thought it was important to note that Ms. Zaradnik had worked with another employer after Dutra.[451] He opined that "if the trier of fact should decide that there is a period of continuing trauma, this period of continuing trauma would be attributed to her last employment."[452]

Dr. Greenfield believed Ms. Zaradnik could return to her usual job, though she might experience stiffness in her back and hips with prolonged sitting, and soreness in her hip and back with prolonged bending.[453]

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448 R. Ex.-3 at 42.

449 R. Ex.-3 at 42.

450 Greenfield Dep. at 19–20.

451 R. Ex.-3 at 42.

452 R. Ex.-3 at 42.

453 R. Ex.-3 at 42.

Dr. Greenfield thought Ms. Zaradnik's basilar thumb arthritis was simply age-related,[454] and that her carpal tunnel syndrome was caused by her age, smoking, genetic predisposition, and subsequent employment with Stone & Webster.[455] For her hands, Dr. Greenfield thought Ms. Zaradnik would need carpal tunnel release and cortisone injections in her trigger fingers.[456] He thought she would benefit from epidural steroid injections for her lumbar spine, and may need decompression at L4-5 in the future.[457] He did not think she needed active care for her right hip, but remained a candidate for a future left hip replacement.[458]

Dr. Greenfield anticipated that, because of her congenital dysplasia, Ms. Zaradnik's hip condition had become worse over time and would continue to do so.[459]

Dr. Greenfield's reports and testimony rebut the § 20(a) presumption of causation. I must weigh the evidence as a whole.

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454 Greenfield Dep. at 20.

455 Greenfield Dep. at 20.

456 R. Ex.-3 at 42.

457 R. Ex.-3 at 43.

458 R. Ex.-3 at 43.

459 Greenfield Dep. at 18–19.

**4. Medical Opinions of Defense Examining Internist Daniel Bressler, M.D.**

Dr. Bressler is board certified in internal medicine.[460] He received his medical degree from Harvard Medical School and completed his residency in internal medicine at Beth Israel Hospital.[461]

Dr. Bressler examined Ms. Zaradnik on Dutra's behalf on October 24, 2012.[462] After taking Ms. Zaradnik's history, performing a physical examination, and reviewing Ms. Zaradnik's medical history, he drafted an October 30, 2012 report.[463]

Dr. Bessler diagnosed Ms. Zaradnik with COPD.[464] He opined that she was permanent and stationary and had suffered a ten percent impairment of her whole person, based on the American Medical Association's *Guides to the Evaluation of Permeant Impairment*.[465]

Dr. Bressler opined that Ms. Zaradnik's work at Dutra "made absolutely no contribution to her pulmonary disease."[466] He believed that, "absent her work with [Dutra], her pulmonary disease would be at the same level of pathophysiology, impairment, and medical requirements as it is at the current

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460 Bressler Dep. at 36.

461 R. Ex.-2 at 25.

462 R. Ex.-1 at 1.

463 R. Ex.-1 at 1.

464 R. Ex.-1 at 21.

465 R. Ex.-1 at 21.

466 R. Ex.-1 at 21 (emphasis removed).

time."[467] He based that conclusion on the following grounds:

1. Ms. Zaradnik's work at Dutra was outside;
2. Ms. Zaradnik was a smoker, "which is the overwhelmingly largest factor in her pulmonary disease;"
3. there was no evidence that Ms. Zaradnik had pulmonary exacerbations while working for Dutra; and
4. on October 7, 2010, after leaving Dutra, Ms. Zaradnik's treating physician found her lungs to be "surprisingly clear" and most of that doctor's visit was spent discussing her smoking.[468]

If Ms. Zaradnik's work at Dutra had contributed to her respiratory problems, Dr. Bressler would have expected to see some subjective or objective evidence of a flare-up in her condition at the time he conducted his examination, which was shortly after her employment at Dutra ended, but he saw none.[469] In fact, Dr. Bressler thought Ms. Zaradnik's breathing condition was better at the time of the examination than it had been in the past, which was a significant factor in his assessment of causation.[470]

Dr. Bressler attributed 100 percent of Ms. Zaradnik's respiratory impairment to her "documented

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[467] R. Ex.-1 at 21 (emphasis removed).

[468] R. Ex.-1 at 21.

[469] Bressler Dep. at 26.

[470] Bressler Dep. at 27.

cigarette smoking, and possibly to previous occupational exposures . . . "[471] He thought the occupational exposures were at most a minor contributor.[472] He explained that any contribution from occupation exposures resulted from "extreme exposures and symptomatic exposures and longstanding exposures."[473] To him, "longstanding" meant "recurrent over multiple months. So not a number of weeks. . . . The longer someone is exposed, the more likely there would be some actual effect."[474] He acknowledged, however, that longstanding exposures to the kinds of dust present at Stone & Webster and Dutra could cause harm over the course of decades.[475] He went on to explain that exposure to fumes from idling diesel engines could contribute to lung disease, but "[o]nly in a hypothetical way . . . , not in a specific way that I understand in this case in terms of the duration of her exposure and, again, the absence of any observed exacerbation."[476] Dr. Bressler also acknowledged that lung irritants have the potential to cause lung injury without causing acute symptoms significant enough to cause a person to seek medical treatment.[477]

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[471] R. Ex.-1 at 22.

[472] Bressler Dep. at 39.

[473] Bressler Dep. at 40.

[474] Bressler Dep. at 40.

[475] Bressler Dep. at 40–41, 46–47.

[476] Bressler Dep. at 46.

[477] Bressler Dep. at 68.

Dr. Bressler also thought it was more likely than not that Ms. Zaradnik's alcohol use had contributed to her lung disease.[478]

Dr. Bressler explained that pulmonary diseases typically worsen over time, even absent new injury.[479] Although the decline can be slowed, it is generally continuous.[480]

Dr. Bressler disagreed with Dr. Harrison's conclusion that Ms. Zaradnik suffered an injurious exposure at Dutra.[481]

> It appears that the logic that Dr. Harrison used was if there's any fumes around anywhere in the vicinity and we know that those fumes could potentially or theoretically be damaging, then the conclusion to come to—and again, this is quoting Dr. Harrison, my understanding of his opinion—is that then she had an injurious exposure. So I think that itself is extremely speculative and isn't consistent with the other factors I've mentioned up till now in my testimony.
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> He uses the issue of potential risk factors and actual injury. And I think those are distinctions that have real meaning in my understanding of causation. He used the potential risk factor exposure to conclude

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478 Bressler Dep. at 67.

479 Bressler Dep. at 22.

480 Bressler Dep. at 22.

481 Bressler Dep. at 32.

causation.[482]

Dr. Bressler went on to explain, "[i]t's, basically, taking a speculation or taking a potential and turning it into an actual in every case. And I think that's the logic that he uses. I don't disagree with her potential exposure to potential pulmonary irritants. All that data he quoted is correct. It just doesn't speak to this specific injury, this specific exposure."[483]

Dr. Bressler thought Ms. Zaradnik would require medical care for the "foreseeable future."[484] He recommended that she use pulmonary protection when exposed to dust, fumes, or smoke.[485]

**5. Conclusion Made from the Medical Proof**

The dispute over causation boils down to a disagreement about the definition of an injury under the Act. The heart of Dutra's argument is stated in its Post-Trial Brief:

> There is no evidence that claimant lost a single day of work because an injury with Dutra. There is no evidence that claimant sustained a single dime of wage loss because of her alleged injuries. There is no evidence of medical treatment concurrent with the employment at Dutra. There is no substantial, credible evidence of any injury whatsoever with Dutra. Claimant is asking this Court

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[482] Bressler Dep. at 32.

[483] Bressler Dep. at 33.

[484] R. Ex.-1 at 22.

[485] R. Ex.-1 at 22.

> to infer, speculate, and assume information that is not in evidence. Absent pure speculation, conjecture, and guess, a link between claimant's medical condition and her brief employment at Dutra cannot be established.[486]

Dutra essentially argues that, because there was no objective evidence of injury during or immediately following Ms. Zaradnik's employment at Dutra, she could not have suffered an injury during that time.

Meanwhile, Ms. Zaradnik argues Dutra has tried to redefine "injury" to suit its purposes:[487]

> The employer attempted to defend against Zaradnik's orthopaedic injury claims based on a novel theory of medical causation—that there was no "measureable change" in her condition during employment. Dutra's legal obligation, however, was to submit "substantial evidence" that the employment did not contribute to Zaradnik's orthopaedic injuries.[488]

Ms. Zaradnik argues that her orthopedic and respiratory problems were caused by a career of arduous work as a pile driver, and at least some small amount of the damage was caused by her work at Dutra, regardless of whether objective evidence shows her condition worsened during that time. She claims that, because Dutra was the last maritime

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[486] R. Post-Trial Brief at 17.

[487] C. Post-Trial Brief at 16.

[488] C. Post-Trial Brief at 16.

employer, it should be responsible for the entirety of her injuries.

**a. Legal Standard**

In *Metropolitan Stevedore Co. v. Cresent Wharf & Warehouse Co.* (hereinafter *Price*),[489] the Ninth Circuit found that a single day of work can aggravate a cumulative trauma injury.[490] In that case, which involved a cumulative trauma knee injury, an Administrative Law Judge "relied on doctors' testimony that there was a gradual loss of knee bone and cartilage each additional day [the claimant] worked," and found that there had been a "gradual wearing away of the bone" through the claimant's last day of work.[491] At the trial level, the ALJ characterized the wearing away as "gradual, albeit barely perceptible."[492] Although the claimant only worked for the last employer one day, it was enough for that employer to be responsible for the entirety of the claimant's injury under the last responsible employer rule.[493]

From the inception of the last responsible employer rule in *Travelers Ins. Co. v Cardillo*,[494] the appellate court understood that the rule would leave an employer and its carrier "liable for the full amount recoverable,

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489 339 F.3d 1102 (9th Cir. 2003).

490 *Metropolitan*, 339 F.3d at 1106–07.

491 *Metropolitan*, 339 F.3d at 1105.

492 *Price v. Metropolitan Stevedore Co.*, BRB No. 00-1017, slip op. at 9 (July 16, 2001) (unpub.).

493 *Metropolitan*, 339 F.3d at 1106–07.

494 225 F.2d 137 (2d Cir. 1955).

even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that last employment."[495]

Ms. Zaradnik's case does not involve the same last responsible employer issue as *Price*; Dutra is the only maritime employer involved. Nevertheless, *Price* is instructive on what constitutes aggravation of cumulative trauma.

**b. Orthopedic Injuries**

Dr. Stark opined that "there is simply no way of excluding the physical demands placed upon a pile driver/construction worker as having contributed to [Ms. Zaradnik's] hip arthritis."[496] Although he believed her entire career as a pile driver had contributed to her hip problems, he was also convinced that her specific work at Dutra had played a role in her ultimate disability. Ms. Zaradnik had lifted and carried items at Dutra, and had also worn a tool belt,[497] all of which were—injurious activities."[498] "You can't say that during those months there was no contribution where in other months, even subsequent to her employment, there was contribution."[499] He went on to explain, convincingly, that "[y]ou can't believe that her hip arthritis was progressing, and miraculously stopped progressing during those two months at Dutra, and

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495 *Cardillo*, 255 F.2 at 145 (internal quote omitted).

496 C. Ex.-7 at 390.

497 C. Ex.-20 at 12–13.

498 C. Ex.-20 at 13.

499 C. Ex.-20 at 13.

then started progressing again. It progressed during that timeframe."[500] Dr. Stark was certain that, although her arthritis would have progressed regardless of her work at Dutra, "it would have progressed slower had she got office-type work than the work she did at Dutra."[501] He thought the same logic applied to Ms. Zaradnik's back[502] and hands.[503]

Dr. Harrison concurred with Dr. Stark's orthopedic findings. He opined that repetitive trauma from walking, climbing, stooping, and bending as a pile driver "significantly contributed" to the degenerative condition in her hips.[504] Because she sustained those types of forces while working at Dutra, he thought her time there had contributed to her condition.[505]

Similarly, Dr. Harrison attributed Ms. Zaradnik's back problems to excessive forces from awkward postures, stooping, and lifting, which slowly led to a cumulative injury.[506]

With respect to Ms. Zaradnik's hands, Dr. Harrison called carpal tunnel syndrome "a classic cumulative occupational disorder . . . ," and explained that "any job that requires repetitive or forceful or awkward postures using operating hand tools, for instance

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[500] C. Ex.-20 at 54.

[501] C. Ex.-20 at 54.

[502] C. Ex.-20 at 18.

[503] C. Ex.-7 at 390.

[504] C. Ex.-21 at 27–28.

[505] C. Ex.-21 at 28.

[506] C. Ex.-21 at 29.

Miss Zaradnik, had clearly that risk over time."[507] He thought the osteoarthritis in her hands had also been caused by a combination of her age and her work.[508] He explained that the same type of cumulative trauma that causes carpal tunnel syndrome and median nerve damage also causes damage to the joint at the base of the thumb.[509]

Dr. Greenfield admitted that Ms. Zaradnik's "work as a pile driver or crane operator or other jobs would probably be expected to produce osteoarthritis of the hip on the right and/or the left."[510] He further acknowledged that Ms. Zaradnik's right hip (the better of the two) did not have congenital dysplasia, and that her work would have contributed in some way to the degenerative changes present there.[511]

Dr. Greenfield also conceded that Ms. Zaradnik's basilar thumb arthritis may have been aggravated by repetitive forceful gripping, twisting, and torqueing,[512] which Ms. Zaradnik performed at Dutra. Similarly, Dr. Greenfield acknowledged that repetitive twisting and loading was among several factors that can cause degenerative changes in the back.[513] As a result, he thought her years working as a pile driver,

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[507] C. Ex.-21 at 22–23.

[508] C. Ex.-21 at 26.

[509] C. Ex.-21 at 26.

[510] R. Ex.-3 at 42.

[511] Greenfield Dep. at 49–50.

[512] Greenfield Dep. at 48.

[513] Greenfield Dep. at 48–49.

including her time at Dutra, would be among the contributing factors to her back problems.[514]

Finally, Dr. Greenfield opined that Ms. Zaradnik's work at Stone & Webster may have contributed to her orthopedic injuries.

> [T]he concrete form work with Stone & Webster produced repetitive bending at the waist, occasional kneeling using a sledge-hammer and a pry bar, and occasional use of an 18" chainsaw. Using these tools would with reasonable probability produce trauma to the bilateral hands resulting in irritation or inflammation in the A1 pulley areas producing triggering of fingers and also bruising the median nerves. She also in her deposition indicates she had increased hip pain and back pain working for Stone & Webster. If the trier of fact does feel that there is a continued trauma claim, it certainly would be from her employment at Stone & Webster. The assembly of Steelcase furniture would have required repetitive use of the hands and fingers, also irritating the inflammation of the carpal canal area and the A1 pulley areas.[515]

The types of tasks Dr. Greenfield claims could have produced trauma at Stone & Webster are very similar to the tasks she performed at Dutra. Furthermore, Ms. Zaradnik worked for Stone & Webster for only brief periods of time (from about October to November

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[514] Greenfield Dep. at 49.

[515] R. Ex.-3 at 43.

2010,[516] and from late October, 2011 to January 27, 2012),[517] just as she did at Dutra.

The primary reasons Dr. Greenfield concluded Ms. Zaradnik's work at Dutra did not contribute to her orthopedic problems were that

1. Ms. Zaradnik reported no injuries;
2. Ms. Zaradnik did not require any job modification;
3. there was no evidence that Ms. Zaradnik had sought timely medical care;
4. there was no evidence Ms. Zaradnik had to change what she was doing;
5. Ms. Zaradnik was able to go on and be gainfully employed elsewhere in a physically demanding job; and
6. Ms. Zaradnik asked for her job back at Dutra.[518]

He went on to explain that, to find industrial causation, he would want to "see change in symptomatology, change in limits, and change in function," none of which he saw in the record.[519] Although Dr. Greenfield acknowledged that a single day of work can constitute an injury in the context of cumulative trauma, that single day must be "the straw that broke the camel's back. And we don't have any evidence in this case

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[516] C. Ex.-10 at 439–46.

[517] C. Ex.-447–62; Tr. 322–23.

[518] Greenfield Dep. at 22.

[519] Greenfield Dep. at 44–45.

that the camel's back broke. The camel continued to work."[520]

Dr. Greenfield proceeds from an erroneous premise. I am not required to identify the predominant, or even a substantial, cause of the Claimant's pulmonary condition. That seems to be what Dr. Greenfield has in mind as the necessary predicate for what he characterizes as "industrial causation." The legal question is whether conditions at Dutra were a contributing factor to the Claimant's orthopedic condition. To extend Dr. Greenfield's analogy, the question is whether it added to the camel's load, not whether it broke the camel's back. Dr. Greenfields's reasoning is inconsistent with the treatment of cumulative trauma injuries in *Price*. Cumulative trauma occurs slowly, over time. The physical degeneration can progress without any immediate change in symptoms.

As Dr. Greenfield himself explained, cartilage cells fret off over time in an arthritic joint, and those cells end up in the joint and the synovial fluid (the fluid that fills joints to reduce friction).[521] There they cause an inflammatory response.[522] He stated that every time Ms. Zaradnik loaded her hip joint, there would be additional fretting of cartilage cells into the synovial fluid.[523] When the cartilage cells are gone, there is bone-on-bone contact.[524] This process—the fretting

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[520] Greenfield Dep. at 63–64.

[521] Greenfield Dep. at 39. (Sic, Greendfield corrected to Greenfield)

[522] Greenfield Dep. at 40.

[523] Greenfield Dep. at 41.

[524] Greenfield Dep. at 39.

away of cartilage cells—constitutes aggravation of the arthritis. There is no denying that Ms. Zaradnik loaded her hip more frequently and with greater weight during her employment at Dutra than she would have had she worked a more sedentary job, or simply stayed home. It's unimportant that she did not report an injury, require job modifications, or seek medical care during her time at Dutra. She did all those things later, when her injury had progressed further. The changes she experienced working for Dutra were an aggravation of her injury.

The same rationale that applies to Ms. Zaradnik's hips applies to her back and hands, which suffer from degenerative conditions that gradually worsened over time because of her arduous work as a pile butt. Dutra, as Ms. Zaradnik's last maritime employer, is responsible for the entirely of her orthopedic injuries.

**c. Respiratory Injuries**

The analysis for Ms. Zaradnik's respiratory problems mirrors that for her orthopedic injuries. Dr. Harrison concluded that Ms. Zaradnik's working conditions, including her work at Dutra, had caused asthma/COPD.[525] He thought exposure to diesel exhaust, silica, welding fumes, and construction dust had all contributed to her respiratory problems.[526] He explained that exposure to diesel exhaust increases the risk of respiratory problems, and specifically

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525 C. Ex.-14 at 670M.

526 C. Ex.-14 at 670M.

COPD.[527] "It causes lung inflammation and, over time, causes obstruction to the flow of air."[528]

Dr. Bressler opined that Ms. Zaradnik's work at Dutra "made absolutely no contribution to her pulmonary disease."[529] He believed that, "absent her work with [Dutra], her pulmonary disease would be the same level of pathophysiology, impairment, and medical requirements as it is at the current time."[530] He based that conclusion on four grounds:

1. Ms. Zaradnik's work at Dutra was outside.
2. Ms. Zaradnik was a smoker, "which is the overwhelmingly largest factor in her pulmonary disease."
3. There was no evidence that Ms. Zaradnik had pulmonary exacerbations while working for Dutra.
4. On October 7, 2010, after leaving Dutra, Ms. Zaradnik's treating physician found her lungs to be "surprisingly clear" and most of that doctor's visit was spent discussing her smoking.[531]

Furthermore, if Ms. Zaradnik's work at Dutra had contributed to her respiratory problems, Dr. Bressler would have expected to see some subjective or objective evidence of a flare-up in her condition

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[527] C. Ex.-21 at 16.

[528] C. Ex.-21 at 16–17.

[529] R. Ex.-1 at 21 (emphasis removed).

[530] R. Ex.-1 at 21 (emphasis removed).

[531] R. Ex.-1 at 21.

when he examined her, which was shortly after her employment at Dutra ended, but he saw none.[532] He thought her condition was actually better at the time of the examination than it had been in the past, which he found significant.[533]

As with Dr. Greenfield, Dr. Bressler's reasoning is unconvincing. The weakest of his arguments is that Ms. Zaradnik's smoking was the primary cause of her respiratory problems. That may very well be true, but even Dr. Bressler acknowledged it was not the only cause. Ms. Zaradnik was exposed to potentially harmful conditions at Dutra. Dr. Bressler needed to explain why those conditions did not result in injury, not suggest additional potential causes. As the Ninth Circuit pointed out in *Cordero v. Triple A Mach. Shop*,[534] the "aggravation rule" is only relevant when other factors are present.

Next, Dr. Bressler found it significant that Ms. Zaradnik suffered no exacerbations while at Dutra. As was the case with Ms. Zaradnik's orthopedic injuries, her respiratory condition developed slowly, over time. The lack of acute exacerbations while at Dutra, while not entirely irrelevant, is an effort to finesse the issue whether conditions at Dutra aggravated her underlying condition. Another of Dr. Bressler's rationale—that Ms. Zaradnik's lungs were "surprisingly clear" after working for Dutra—is similar in nature. The fact that Ms. Zaradnik's lungs were relatively clear after her employment at Dutra does

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[532] Bressler Dep. at 26.

[533] Bressler Dep. at 27.

[534] 580 F.2d 1331 (9th Cir. 1978).

not mean that no damage had been caused. Ms. Zaradnik explained that, while her lungs are generally less symptomatic while she is not working, they have still generally gotten worse over time.[535] Ms. Zaradnik's symptoms may wax and wane, but her condition has deteriorated over the years. Things present at the Durta worksite were ones that would lead to aggravation of her pulmonary condition.

Finally, the fact that Ms. Zaradnik's work was outside is relevant, yet ultimately unconvincing. Working in an open environment would reduce the concentration of particulate matter Ms. Zaradnik inhaled, but that doesn't mean her level of exposure was safe. Dr. Harrison explained that exposure to diesel fumes, even outdoors, can be harmful.[536]

Furthermore, Dr. Bressler conceded that occupational exposures may have played a role in Ms. Zaradnik's condition, though he thought that role was minor.[537] Minor is enough for liability. He discounted the possibility that Ms. Zaradnik's work at Dutra had contributed, however, because he thought only "extreme exposures and symptomatic exposures and longstanding exposures" would contribute to her condition[538] He defined "longstanding" as "recurrent over multiple months. So not a number of weeks. . . . The longer someone is exposed, the more likely there would be some actual effect."[539] He went on to

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[535] Tr. at 139.

[536] C. Ex.-21 at 18.

[537] Bressler Dep. at 39.

[538] Bressler Dep. at 40.

[539] Bressler Dep. at 40.

acknowledge that longstanding exposures to the kinds of dust present Stone & Webster and Dutra could cause harm over the course of decades.[540] More specifically, he thought exposure to fumes from idling diesel engines could contribute to lung disease, but "[o]nly in a hypothetical way . . . , not in a specific way that I understand in this case in terms of the duration of her exposure and, again, the absence of any observed exacerbation."[541]

An injury that results from career-long exposures to airborne toxins does not suddenly manifest itself on a single day. Damage occurs gradually, sometimes before the physical change is perceptible. Dr. Bressler himself acknowledged that lung irritants have the potential to cause lung injury without causing acute symptoms significant enough for a person to seek medical treatment.[542] By acknowledging that years of exposure to the working conditions at Dutra could cause respiratory problems, Dr. Bressler effectively concedes that exposure to those conditions for 48 days would also contribute to harm, even if in a small way. Harm insignificant from a clinical perspective carries significance under the Act.

Dutra is also responsible for Ms. Zaradnik's respiratory problems.

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[540] Bressler Dep. at 40–41, 46–47.

[541] Bressler Dep. at 46.

[542] Bressler Dep. at 68.

## V. No Intervening Injury From Non-Maritime Work for a General Contractor Relieves Dutra of Liability

I reject Dutra's argument that Ms. Zaradnik's employment at Stone & Webster caused intervening injuries (or aggravations of her existing injuries) that relieve Dutra of liability.[543]

Ms. Zaradnik worked for Stone & Wesbter from about October to November 2010,[544] and a second time from late October, 2011 to January 27, 2012.[545] Ms. Zaradnik performed physical work there.

During her first period of employment at Stone & Webster, Ms. Zaradnik had to hold up 2×4s and nail them to stakes, pound in stakes with sledgehammer, and cut plant roots out with a skill saw.[546] She spent significant time standing, squatting, or kneeling.[547] She used a variety of tools and equipment,[548] and used her hands extensively.[549] Her work caused pain in her hip, and the tools she used caused problems with her hands.[550] Despite all that, Ms. Zaradnik

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543 R. Post Trial Brief at 50–52.

544 C. Ex.-10 at 439–46.

545 C. Ex.447–62; Tr. at 321.

546 Tr. at 63–64.

547 Tr. at 299, 311.

548 Tr. at 299.

549 Tr. at 300.

550 Tr. at 311.

testified that her job was "[m]uch easier at Stone & Webster" than it had been at Dutra.[551]

During her second period of employment there, Ms. Zaradnik assembled furniture, sometimes for up to 11 hours per day.[552] She sometimes had to transport furniture, cables, and hardware on a dolly, and unload items from the dolly.[553] She worked in a variety of positions, including seated, kneeling, standing, lying on her back, and bent over.[554] Her work also involved the use of several hand tools, including screw guns, manual tools, nut drivers, and pry bars.[555] Again, she experienced increased hip and back pain.[556] She had to change positions because of pain in her hip and back, and because of her hands "locking up,"[557] and gripping was difficult and painful.[558]

Dr. Greenfield thought Ms. Zaradnik's work at Stone & Webster may have contributed to her injuries. He opined that

> The concrete form work with Stone & Webster produced repetitive bending at the waist, occasional kneeling using a sledge-hammer and a pry bar, and occasional use of

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551 Tr. at 65.

552 Tr. at 323.

553 Tr. at 323–24.

554 Tr. at 325.

555 Tr. at 328.

556 Tr. at 327.

557 Tr. at 327.

558 Tr. at 68.

> an 18" chainsaw. Using these tools would with reasonable probability produce trauma to the bilateral hands resulting in irritation or inflammation in the A1 pulley areas producing triggering of fingers and also bruising the median nerves. She also in her deposition indicates she had increased hip pain and back pain working for Stone & Webster. If the trier of fact does feel that there is a continued trauma claim, it certainly would be from her employment at Stone & Webster. The assembly of Steelcase furniture would have required repetitive use of the hands and fingers, also irritating the inflammation of the carpal canal area and the A1 pulley areas.[559]

Ms. Zaradnik has proven her *prima facie* case. She suffered injuries to her hips, back, hands, and lungs, and has shown work conditions existed which could have caused the harm.[560] The Act presumes, under § 20(a), that her injuries arose out of employment.[561] Where, as Dutra argues, there has been a subsequent or intervening injury, an employer can rebut the § 20(a) presumption by showing that:

1. the later, intervening event caused the entirety of the injury; or

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559 R. Ex.-3 at 43.

560 *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71, 72 (1996) (citing *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990)).

561 33 U.S.C. § 920(a).

2. the later event was responsible for a provable percentage of the claimant' s condition.[562]

An employer remains liable for the entire disability if the later injury is the natural or unavoidable result of the injury suffered in the employer's work.[563] If, however, the second injury is the result of an intervening cause, and the worker's disability is caused by a combination of the earlier work injury and the subsequent or intervening event, "the employer is relieved of liability for that portion of the disability attributable to the second injury."[564] The employer remains liable for at least the effect of the work injury.[565] Without affirmative medical proof that makes the allocation, "there is no way to ascertain what portion of claimant's disability is attributable to each injury. Without such apportionment, employer is liable for the entire disability."[566]

If Stone & Webster were a maritime employer, the evidence would likely be sufficient to shift liability from Dutra to Stone & Webster under the last responsible employer rule.[567] Stone & Webster is not a maritime employer, however; it is an engineering

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562 *Plappert v. Marine Corps Exch.*, 31 BRBS 109, 110 (Sept. 17, 1997), *aff'g on recon. en banc* 31 BRBS 13 (March 18, 1997).

563 *Plappert*, 31 BRBS 109 at 110.

564 *Plappert*, 31 BRBS 109 at 110.

565 *Plappert*, 31 BRBS 109 at 110.

566 *Plappert*, 31 BRBS 109 at 110.

567 *Kelaita v. Dir., OWCP*, 799 F.2d 1308, 1311–12 (9th Cir. 1986) *(*quoting *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646, 649–50 (1979)).

services company, and all of Ms. Zaradnik's work there was done at the San Onofre Nuclear Generating Station. The last responsible rule is irrelevant here, and Dutra must demonstrate, with medical evidence, what percentage of Ms. Zaradnik's current injuries are attributable to her work at Stone & Webster in order to avoid liability for Mr. Garcia's full injuries. It has not done so.

## VI. Nature and Extent of Disability

### A. Ms. Zaradnik Has Not Reached Maximum Medical Improvement

An injured worker's impairment may progress from temporary to permanent impairment under either of two tests.[568] Under the first, a disability is permanent if the employee's impairment—has continued for a lengthy period, and it appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period."[569] The date of permanency becomes the date the employee ceases to receive treatment meant to improve her condition.[570]

Under the second test, a disability is permanent as of the date of maximum medical improvement ("MMI").[571] The date of MMI is the date on which the employee has received the maximum benefit of

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568 *Eckley v. Fibrex & Shipping Co.*, 21 BRBS 120, 122–23 (1988).

569 *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

570 *Leech v. Serv. Eng'g Co.*, 15 BRBS 18, 21 (1982).

571 *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989).

medical treatment such that his condition will not improve. Any disability before reaching MMI is temporary.[572]

Ms. Zaradnik argues she became permanently totally disabled ("TTD") on August 29, 2011, when Dr. Ezzet told her to stop working as a pile driver, and has remained TTD since then, except during her employment with Stone & Webster from late October 2011[573] to January 2012.[574]

Dr. Stark thought Ms. Zaradnak's condition would improve with further treatment.[575] He thought her hip would "[c]ertainly" improve, but he was less optimistic about her back and hands.[576] "Her hip will improve. Her hip may become painless after the surgery."[577] Dr. Stark thought Ms. Zaradnik should

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572 *Crouse v. Bath Iron Works Corp.*, 33 BRBS 442, 448–49 (ALJ May 4, 1999).

573 Ms. Zaradnik's post-trial brief states she worked her second stint at Stone & Webster from October 24, 2011 to January 27, 2012. C. Post-Trial Brief at 39. Dutra's post-trial brief states that Ms. Zaradnik's second period of employment at Stone & Webster began October 28, 2011. R. Post-Trial Brief at 8. Neither Ms. Zaradnik nor Dutra cites to any evidence that definitively establishes the correct start date. The exact date she began her second period of employment at Stone & Webster does not matter, however. She was not entitled to benefits until after she finished that period of employment, as will be discussed later in the decision.

574 C. Post-Trial Brief at 39.

575 C. Ex.-20 at 52–53.

576 C. Ex.-20 at 53.

577 C. Ex.-20 at 53.

proceed with a left hip replacement:[578] "She has got progressive severe bone-on-bone arthritis. She has all the indications and the only relative contraindication is her age."[579] With respect to her right hip, Dr. Stark thought, for the time being, Ms. Zaradnik should simply "[w]atch and wait."[580] She should try to maintain the strength of her gluteal and hip moving muscles, take anti-inflammatory medications if she can tolerate them with her asthma, and avoid pain-precipitating activities.[581]

Dr. Stark also thought Ms. Zaradnik may need interpositional arthroplasties or other surgical procedures for her carpal tunnel at some point in the future, but recommended only avoidance of pain precipitating activity for the time being.[582]

Dr. Harrison thought Ms. Zaradnik should receive "[c]ontinued medical checkups, anti-inflammatory medications, x-rays of the hip, physical therapy, possibly injection with a cortisone shot to give her some temporary relief of the hip pain," but did not think she was ready for a hip replacement.[583] "[S]he needs hip replacement, but that is something to potentially hold out for the future."[584]

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578 C. Ex.-20 at 15–16, 53.

579 C. Ex.-20 at 53.

580 C. Ex.-20 at 16–17.

581 C. Ex.-20 at 17.

582 C. Ex.-7 at 390.

583 C. Ex.-21 at 28.

584 C. Ex.-21 at 28.

Dr. Harrison also thought Ms. Zaradnik would need medical monitoring, anti-inflammatory medication, thumb splints, and cortisone injections at the base of the thumb for the osteoarthritis in her hand.[585] For her carpal tunnel syndrome, he recommended monitoring of her condition, anti-inflammatory medications, and wrist splints.[586] If her symptoms worsened, he thought she may also need steroid injections in her wrists or carpal tunnel release.[587]

Dr. Harrison thought Ms. Zaradnik might be capable of working after having a hip replacement and surgery for her carpal tunnel syndrome.[588]

Even Dr. Greenfield acknowledged that Ms. Zaradnik would require medical care for her orthopedic conditions. He did not think she needed active care for her right hip, but opined she was a candidate for a future left hip replacement.[589] Dr. Greenfield thought Ms. Zaradnik would need carpal tunnel release and cortisone injections in her trigger fingers.[590] He also thought she would benefit from epidural steroid injections for her lumbar spine, and may need decompression at L4-5 in the future.[591]

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585 C. Ex.-21 at 27.

586 C. Ex.-21 at 23.

587 C. Ex.-21 at 23.

588 C. Ex.-21 at 60–61.

589 R. Ex.-3 at 43.

590 R. Ex.-3 at 42.

591 R. Ex.-3 at 43.

Although no hip replacement had been scheduled at the time of trial, Ms. Zaradnick was ready to have the hip surgery performed once she had insurance to cover its cost.[592] Her need for that surgery is not speculative; Ms. Zaradnik has been universally advised that she requires a left hip replacement at some point, and she plans to undergo the procedure as soon as she is able. The surgery also has the potential to substantially improve her condition. Dr. Stark went so far as to suggest a hip replacement could completely resolve her hip pain. Ms. Zaradnik continues to seek treatment with a view toward improving her condition. Her disability remains temporary.

**B. Ms. Zaradnik is Totally Disabled**

A disability is total when (1) a claimant shows that a work-related injury has left him unable to return to prior employment, and (2) the employer fails to establish suitable alternative employment is available within the geographic area of the claimant's residence. Suitable jobs are those the claimant can perform with his limitations, taking into consideration his age, education, and background, assuming he engages in a diligent employment search.[593]

Dutra has made no effort to show that suitable alternative employment is available to Ms. Zaradnik. She is, therefore, totally disabled if she is unable to return to work as a pile driver.

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592 Tr. at 138.

593 *General Const. Co. v. Castro*, 401 F.3d 963, 968–69 (9th Cir. 2005).

Dr. Ezzet first advised Ms. Zaradnik to stop work as a pile driver on August 29, 2011.[594]

Dr. Stark agreed with that assessment. He did not believe Ms. Zaradnik could return to work as a pile driver with her physical limitations.[595] Based on the medical record, Dr. Stark thought Ms. Zaradnik first became unable to return to her usual work as a pile driver after her August 29, 2011 evaluation with Dr. Ezzet.[596]

Dr. Harrison would prohibit Ms. Zaradnik from return to work as a pile driver for a number of reasons, including her respiratory problems,[597] her carpal tunnel syndrome,[598] the osteoarthritis in her hand,[599] and the arthritis in her hips.[600]

Dr. Greenfield believed Ms. Zaradnik could return to her usual job, though she might experience stiffness in her back and hips with prolonged sitting, and soreness in her hips and back with prolonged bending.[601]

Ms. Zaradnik cannot return to work as a pile driver. She is willing to proceed with a left hip

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[594] C. Ex.-23 at 20–21.

[595] C. Ex.-3 at 378; C. Ex.-20 at 16.

[596] C. Ex.-20 at 26.

[597] C. Ex.-21 at 22.

[598] C. Ex.-21 at 23.

[599] C. Ex.-21 at 26.

[600] C. Ex.-21 at 28–29.

[601] R. Ex.-3 at 42.

replacement, knowing her doctors advise that she wait as long as possible before having the procedure performed (because the replacement hip can wear out and lead to another surgery). I find this convincing proof that her pain is too severe to perform the physically demanding work of a pile driver.

Dr. Greenfield's opinion on her ability to return to work does not persuade me. Having already rejected Dr. Greenfield's opinion that Ms. Zaradnik's work as a pile driver had a minimal impact on her orthopedic injuries, and that her work at Dutra had no impact at all, common sense (along with the opinions of Drs. Stark and Harrison) suggests that returning to the same work would only make those injuries worse.

The only remaining issue is when, precisely, Ms. Zaradnik became totally disabled.

A claim for temporary total disability benefits requires that the claimant establish a loss of wage-earning capacity.[602] Dr. Ezzet advised Ms. Zaradnik to stop working as a pile driver on August 29, 2011.[603] She did not follow that advice. She sought pile driving and carpentry work after her first period of employment at Stone & Webster ended in November 2010,[604] and nothing suggests she altered that job search after she met with Dr. Ezzet in August 2011. Her job search resulted in a second period of employment at Stone & Webster from late October, 2011 to

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602 *Burson v. T. Smith & Son, Inc.*, 22 BRBS 124, 127 (1989); *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148, 149 (2001); 33 U.S.C. § 902(10).

603 C. Ex.-23 at 20–21.

604 Tr. at 319.

January 27, 2012,[605] though she considered that relatively light work.[606] She resumed looking for work again afterward.[607]

Ms. Zaradnik may have acted against medical advice by continuing to seek out pile driving work and taking the second job with Stone & Webster, but the fact remains she suffered no loss in pay during that time. She does not claim she would have found work earlier, or that she would have found higher paying work but for her injuries. Her job at Dutra and both periods of employment at Stone & Webster ended when those projects were completed; she did not leave because of her injuries. She was not disabled within the meaning of the Act until January 28, 2012, after her second job at Stone & Webster ended.

## VII. Order

Based upon the foregoing Decision and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. Dutra must pay to Ms. Zaradnik compensation for her TTD from January 28, 2012 forward, based upon her stipulated average weekly wage of $1,301.58. The compensation must be computed as § 8(b) of the Act requires.

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605 C. Ex.-11 at 447–62; Tr. 321.

606 Tr. at 333–34.

607 Tr. at 335–37, 369–70.

2. Dutra must furnish such reasonable, appropriate, and necessary medical care and treatment as Ms. Zaradnik's work-related injuries may require, pursuant to § 7 of the Act. This includes a hip replacement.

3. Dutra must pay interest, compounded at least annually, on any unpaid compensation that is past due to Ms. Zaradnik.

4. All computations of benefits and other calculations this Order requires are subject to verification and adjustment by the District Director.

5. Ms. Zaradnik's counsel is entitled to reasonable attorney's fees and costs for benefits procured on Ms. Zaradnik's behalf. A fee petition that comports with 20 C.F.R. § 702.132 must be filed within 21 days from the date this order is served by the District Director. Dutra must file its objections within 14 days after the fee petition is served. The parties must meet in person or voice-to-voice to discuss and attempt to resolve any objections within 14 days after objections are served. Both parties are charged with the duty to arrange the meeting. Ms. Zaradnik's counsel must file a report within 7 days thereafter that identifies the objections that have been resolved, those that have been narrowed, and those that remain unresolved. The report may also reply to any unresolved objections.

So Ordered.

Digitally Signed

/s/ William Dorsey
Administrative Law Judge

San Francisco, California

**BENEFITS REVIEW BOARD**
**ORDER ON MOTION FOR RECONSIDERATION**
**(NOVEMBER 23, 2021)**

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NOT PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
200 Constitution Ave. NW
Washington, DC 20210-0001

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KELLY ZARADNIK,

*Claimant-Respondent*
*Cross-Petitioner,*

v.

THE DUTRA GROUP, INCORPORATED

and

SEABRIGHT INSURANCE COMPANY,

*Employer/*
*Carrier-Petitioners*
*Cross-Respondents.*

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BRB Nos. 16-0128 and 16-0128A
OALJ No. 2012-LHC-00988
OWCP No. 18-099601

Date Issued: 11/23/2021

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**ORDER ON MOTION FOR RECONSIDERATION**

Employer has filed a timely motion for reconsideration of the Benefits Review Board's Order in this case, *Zaradnik v. The Dutra Group, Inc.*, BRB Nos. 16-0128/A (July 27, 2021) (Order). 33 U.S.C. § 921(b)(5); 20 C.F.R. § 802.407. Claimant has not responded.

After consideration of Employer's contentions, no member of the panel has voted to vacate or modify the Board's order.

Accordingly, the Board denies Employer's motion for reconsideration and the Board's decision is affirmed. 20 C.F.R. §§ 801.301(c), 802.409.

By Order of the Board:

/s/ Thomas O. Shepherd, Jr.
Clerk of the Appellate Boards

**BENEFITS REVIEW BOARD ORDER ON MOTION FOR RECONSIDERATION EN BANC (SEPTEMBER 22, 2017)**

NOT PUBLISHED

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
200 Constitution Ave. NW
Washington, DC 20210-0001

KELLY ZARADNIK,

*Claimant-Respondent,*

v.

THE DUTRA GROUP, INCORPORATED

and

SEABRIGHT INSURANCE COMPANY,

*Employer/*
*Carrier-Petitioners.*

BRB Nos. 16-0128

Date Issued: Sep 22 2017

Before: Betty Jean HALL, Chief Administrative Appeals Judge, Judith S. BOGGS, Ryan GILLIGAN, Jonathan ROFLE, Greg J. BUZZARD, Administrative Appeals Judges.

## ORDER ON MOTION FOR RECONSIDERATION EN BANC

HALL, Chief Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration en banc of the Board's decision in *Zaradnik v. The Dutra Group, Inc.*, BRB No. 16-0128 (Dec. 9, 2016) (Boggs, J., concurring and dissenting) (unpub.). 33 U.S.C. § 921(b)(5); 20 C.F.R. § 802.407(a), (b). Claimant responds, urging rejection of employer's motion. We grant employer's motion for reconsideration en banc, but deny the relief requested.

In its motion for reconsideration, employer first asserts that the Board did not sufficiently address whether or not the last responsible employer rule espoused in *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004), is the correct legal standard for use in this single injury, single covered employer case. Emp. Br. on Recon. at 6. We reject this contention.

The administrative law judge's discussion concerning the work-relatedness of claimant's orthopedic conditions exhibits a proper application of Section 20(a) of the Act. 33 U.S.C. § 920(a). While the administrative law judge's discussion of the "Legal Standard" focused on *Price*, and specifically recited "the last employer rule," he nevertheless found that this case "does not involve the same last responsible employer issue as *Price*," because employer "is the only maritime employer involved." Decision and Order at 44-45. Noting that "*Price* is instructive on what constitutes

aggravation of cumulative trauma,"[1] the administrative law judge nonetheless properly applied the correct analysis in terms of the Section 20(a) presumption for determining whether an injury is causally related to employment. Decision and Order at 62-64. The Board previously held that the administrative law judge "rationally credited medical evidence that claimant's work for employer aggravated, accelerated and/or contributed to her orthopedic conditions," *Zaradnik*, slip op. at 8, and thus rejected employer's contention that the administrative law judge failed to place the burden on claimant of establishing the work-relatedness of her orthopedic conditions once the Section 20(a) presumption is invoked and rebutted. Consequently, we again hold that the administrative law judge did not err in addressing causation in this case.[2] *See* 33 U.S.C. § 920(a); *Hawaii Stevedores, Inc.*

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[1] The "aggravation rule" states that an employer is liable for the claimant's full disability if the work-related injury aggravates, accelerates, or combines with a preexisting condition to result in that disability; the relative contribution of the conditions is not weighed. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). The "aggravation rule" applies to both the causation inquiry and in identifying the responsible employer in traumatic injury cases. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004) (responsible employer); *Independent Stevedore Co.*, 357 F.2d 812 (causation).

[2] We reject as unfounded employer's concern that the Board's decision leaves open the possibility that the last employer rule may be applied as the causation standard in single employer cases. Both the Board's original decision, *Zaradnik*, slip op. at 7-8, and this order, *supra* at n. 1, elucidate the applicable causation law in a single covered employer case. Moreover, we reject employer's contention that *Kellison v. The Dutra Group, Inc.*, BRB No. 16-

*v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010).

Employer next contends that the Board erred in affirming the administrative law judge's finding that a causal relationship exists between claimant's orthopedic conditions and her work for employer because there is a lack of objective evidence showing that claimant's orthopedic conditions actually worsened during her work for employer. Employer avers that the record establishes that claimant missed no time from work, made no complaints, sought no treatment, modified no activities, and would have continued working for employer but for the economic layoff, all of which serve as compelling evidence as to the lack of a causal connection between claimant's orthopedic conditions and her work for employer. We reject employer's contention.

The record in this case contains the opinions of Drs. Stark, Harrison, and Greenfield. Dr. Stark opined that [e]ach anatomical area involvement including lower back, hips and hands were caused, aggravated or accelerated by work activities through her last day of work." CX 3. He added, "[t]here simply is no way of excluding the physical demands placed upon a pile driver/construction worker as having contributed to the hip arthritis. By this, I mean that if the work did not cause hip arthritis, it certainly aggravated and

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0242 (Feb. 21, 2017) (unpub.), appeal pending, No. 17-71143 (9th Cir.), is binding on the administrative law judge and/or Board, as the result in *Kellison* involved a different administrative law judge addressing different facts and different evidence. In addition, different administrative law judges can reach different results on the same facts and evidence, and both decisions could be affirmable under the substantial evidence standard.

accelerated the condition." CX 7 at 6. Dr. Stark subsequently explained that he based this opinion on data and studies which show "that individuals who do a lot of heavy lifting or carrying have more advanced arthritis than those who don't, because those are aggravating or causative factors." CX 20, Dep. at 11. Dr. Stark admitted that he could not say that claimant's work caused her hip condition, "but I am certain that it aggravated it." *Id.* Dr. Harrison agreed with Dr. Stark's opinion that claimant's work activities contributed to the development of her injuries and specifically opined that claimant's "work [with employer] from July 23 through September 20, 2010, contributed to both her respiratory problems and cumulative injuries to the musculoskeletal system," *i.e.*, hips, hands and back. CX 14. In contrast, Dr. Greenfield opined that claimant's orthopedic conditions are related to activities of daily living and the continuing trauma of her last non-covered employment with Stone & Webster (S & W). EX 3. Contrary to employer's contention, the opinions of Drs. Stark and Harrison, which the administrative law judge rationally credited over the opinion of Dr. Greenfield as "better reasoned," constitute substantial evidence establishing that claimant's orthopedic conditions are, in part, related to her work with employer. We thus reject employer's contentions that the Board erred in affirming the administrative law judge's finding that claimant's orthopedic conditions are work-related. *Zaradnik*, slip op. at 11-12.

Employer also contends the administrative law judge's finding that claimant's respiratory conditions are related to her work for employer should be vacated and the case remanded for a specific determination

as to whether claimant's work for employer actually aggravated her underlying respiratory conditions. The administrative law judge, in addressing whether claimant's work with employer aggravated, accelerated and/or contributed to her underlying asthma/COPD, weighed the conflicting opinions of Drs. Harrison and Bressler. The administrative law judge, within his discretion, credited the opinion of Dr. Harrison that claimant's work for employer "contributed to the cumulative injury to her lung that occurred over the duration of her employment as a pile butt."[3] CX 21, Dep. at 13. This statement by Dr. Harrison constitutes substantial evidence establishing a causal link between claimant's respiratory conditions and her work with employer sufficient to meet claimant's burden.[4] We thus reject employer's assertion of error with regard to the Board's affirmance of the administrative law

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[3] Dr. Harrison's opinion establishes that claimant's lung condition is related to her work for employer and thus is sufficient to meet claimant's burden of establishing on the record as a whole that her respiratory condition is related to her work for employer. *See Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010); *see also Director. OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Thus, the finding that a causal relationship exists is not based on the "could" and/or "would" contribute standard that employer alleges was applied in this case.

[4] Upon further reflection, we agree with employer that the administrative law judge erred in finding that Dr. Bressler "effectively concedes" contribution. *Zaradnik*, slip op. at 10. However, the administrative law judge also gave greater weight to the opinion of Dr. Harrison that claimant's work for employer contributed to the cumulative injury to her lungs and found Dr. Bressler's opinion to the contrary to be unconvincing. *Id.* Thus, any inaccurate inferences drawn from Dr. Bressler's opinion are harmless error.

judge's finding that claimant's respiratory conditions are work-related. *Zaradnik*, slip op. at 10.

Employer further contends the Board erred in affirming the administrative law judge's finding that claimant's subsequent work with S & W, a non-covered employer, is not an intervening cause of her bilateral hand condition. Employer avers the administrative law judge did not accurately address and weigh the opinion of Dr. Greenfield in relation to whether claimant's work at S & W alone caused her bilateral carpal tunnel syndrome.

The administrative law judge found, based on the opinions of Drs. Harrison and Greenfield, that claimant's carpal tunnel syndrome is likely due to her work both with employer and with S & W.[5] Dr. Harrison opined that claimant's work activities with employer contributed to the development of her carpal tunnel syndrome. CX 14. Dr. Greenfield opined that claimant's carpal tunnel syndrome was related to aging and smoking, Dr. Greenfield Dep. at 20, and added that "the type of tasks that she did working for S & W, where she was putting together steel-case cabinets would be an activity that would potentially aggravate her carpal tunnel." *Id.* This evidence, credited by the administrative law judge, constitutes substantial evidence that claimant's work for employer and subsequent work with S & W each contributed to her carpal tunnel syndrome. Due to the absence of evidence apportioning claimant's disability between her covered

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[5] The administrative law judge, on reconsideration, found that employer did not show that the later, intervening event caused the entirety of claimant's carpal tunnel injury. Order on Recon. at 6.

and non-covered employment, the administrative law judge properly concluded that employer's intervening cause contention fails. *Plappert v. Marine Corps Exchange*, 31 BRBS 13 (1997), *aff'd on recon. en Banc*, 31 BRBS 109 (1997). He thus properly concluded that claimant's work with S & W after she left employer is not an intervening cause that relieves employer of its liability in this case. *See generally Jones v. Director, OWCP*, 977 F.2d 1106, 26 BRBS 64(CRT) (7th Cir. 1992). Consequently, there is no error in the Board's affirmance of the administrative law judge's finding that employer is liable for compensation relating to claimant's orthopedic injuries.

Accordingly, employer's motion for reconsideration is denied. 20 C.F.R. §§ 801.301(c), 802.407(d), 802.409. The Board's decision is affirmed.

SO ORDERED.

/s/ Betty Jean Hall
Chief Administrative Appeals Judge

We concur:

/s/ Greg J. Buzzard
Administrative Appeals Judge

/s/ Ryan Gilligan
Administrative Appeals Judge

/s/ Jonathan Rolfe
Administrative Appeals Judge

## CONCURRING AND DISSENTING OPINION OF JUSTICE BOGGS

BOGGS, Administrative Appeals Judge, concurring and dissenting:

For the reasons stated in my dissenting opinion in this case, I continue to respectfully dissent from my colleagues' decision to affirm the administrative law judge's findings that claimant's asthma/COPD is related to her work exposures with employer and that claimant's work with S & W after she left employer is not an intervening cause of claimant's bilateral hand condition. *See Zaradnik*, slip op. at 15-16. As discussed, I would vacate the administrative law judge's findings on these issues and remand the case for the administrative law judge to make more specific findings of fact. With the exception of these issues, I concur with the majority's decision to affirm the Board's opinion.

/s/ Judith S. Boggs
Administrative Appeals Judge

**ADMINISTRATIVE LAW JUDGE ORDER GRANTING RECONSIDERATION (OCTOBER 15, 2015)**

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U.S. DEPARTMENT OF LABOR
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In the Matter of
KELLY ZARADNIK,

*Claimant,*

v.

THE DUTRA GROUP, INC., /
SEABRIGHT INSURANCE COMPANY

*Employer/Carrier.*

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OALJ Case No:2012-LHC-00988
OWCP Case No:18-099601

Issue Date: 13 October 2015

Before: William DORSEY,
Administrative Law Judge.

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## ORDER ON MOTION FOR RECONSIDERATION

The Dutra Group, Inc. ("Dutra") has moved for reconsideration[1] of the Decision and Order Awarding Benefits dated August 25, 2015. Kelly Zaradnik was awarded benefits under the Longshore and Harbor Workers' Compensation Act ("Act") for orthopedic and respiratory injuries. Dutra argues that the Decision and Order was incorrect in nearly every respect. I agree with Dutra on only one point: I must address whether Ms. Zaradnik's untimely notice of her injury—outside the 30-day timeframe prescribed by § 12 of the Act—prejudiced Dutra. I find it did not. The outcome of the Decision and Order remains unchanged.

The remainder of Dutra's motion is little more than a restatement of its post-trial brief. It's as if Dutra refiled the post-trial brief with a request to "please read it this time." Having considered the arguments once already, I readdress them briefly.

### I. Ms. Zaradnik Gave Untimely Notice but Her Claim is Unaffected Because Dutra Was Not Prejudiced

#### A. Ms. Zaradnik Became "Aware" of Her Hip Injury on August 29, 2011

Under § 12 of the Act, a claimant must give her employer notice within 30 days of an injury, or within 30 days after the claimant becomes aware of the

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[1] Dutra asked by letter to be allowed a reply brief on the motion, without indicating what it would address or why it would be helpful. No reply was authorized.

relationship between the injury and the employment.[2] The notice of injury usually precedes a claim. Section 12(d) of the Act excuses untimely notice when "the employer or carrier has not been prejudiced by the failure to give such notice."[3]

For the 30-day time limit to begin, the claimant must know the claim is compensable, and that there has been an "impairment of earning power."[4] Ms. Zaradnik gave notice of her injury on October 12, 2011, when she filed her claim. She became aware of her injury for the purposes of § 12 on August 29, 2011—44 days earlier—when Dr. Ezzet explained to her that her hip problems were work-related and that she should end her career as a pile driver.[5]

As the original Decision and Order noted, it remains unclear whether Ms. Zaradnik knew, on August 29, 2011, that her specific employment at Dutra was responsible for any identifiable part of her injury, which would be necessary for her to know that she had a compensable claim under the Act. I now find that Ms. Zaradnik reasonably should have known, by that time, that her work at Dutra contributed to her hip injury, which is enough to establish

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[2] 33 U.S.C. § 912(a) ("Notice of an injury . . . shall be given within thirty days after the date of such injury . . . or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury . . . and the employment.

[3] 33 U.S.C. § 912(d).

[4] *Todd Shipyards Corp. v Allan*, 666 F.2d 399, 401–02 (9th Cir. 1982).

[5] C. Ex.-23 at 20–22.

awareness.[6] Any other conclusion would effectively render § 12 meaningless in many cumulative trauma cases. Claimants typically lack evidence tying cumulative trauma injuries to specific employment until a medical expert states a view on causation, which generally happens well after a claim is filed. By August 29, 2011, Ms. Zaradnik knew she had a hip injury, that her work over the years had made it worse, and that her symptoms had increased at Dutra. She reasonably should have known her work at Dutra contributed to her problem.

August 29, 2011 remains the date of awareness because Dr. Ezzet's remarks that day first implicated an impairment of earning power. Ms. Zaradnik argues she was not aware of the full character, extent, and impact of her injury until January 28, 2012, the day after her final employment ended (at Stone & Webster). I found, in the Original Decision and Order, that Ms. Zaradnik was not disabled within the meaning of the Act until January 28, 2012, because only then did she suffer an actual loss in income. After leaving Dutra, she worked for Stone & Webster twice, and there was no evidence she would have found work earlier, or that she would have found higher paying work but for her injuries. She is, therefore, not entitled to disability benefits until January 28, 2012. I now clarify that she nevertheless suffered an "impairment of earning power" on August 29, 2011, when Dr. Ezzet told her to quit working as a pile driver. Any pile driving thereafter would have been counter to medical advice. A worker often pushes

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[6] *See Jackson v Ingalls Shipbuilding Div, Litton Systems, Inc.*, 15 BRBS 299, 303–05 (1983); *Geisler v Columbia Asbestos Inc.*, 14 BRBS 794, 796 (1981).

herself to perform short-term work that is medically contraindicated and expected to cause long-term harm. In that scenario, the worker cannot reasonably be considered capable of maintaining the work performed. Though Ms. Zaradnik sought pile driving work after August 29, 2011, she was not truly capable of it, and stopped. Her only work after August 29, 2011 was assembling office furniture for Stone & Webster, a job less physically demanding than her normal pile driving work. Her inability to return to her usual work as a pile driver on August 29, 2011 initiated the § 12 time limit.

### B. Dutra Was Not Prejudiced by Receiving Notice on October 12, 2011

Dutra received notice of Ms. Zaradnik's injury 14 days late. Nothing in the record convinces me that two week delay prejudiced Dutra.

Dutra argues that "Claimant deprived Respondent of the opportunity to investigate her claim, determine the extent of disability due to it, if any, and minimize the effects of her injury and promote recovery."[7] That boilerplate argument applies in almost any case of late notice. Dutra's argument is untethered to this claim. Dutra must show how it was actually prejudiced, not raise the theoretical possibility that any delay has a potential for prejudice.

Dutra claims "Claimant did not report an injury with Dutra until after she had worked two subsequent employment periods with Stone & Webster. Both of those subsequent employments caused a worsening,

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[7] Motion for Reconsideration at 5.

and thus changing, of her symptoms and condition."[8] Dutra further asserts "Dr. Greenfield memorializes [the prejudice to Dutra] through his testimony that having the opportunity to evaluate Claimant following her employment with Dutra and prior to her employment with Stone & Webster would have provided more insight into her condition at the time she left Dutra."[9] Dutra focuses on the wrong timeframe for prejudice. Ms. Zaradnik was not required to provide notice of her injury until she became aware of it on August 29, 2011. The only prejudice I consider is prejudice that arose between September 28, 2011 (30 days after awareness) and October 12, 2011 (the date of notice).

Ms. Zaradnik worked at Stone & Webster from October to November 2010,[10] and again from late October 2011 to January 27, 2012.[11] Although I am unable to determine the exact date she began her second period of employment at Stone & Webster,[12] it's clear that little, if any, of that work occurred before she filed her claim on October 12, 2011. Ms. Zaradnik also considered the furniture assembly to be light work.[13] Her employment at Stone & Webster

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[8] Motion for Reconsideration at 6.

[9] Motion for Reconsideration at 6.

[10] C. Ex.-10 at 439–46.

[11] C. Ex.-11 at 447–62; Tr. 322–23.

[12] Dutra's Post-Trial Brief states Ms. Zaradnik started on approximately October 28, 2011. Dutra Post-Trial Brief at 8. Thus, by Dutra's own account of the facts, none of the work occurred during the 14-day delay in notice.

[13] Tr. at 333–34.

did not hinder Dutra's ability to investigate her injury. Furthermore, the nature of cumulative trauma diminishes the necessity of a rapid investigation. There is no event to analyze that might lead a conscientious employer to make changes to enhance safety. Ms. Zaradnik alleges that her injury occurred over her entire career; only a small portion occurred at Dutra. The question of causation hinges more on the conditions of her work at Dutra than on objective changes in her physical condition while employed there.

Similarly, no significant medical treatment took place during the 14-day delay that would affect Dutra's ability to investigate her injury. No proof supports the idea that any measurable change in Ms. Zaradnik's condition took place during that time.

Dutra also proposes no specific medical treatment that, if provided immediately after September 28, 2011, would have altered the course of her injuries. Even if it had, there's no evidence that Dutra rushed to provide any critical treatment after it received notice of her claim on October 12, 2011.

The 14-day delay in notice did Dutra no harm. Ms. Zaradnik's claim is not barred by § 12.

## II. Ms. Zaradnik's Claim Is Not Time Barred by § 13

As in its post-trial brief, Dutra points out that Ms. Zaradnik had knowledge of the relationship between her injuries and her work as a pile driver before she even began her employment with Dutra:[14]

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[14] Motion for Reconsideration at 7–9.

"Claimant knew, per the advisement of physicians, that her pre-Dutra work as a pile driver was aggravating her condition, Claimant worked for Dutra as a pile driver, therefore Claimant must have known that her work with Dutra contributed to her condition."[15] The only real difference between Dutra's motion and its earlier post-trial brief seems to be the new emphasis placed on Ms. Zaradnik's active union membership for many years. Dutra argues "[s]he was not unsophisticated in the consideration of work injuries" and "[f]rom her years of being a union member, she understood that an injury should be reported when it happens."[16]

Ms. Zaradnik couldn't report an injury she didn't know she had. Though Ms. Zaradnik experienced an increase in symptoms at Dutra, she was unaware of the nature and extent of the damage suffered until she was told by a physician.

Furthermore, the date Ms. Zaradnik became aware that her work at Dutra had contributed to her injuries has no bearing on when she first suffered a loss in earning power. Dr. Ezzet was the first doctor to advise her to stop doing pile driving work.[17] August 29, 2011 is, therefore, the earliest she could be found to have suffered a loss in earning capacity.

Section 13 does not bar Ms. Zaradnik's claim.

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[15] Motion for Reconsideration at 8–9 (emphasis removed).

[16] Motion for Reconsideration at 7.

[17] Tr. at 136, 329, 351.

## III. Work at Dutra Aggravated or Accelerated Ms. Zaradnik's Injuries

The original Decision and Order looked to *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* (hereinafter *Price*)[18] for guidance on what constitutes cumulative trauma. Dutra argues that *Price* doesn't apply, because the primary issue the court addressed was how to identify the last responsible employer in a claim against multiple maritime employers. The only employer here is Dutra. *Price* is, nevertheless, instructive on how to identify the responsible employer in a cumulative trauma claim. The Benefits Review Board may disagree with my treatment of the *Price* decision, but that is an issue more appropriate for appeal than reconsideration.

Dutra next argues that, even looking to *Price,* Ms. Zaradnik failed to prove an injury. it claims Ms. Zaradnik showed only that work at Dutra could have contributed to her injuries, not that it did. It then argues that relying on such evidence improperly placed the burden of proof on Dutra rather than Ms. Zaradnik.[19] There is sufficient proof that an injury occurred at Dutra. I decline to repeat the entirety of my findings from the original Decision and Order here. For present purposes, it is sufficient to note that Ms. Zaradnik's hip symptoms increased about 20 to 25 percent during her employment at Dutra,[20] Drs. Stark and Harrison concluded that Ms. Zaradnik's work at Dutra had contributed to her orthopedic

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[18] 339 F.3d 1102 (9th Cir. 2003).

[19] Motion for Reconsideration at 11–16.

[20] Tr. at 56.

injuries,[21] and Dr. Harrison concluded that Ms. Zaradnik's work at Dutra had contributed to her asthma/COPD.[22] This evidence convinced me it was more likely than not Ms. Zaradnik had, in fact, suffered an injury at Dutra, not merely that she could have.

## IV. Ms. Zaradnik's Employment with Stone & Webster Did Not Relieve Dutra of Liability

Dutra argues that Ms. Zaradnik's work for Stone & Webster from October 2011 to January 2012—after Dr. Ezzet told her to stop working as a pile driver—"constituted negligence and/or recklessness sufficient to relieve Dutra from liability."[23] Again, Dutra's motion adds little to its post-trial brief.

To escape liability for a subsequent or intervening injury, Dutra must show that:

1. the later, intervening event caused the entirety of the injury; or
2. the later event was responsible for a provable percentage of the claimant' s condition.[24]

Dutra did neither. Work at Dutra contributed to Zaradnik's injury, and Dutra offered no proof to apportion responsibility between Dutra and Stone & Webster.

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[21] C. Ex.-7 at 390; C. Ex.-20 at 12–13, 18, 54; C. Ex.-21 at 27–28.

[22] C. Ex.-14 at 670M.

[23] Motion for Reconsideration at 16–17.

[24] *Flappert v Marine Corps Exch.*, 31 BRBS 109, 110 (Sept. 17, 1997), *aff'g on recon. en banc* 31 BRBS 13 (March 18, 1997).

I also fail to see how Ms. Zaradnik was reckless or even negligent in continuing to do some work. It's true that Dr. Ezzet had advised her to stop working as a pile driver, but she worked at Stone & Webster assembling office furniture;[25] she did not return to pile driving (even though she may have wanted to). The assembly was easier than her pile driving at Dutra.[26] The work comports with Dr. Ezzet's advice.

Even if the work at Stone & Webster were of the type Dr. Ezzet advised her to avoid, Ms. Zaradnik was not negligent or reckless. She needed income and turned to the skilled work she knew. Her injury had developed slowly, over time. She had no reason to suspect similar employment would cause a sudden, severe change in her condition. And it didn't.

While Ms. Zaradnik agrees with my conclusion on this issue, she too objects with my reasoning. In her opposition to Dutra's motion, she asserts that an employer's liability cannot be reduced by apportioning responsibility for some percentage of a disability to subsequent, non-covered employment. She instead favors some form of all-or-nothing standard for liability. She argues that "to establish an intervening or supervening cause of disability, the employer must prove a subsequent event that overpowers or nullifies the causal connection between the covered injury and the subsequent disability," citing to case law from the Fifth and Seventh Circuits[27] The contours of whatever legal rule is appropriate doesn't matter

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[25] Tr. at 323.

[26] Tr. at 333–34.

[27] Opposition Motion for Reconsideration at 9.

because Dutra made no effort at apportionment. Nevertheless, I regard her contention as inconsistent with the law in the Ninth Circuit.

The BRB stated quite clearly in *Plappert* that, "where the second injury is the result of an intervening cause, the employer is relieved of liability for that portion of the disability attributable to the second injury."[28] In *Plappert*, the claimant's disability had resulted from both the natural progression of the original work injury and a subsequent injury.[29] Without medical evidence to apportion the disability between the work injury and the unrelated injury, there was no "no way to ascertain what portion of claimant's disability [was] attributable to each injury," so the employer paid for the entire disability.[30]

A recent BRB decision (unfortunately unpublished) states the rule more directly: "If there is evidence of record apportioning the claimant's disability between a covered injury and a subsequent non-covered injury, the covered employer is relieved of liability for disability caused by the subsequent non-covered injury."[31]

## V. Ms. Zaradnik Is Entitled to Temporary Total Disability Benefits from January 28, 2012 Forward

Dutra argues there is no evidence to support an award of temporary total disability ("TTD") benefits.

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[28] *Plappert*, 31 BRBS at 110 (emphasis added).

[29] *Plappert*, 31 BRBS at 110.

[30] *Plappert*, 31 BRBS at 110.

[31] *Grimm v. Vortex Marine Constr.*, BRB No. 14-0323, slip op. at 6 (May 29, 2015) (unpublished).

A disability is total when (1) a claimant shows that a work-related injury has left her unable to return to prior employment, and (2) the employer fails to establish suitable alternative employment is available within the geographic area of the claimant's residence.

I found Ms. Zaradnik unable to return to her prior employment as a pile driver based on the opinions of Drs. Ezzet, Stark, and Harrison.[32] She is therefore totally disabled unless Dutra proves suitable alternative employment is available. Dutra seems to suggest that Ms. Zaradnik has suffered no loss in earnings because she worked for Stone & Webster on two occasions, and left those jobs when the projects she was assigned to ended, rather than quitting because of impairments related to her disability. She also testified that she would have continued to work those jobs if they had remained available. Those facts don't matter.

Ms. Zaradnik was advised on August 29, 2011 to cease pile driving work, which she was no longer capable of performing. Her continued search for union or non-union work (whatever she could find) from January to September, 2012[33] was a borne out of her need for income. She gave up work in September 2012, when the Commissioner of Social Security found her totally disabled (under a different statutory definition of disability) and granted social security disability benefits.[34] Her need for income may have

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[32] C. Ex.-23 at 20–21; C. Ex.-3 at 378; C. Ex.-20 at 16, 26; C. Ex.-21 at 21–24, 26, 28–29.

[33] Tr. at 335–37, 368–70.

[34] Tr. at 336–37.

driven her to look for work, but she did no more pile driving work, and Dutra did not prove there was other work she could maintain over time in her physical condition.

As I explained in the original Decision and Order, Ms. Zaradnik is not entitled to disability benefits until January 28, 2012 because that was when she actually lost income. But that doesn't alter the fact she was incapable of work as a pile driver on and after August 29, 2011. Her work assembling furniture at Stone & Webster from late October 2011 to January 27, 2012 wasn't skilled pile driving work. Assembling furniture for three or four months does not prove she was capable of returning to her normal work as a pile driver. No witness said it did.

Nor does the work at Stone & Webster show that suitable alternative employment is (or was) available to Ms. Zaradnik. As Dutra is eager to point out, she left those jobs because she was laid off when the projects ended. Those jobs were no longer available to her. If Dutra wants to prove that similar employment remained available to her after that time, it must produce evidence identifying actual, specific positions that are (or were) available and fall within her work restrictions. It didn't.

## VI. Conclusion

The substance of the August 25, 2015 Order remains unchanged, in so far as the benefits Ms. Zaradnik is entitled to receive.

So Ordered.

Digitally Signed

William Dorsey
Administrative Law Judge

San Francisco, California

**SERVICE SHEET**

Case Name: ZARADNIK_KELLY_V_DUTRA_GROUP_

Case Number: 2012LHC00988

Document Title: **Order Granting Reconsideration**

I hereby certify that a copy of the above-referenced document was sent to the following this 13th day of October, 2015:

Digitally Signed

CECELIA J. MCBRIDE
Legal Assistant

Eric A Dupree, Esq.
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**DOL OWCP CORRESPONDENCE**
**(OCTOBER 22, 2015)**

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U.S. DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMPENSATION PROGRAM
DIVISION OF LONGSHORE AND
HARBOR WORKERS' COMPENSATION
Telephone#: (562) 980-3577; Fax #: (904) 357-4787
400 West Bay St., Suite 63A, Box 28
Jacksonville, FL 32202

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| | |
|---|---|
| OALJ File No.: | 2012 LHC-00988 |
| OWCP File No.: | 18-099601 |
| Injured Employee: | Kelly Zaradnik |
| Date of Injury: | 9/1/2011 |
| Employer: | Dutra Group |

Dutra Group
2350 Kerner Blvd. #200
San Rafael, CA 94901

Dear Gentleperson:

The enclosed **Order Granting Reconsideration** of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order have been dated and filed in the District Director's

Office. Procedures for appealing are described on Page 2 of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits, the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional twenty (20) percent is added to the amount of compensation due if not paid within ten (10) days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, Attn: Clerk of the Board, 200 Constitution Ave. N.W., Room S-5220, P.O. Box 37601, Washington, D.C. 20013.

Sincerely,

/s/ Marco A. Adame, II
District Director
18th Compensation District

Enclosure

Claimant: Kelly Zaradnik
OWCP File No.: 18-099601

A Petition for Reconsideration of a Decision and Order must be filed with the Office of the Administrative Law Judge, who issued the attached Decision and Order, within ten (10) days from the date the District Director files the Decision and Order in his Office.

Any Notice of Appeal shall be sent by mail or otherwise presented to the Clerk of the Benefits Review Board in 200 Constitution Ave. N.W., Room S-5220, P.O. Box 37601, Washington, D.C. 20013, within thirty (30) days from the date upon which the Decision and Order has been filed in the Office of the District Director, or within thirty (30) days from the date final action is taken on a timely-filed Petition for Reconsideration. If a timely Notice of Appeal is filed by a party, any other party may initiate cross-appeal or protective appeal by filing a Notice of Appeal within fourteen (14) days of the date on which the first notice of appeal was filed or within the thirty (30) day period described above, whichever period last expires. A copy shall be served upon the District Director and on all other parties by the party who files a Notice of Appeal. Proof of Service shall be included with the Notice of Appeal.

The date compensation is due is the date the Decision and Order is filed in the Office of the District Director.

**CERTIFICATE OF FILING AND SERVICE**

I certify that on October 22, 2015, the foregoing Order Granting Reconsideration was filed in the Office of the District Director, 18th Compensation District, and a copy was served on the parties and their representatives by the methods indicated below. I have used the last known address of each individual served by certified mail, and I have used the most recent email address(es) supplied by each individual who has validly waived certified mail service and elected electronic service.

**Served by E-mail:**

N/A

**Served by Certified Mail:**

Claimant:
Kelly Zaradnik,
P.O. Box 234222, Encinitas, CA 92023

Employer:
Dutra Group, Inc.,
2350 Kerner Blvd., #200, San Rafael, CA 94901

**Regular Mail:**

Claimant's Representative:
Dupree Law,
Attn: Eric Dupree, Esq.,
1715 Strand Way #203, Coronado, CA 92118

Employer's Representative:
Law Offices of England, Ponticello & St. Clair,
701 "B: Street # 1790, San Diego, CA 92101

Insurance Carrier:
SeaBright Insurance,
P.O. Box 91107, Seattle, WA 98111

Office of Administrative Law Judges,
Attn: William Dorsey, Administrative Law Judge,
90 Seventh Street, Suite 4-800,
San Francisco, CA 94103-1516

/s/ Marco A. Adame, II
District Director
18th Compensation District
U.S. Department of Labor
Office of Workers' Compensation Programs
Long Beach, California

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the District Director files the order in his office.

*If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.*

## STATUTORY AND REGULATORY PROVISIONS

### 33 U.S.C. § 921
### Review of Compensation Orders

**(a) Effectiveness and finality of orders.** A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 [33 USCS § 919], and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

**(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand.**

**(1)** There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

**(2)** For the purpose of carrying out its functions under this Act, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

**(3)** The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

**(4)** The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

**(5)** Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a

decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

**(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments.** Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the

amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

**(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders.** If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

**(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders.** Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted

otherwise than as provided in this section and section 18 [33 USCS § 918].

**20 C.F.R. § 802.205**
**Time for Filing**

**(a)** A notice of appeal, other than a cross-appeal, must be filed within 30 days from the date upon which a decision or order has been filed in the Office of the Deputy Commissioner pursuant to section 19 (e) of the LHWCA or in such other office as may be established in the future (see §§ 702.349 and 725.478 of this title).

**(b)** If a timely notice of appeal is filed by a party, any other party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time prescribed by paragraph (a) of this section, whichever period last expires. In the event that such other party was not properly served with the first notice of appeal, such party may initiate a cross-appeal by filing a notice of appeal within 14 days of the date that service is effected.

**(c)** Failure to file within the period specified in paragraph (a) or (b) of this section (whichever is applicable) shall foreclose all rights to review by the Board with respect to the case or matter in question. Any untimely appeal will be summarily dismissed by the Board for lack of jurisdiction.

**20 C.F.R. § 802.207**
**When a notice of appeal is considered to have been filed in the office of the Clerk of the Board**

**(a)** Date of receipt.

**(1)** Except as otherwise provided in this section, a notice of appeal is considered to have been filed only as of the date it is received in the office of the Clerk of the Board.

**(2)** Notices of appeal submitted to any other agency or subdivision of the Department of Labor or of the U.S. Government or any State government shall be promptly forwarded to the office of the Clerk of the Board. The notice shall be considered filed with the Clerk of the Board as of the date it was received by the other governmental unit if the Board finds that it is in the interest of justice to do so.

**(b)** Date of mailing. If the notice of appeal is sent by mail and the fixing of the date of delivery as the date of filing would result in a loss or impairment of appeal rights, it will be considered to have been filed as of the date of mailing. The date appearing on the U.S. Postal Service postmark (when available and legible) shall be prima facie evidence of the date of mailing. If there is no such postmark or it is not legible, other evidence, such as, but not limited to, certified mail receipts, certificate of service and affidavits, may be used to establish the mailing date.

**20 C.F.R. § 802.208**
**Contents of notice of appeal.**

**(a)** A notice of appeal shall contain the following information:

**(1)** The full name and address of the petitioner.

**(2)** The full name of the injured, disabled, or deceased employee;

**(3)** The full names and addresses of all other parties, including, among others, beneficiaries, employers, coal mine operators, and insurance carriers where appropriate;

**(4)** The case file number which appears on the decision or order of the administrative law judge;

**(5)** The claimant's OWCP file number;

**(6)** The date of filing of the decision or order being appealed;

**(7)** Whether a motion for reconsideration of the decision or order of the administrative law judge has been filed by any party, the date such motion was filed, and whether the administrative law judge has acted on such motion for reconsideration (see § 802.206);

**(8)** The name and address of the attorney or other person, if any, who is representing the petitioner.

**(b)** Paragraph (a) of this section notwithstanding, any written communication which reasonably permits identification of the decision from which an appeal is sought and the parties affected or aggrieved thereby, shall be sufficient notice for purposes of § 802.205.

**(c)** In the event that identification of the case is not possible from the information submitted, the Clerk of the Board shall so notify the petitioner and shall give the petitioner a reasonable time to produce sufficient information to permit identification of the case. For purposes of § 802.205, the notice shall be deemed to have been filed as of the date the insufficient information was received.

**PETITIONER'S OPENING BRIEF IN THE NINTH CIRCUIT (MARCH 1, 2018)**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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THE DUTRA GROUP, INC. and
SEABRIGHT INSURANCE COMPANY,

*Petitioners,*

v.

KELLY ZARADNIK and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM,

*Respondents.*

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No. 17-73093

BRB No. 16-0128
Benefits Review Board

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

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**CORPORATE DISCLOSURE STATEMENT**

The DUTRA Group has no parent corporation. No publicly held corporation owns 10% or more of its stock. Enstar Group, Limited, the shares of which are publicly traded on the NASDAQ exchange, owns 20% of SeaBright Insurance Company.

Date: March 1, 2018

ENGLAND, PONTICELLO & ST. CLAIR

/s/ Renee C. St. Clair
Attorney for Petitioners,
Dutra/Seabright

[ Table of Contents and Table of Authorities Omitted]

**STATEMENT OF JURISDICTION**

Petitioner THE DUTRA GROUP, insured by SEABRIGHT INSURANCE COMPANY, ("DUTRA") seeks review of an Order on Motion for Reconsideration, *En Banc*, of the Benefits Review Board's ("BRB") decision in *Zaradnik v. The Dutra Group, Inc, et al*. which affirmed Administrative Law Judge ("ALJ") William Dorsey's award of benefits to Claimant/Res-

pondent[1] Kelly Zaradnik ("ZARADNIK") under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C §§ 901-950.

The "District Director" of the United States Department of Labor's Office of Workers' Compensation Programs ("OWCP") initially had administrative jurisdiction of ZARADNIK's claim. DUTRA denied liability for ZARADNIK's claimed injuries and the District Director thus referred the claim to the Department of Labor's Office of Administrative Law Judges ("OALJ") to be set for formal hearing. The OALJ and BRB held administrative adjudicatory jurisdiction under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et. seq.* The BRB issued a final order on September 22, 2017. *(ER 18)* Pursuant to 33 U.S.C. § 921(c), this Court has jurisdiction over a final order of the BRB.[2] The Petition for Review was timely filed on November 13, 2017 within 60 days of the BRB's Order issued on September 22, 2017 which concluded the administrative proceeding. *(ER 1; 18)* The briefing now issues pursuant to the briefing schedule and Orders.

## STATEMENT OF ISSUES

1. Whether the BRB committed legal error and/or adhered to the substantial evidence standard by upholding the ALJ's finding that DUTRA was not

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[1] Respondent ZARADNIK is referred to as "Claimant" throughout the trial level proceedings and post-trial briefing.

[2] On February 21, 2018, Respondent OWCP filed a Motion to Dismiss for Lack of Jurisdiction. DUTRA's opposition to the motion is being filed concurrently herewith.

prejudiced by ZARADNIK's untimely notice and untimely claim filing.

2. Whether the BRB committed legal error and/or adhered to the substantial evidence standard when it upheld the ALJ's Order granting benefits despite the ALJ's reliance on the last responsible employer case of *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. (Price)* 339 F.3d 1102 (9th Cir. 2003) *cert. denied* 543 U.S. 940 (2004) as the legal standard for determining causation of an alleged industrial injury-even though this case does not involve an admitted injury with multiple employer/carriers.

3. Whether the BRB committed legal error and/or adhered to the substantial evidence standard when it upheld the ALJ's finding that ZARADNIK's 48 days of work at DUTRA caused or aggravated any orthopedic and pulmonary conditions.

4. Whether the BRB committed legal error and/or whether it adhered to the substantial evidence standard when it upheld the ALJ's decision to reject DUTRA's defense that ZARADNIK's Stone & Webster employment was sole cause for any injury(ies) or inability to work.

## INTRODUCTION

ZARADNIK alleges orthopedic and pulmonary injuries arising out of and in the course of her 48 day employment with DUTRA under the auspices of the LHWCA. The claim was filed more than one year after the employment ended, which served as DUTRA's first notice of injury. The date of awareness determination and ruling of no prejudice by late notice were both legal error and not supported by substantial evi-

dence. The decision to reject DUTRA's defense that ZARADNIK's subsequent work caused the entirety of her injury or inability to work was also legal error and not supported by substantial evidence.

With no evidence to prove actual injury at DUTRA, ZARADNIK pleads cumulative trauma "could have" resulted from her years of maritime employment. However, pleading "cumulative trauma" is not the legal equivalent of *proving* industrial cumulative trauma occurred with employer DUTRA as a result of the 48 days she worked there. Expert testimony lacking foundation shows only that working conditions *could* have or *may* have contributed to a purported injury, but does not amount to substantial evidence of *actual* injury. Self-serving statements as to the brief period working for DUTRA, from a witness found to have credibility issues, with no other evidence of injury, worsening, aggravation, contribution, or even corroborated symptoms during or shortly after the stint with DUTRA does not amount to substantial evidence.

At the heart of this Petition is the question of what constitutes actual compensable injury in a single employer disputed liability case and what satisfies the claimant's burden of proof once the employer rebuts the 33 U.S.C. § 920a ("920(a)") presumption. The ALJ and BRB rulings granting benefits arise from legal error, are not supported by substantial evidence, and should not stand.

The ALJ evaluated the claim and the record using an erroneous legal framework and standard inapplicable to the facts of this case which impermissibly *presumes* injury. The ALJ erred in evaluating the evidence under the last responsible

employer framework, which has no place in this one employer disputed injury matter. The evaluation is fatally flawed and the legal error cannot be undone by back stepping. Nothing set forth in *Price* relieves ZARADNIK of her burden to prove work place injury and actual causation. The last responsible employer rule was created by the courts to mitigate the difficulties and delays inherent in trying to apportion liability in an admitted injury scenario among several potentially responsible employers. The question of which employer is responsible for the admitted industrial injury condition is a far cry from the facts and issue in our present case. Simply walking onto DUTRA's job site with a tool belt and contending that work performed there "could have" caused injury, does not meet the worker's burden of proving actual injury. DUTRA is not responsible for the natural progression of ZARADNIK'S pre-existing conditions nor is the burden shifted to DUTRA to disprove anything after it rebutted the 920(a) presumption. The ALJ's Decision and Order is not supported by substantial evidence and it was error for the BRB to affirm it.

## STATEMENT OF FACTS

ZARADNIK alleged cumulative trauma to her bilateral hips, back, bilateral upper extremities, bilateral lower extremities, and lungs due to 48 days of employment at DUTRA from July 23, 2010 to September 20, 2010. *(ER 354-56)*. She has a documented pre-existing history of orthopedic injuries, respiratory conditions and injuries, illnesses, issues, exposures, and medical treatment that all pre-date her employment with DUTRA. She neither sought

nor received any medical care or attention alleged to be due to the DUTRA employment during the period of her employment with DUTRA, or during the periods of employment with a subsequent employer, Stone and Webster.

**Lifetime Smoking History**

ZARADNIK is "a high-risk individual for certainly significant respiratory insufficiency." *(ER 374)*. She has been diagnosed with asthma, bronchitis, and early emphysema. *(ER 267; 394; 396)*. She testified she started smoking cigarettes in her "early 20s". *(ER 267)*. Her medical records, note she has been smoking since she was 14 years old. *(ER 371; 381)*. At its height, ZARADNIK smoked up to two packs per day. *(ER 267)*. She is described as a "heavy smoker, already accumulating 45 pack years." *(ER 378)*. She uniformly and repeatedly was advised by her doctors to stop smoking and that her breathing conditions could be life threatening. *(ER 186; 374-375)*.

**Prior Pulmonary Medications**

After suffering an asthma attack and hospitalization in 2000, ZARADNIK used medication and herbal supplements for her lungs/asthma, including steroids at least part of each year from 2000-2012. *(ER 189; 191-192; 194; 268; 369)*. Since 2000, ZARADNIK carried with her some type of breathing apparatus, such as Albuterol, everywhere she went. *(ER 196-197)*.

**Prior Injurious Occupational Lung Exposures**

In 1992, ZARADNIK suffered galvanized poisoning from inhaling the vapors cutting galvanized steel

and was provided medical treatment. *(ER 268-270).* She was in weakened condition for a month after the galvanized poisoning. *(ER 270).*

In 2000, ZARADNIK was sandblasting silica without use of proper equipment and was hospitalized for approximately one week. *(ER 185; 250).*

In 2005, ZARADNIK was having problems breathing after working with "spun glass." *(ER 251; 379-382).* She was admitted to the hospital for one to two weeks due to "[o]ccupational lung exposure with silica and fiberglass, probably causing a bronchitis." *(ER 252; 383).* She underwent "intensive broncho-dilator therapy." *(ER 384).* The doctor discussed with ZARADNIK "changing jobs to avoid toxic exposures." *(ER 385).* She was also advised to use a respirator. *(ER 380).*

In 2006, ZARADNIK presented "almost covered head to toe in dirt" with an exacerbation for three weeks, possibly precipitated by her job working with cement. *(ER 376*). Again in 2006, she presented to the doctor's office "covered in head to toe in dirt." *(ER 374).*

In 2008, she reported increased tightness and wheezing after work exposure to metal fumes and treated woods. *(ER 372).* She was diagnosed with asthma and was again advised to wear respiratory protection. *(ER 373).* In 2008, she was diagnosed with "[a]sthma, likely exacerbated by her job inhaling concrete dust." *(ER 371).*

In 2010, during and immediately after her work with DUTRA, there are no medical records of pulmonary injury, exacerbation, flare-up, aggravation, or medical treatment.

**Prior Hip Condition**

ZARADNIK has had hip pain since at least 2007 and was diagnosed with bilateral hip osteoarthritis prior to DUTRA. *(ER 229; 276; 368).* In 2010, ZARADNIK drove an old truck with a clutch 4 hours up and back to Big Bear for work, which resulted in back pain, left side sciatica, and left hip pain. *(ER 198; 279; 367).* She had pain in the left hip and hip flexor area for "about the last year" prior to DUTRA. *(ER 366).* In July 2010, before starting at DUTRA, ZARADNIK advised doctors that she was having back and hip pain, in part, due to the lifting on the job. *(ER 198).*

ZARADNIK believed the construction work she was doing before her employment with DUTRA was aggravating her hip, and doctors advised that the work she was doing may be aggravating her hip. (*ER 229-230).* ZARADNIK last worked in January 2012. She contends her hip has been continually getting worse whether working or not. *(ER 240-241; 258-259).*

**DUTRA Employment**

ZARADNIK was hired as a pile driver to work in the yard at DUTRA's Long Beach/San Pedro job site. *(ER 175-176.1).* The jobsite was "wide open" and all of

ZARADNIK's work was done in the open air. *(ER 160; 177; 260).* Her foreman in the yard was her boyfriend, Jack Kellison.[3] *(ER 57; 202-203).* Mr.

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[3] Jack Kellison, also filed a post-layoff/ post retirement claim alleging respiratory and orthopedic cumulative trauma injury from employment with DUTRA. *(ER 232-233; 266).* Like ZARADNIK, Kellison did not report an injury while at DUTRA.

Kellison was responsible for assigning ZARADNIK work. *(ER 204)*. ZARADNIK worked at DUTRA for parts of 48 days during the period July 23, 2010 to September 20, 2010 until the entire crew was laid off at end of the job. *(ER 256)*. ZARADNIK would have continued working for DUTRA, but for the job end layoff. *(ER 207)*. She looked for other union pile driving/ carpenter jobs after DUTRA. *(ER 207)*.

**Stone & Webster**

Post-DUTRA, ZARADNIK worked two periods of employment with Stone & Webster; in total working more than twice as many days at Stone & Webster than at DUTRA. *(ER 302-303)*. Two weeks after DUTRA, ZARADNIK obtained a union position at Stone & Webster[4], where she was the lead person from October 6, 2010 until November 18, 2010. *(ER 206; 302-308; 331-337)*. She did concrete and form work eight hours per day, almost the entire day either standing

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*(ER 233)*. They retained the same attorney, same medical experts, and made the same allegation that employment at DUTRA *could* have contributed to injury. In *Kellison*, the ALJ found no injury and explained, " . . . Claimant needs to support an inference from the proposition that his injury could have been caused, in part, by his work at DUTRA to the proposition that his injury in fact was caused, in part, by his work at DUTRA" The ALJ found Kellison did not carry his burden of proof. Kellison filed a Petition for Review in the 9th Circuit Court of Appeal which is Case No. 17-71143, Benefits Review Board No. 16-0242.

[4] Stone & Webster is a non-maritime employer and not a party to this longshore case. ZARADNIK testified to increased back, hip, and hand pain while working for Stone & Webster. *(ER 212; 235-236)*. She did not file a California state workers' compensation claim with Stone & Webster.

or squatting or kneeling. *(ER 208-209; 213).* She would occasionally load and unload trucks. *(ER 209.1).* Physically, ZARADNIK worked in a "bent-over position", occasionally kneeled and squatted, swung a sledgehammer, used a pry bar and cat's claw, operated skill saws, sawzals, drills, and an 18-inch chain saw. *(ER 208; 211).* She used her hands all day on this job and all of the tools caused her problems with her hands. *(ER 209-209.1; 213).* Because of pain in her back and hip, ZARADNIK worked in a "lunge position" with a leg behind her and bent at the waist. *(ER 211-212).* ZARADNIK admits that the work at Stone & Webster increased pain in her back and hip. *(ER 212).*

Despite the increased pain in her back, hip, and hands, ZARADNIK would have continued working with Stone & Webster if the particular job had not ended. *(ER 214).* After leaving Stone & Webster for this first time, she continued to look for pile driving and carpentry work. *(ER 215).*

ZARADNIK worked with Stone & Webster again from October 26, 2011 until January 7, 2012, during which time she assembled furniture up to 11 hours per day. *(ER 216-217).* The position required sitting, kneeling, standing, lying on her back, bending "quite a bit", and the use of hand tools. *(ER 217-222).* She "used to have [her] little cheating ways" to position her legs and prop up the furniture she was working on. She could not sit "normally" with her legs crossed. *(ER 221).* On occasion ZARADNIK would load, unload, and transport dollies of furniture, cables, and hardware. *(ER 217-218).* The majority of the day, she used various hand tools, including screw guns, manual tools, nut drivers, and pry bars. *(ER 222*). It was a "very hand-

intensive job." *(ER 222)*. She had to change positions because of pain in her hip, back and because of her hands locking up." *(ER 221)*. She felt an increase in back and hip pain when she was working for Stone & Webster. *(ER 212)*. After working up to an 11 hour day, ZARADNIK felt worse at the end of the day. *(ER 221; 235-236)*.

ZARADNIK continued to work with Stone & Webster until she and other employees were laid off on or about January 27, 2012. *(ER 223; 302-303; 309)*. But for the layoff, she would have continued working with Stone & Webster. *(ER 223)*. From January 2012 until the beginning of September 2012, she continued looking for work, which included positions as a union carpenter and pile driver. (*ER 224-227; 242-243)*.

**Social Security and Current Benefits/Income**

ZARADNIK was approved for Social Security Disability and retired in September 2012. *(ER 224; 226-227)*. At the time of the ALJ hearing she was receiving $4,300-$4,400 per month in Social Security Disability and pension benefits. *(ER 261-262)*. Her income of $45,000 to $50,000 per year is the same *or more* than she earned during her periods of employment in the past 5-7 years. *(ER 263-264)*. She was scheduled to become eligible for Medicare in March 2013. *(ER 235)*.

**Litigation and Credibility**

ALJ Dorsey rejected ZARADNIK's trial testimony on her smoking history, alcohol use, and illicit drug use. *(ER 55)*. He determined that ZARADNIK had "an incentive in this case to downplay" the effect of

the smoking in this case. *(ER 55)*. He was convinced that she "drank substantially more at times" than she disclosed in this case. *(ER 55)*. He acknowledged that the medical records contradicted her testimony regarding drug use, found she engaged in illicit drug use more recently than high school and he dismissed her claims that her medical records were erroneous. *(ER 56-57)*. As to her working conditions, the ALJ found that ZARADNIK "overstated her exposure to diesel fumes" and found her testimony as to the proximity and duration of work near generators "implausible". *(ER 70)*.

**PROCEDURAL HISTORY**

The parties proceeded to Trial before ALJ Russell Pulver on December 14, 2012 and January 25, 2103. ZARADNIK was the only witness at trial. Testimony was given via post–trial depositions due to witness location and/or availability by DUTRA employees (Lindsey and O'Sullivan), DUTRA medical experts (Dr. Richard Greenfield and Dr. Daniel Bressler), and ZARADNIK's medical experts, (Dr. James Stark and Dr. Robert Harrison). ALJ Pulver retired before issuing his trial decision. The case was thus decided on the written record by ALJ William Dorsey, who did not view or witness ZARADNIK'S testimony and demeanor.

On August 25, 2015 ALJ Dorsey issued a Decision and Order Granting Benefits finding DUTRA responsible for ZARADNIK's alleged orthopedic and respiratory conditions. *(ER 53)*. DUTRA moved for reconsideration. ALJ Dorsey granted the Motion in part, but left unaltered the award of benefits. *(ER 43)*. DUTRA petitioned for Review to the BRB. The

BRB affirmed the ALJ's findings of fact, conclusions of law and benefits awarded, with a dissenting opinion. *(ER 25).* DUTRA filed a Motion for Reconsideration of the BRB's December 9, 2016 decision. The BRB again affirmed the ALJ's findings and award of benefits, with a dissenting opinion. *(ER 18).* Pursuant to section 921(c)[5], DUTRA petitions this Court for review of the BRB's Order.

## STATEMENT OF LEGAL FRAMEWORK

DUTRA sets forth the following brief synopsis of the legal framework at issue in this LHWCA workplace injury case.

### 1. The LHWCA Is A Workers' Compensation System, Not An Insurance Policy.

The LHWCA was enacted to create a federal workers' compensation system for certain maritime employments. (*U.S. Industries/Federal Sheet Metal, Inc. et. al. v. Director, OWCP*, 455 U.S. 608, 615 fn. 10 (1982)). As explained by the United States Supreme Court, "Workmen's compensation legislation has never been intended to provide life or disability insurance for covered employees. The required connection between the death or disability and employment distinguishes the workmen's compensation program from such an insurance program, and the separate requirements that the injury arises out of and in the course employment are the means for assuring, to the extent possible, that the work connection is proved." (*Id.*, *citing* W. Dodd, Administration of Workmen's Com-

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[5] Unless otherwise noted, all statutory cites are within the LHWCA, 33 U.S.C. § 901, et. Seq.

pensation 681 (1936); *Cudahy Packing Co. v. Parramore*, 263 U.S. 418, 422-424 (1923)). Consistent therewith, the fundamental tenet of "work connection" is embedded in the statutory definition of "injury" under the LHWCA. 33 U.S.C. § 902(2).

**2. Defining "Injury"**

Section 902(2) of the LHWCA defines an "injury" as an:

> accidental injury or death *arising out of and in the course of employment*, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accident injury . . . (*Emphasis added*) 33 U.S.C. § 902(2).

Injuries can be the result of a continuing industrial exposure, occupational diseases arising from a peculiar or increased degree of exposure to harmful conditions of the employment, or a work-related aggravation. (*See Bath Iron Works Corp. v. White,* 584 F.2d 569 (1st Cir. 1978); *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 160 (5th Cir. 1997); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) *aff'd sub nom., Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981)).

**3. Legal Framework for Causation and Section 920(a).**

Whether an injury is compensable is a three-step process. The claimant has the burden of establishing a *prima facie* case of compensability. She must demonstrate that she sustained a physical harm and prove

that working conditions existed, or an accident occurred, which could have caused the harm. (*Graham v. Newport News Shipbuilding & Dry Dock Co.,* 13 BRBS 336, 338 (1981); *U.S. Industries/Federal Sheet Metal, Inc., supra*, at p.616*).* The claimant must establish each element of her *prima facia* case by affirmative proof. (*Kooley v. Marine Indus. Northwest,* 22 BRBS 142 (1989); *see also Director OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994)). Once the claimant establishes the two elements of her *prima facie* case, she may invoke the Section 20(a) presumption that links the harm suffered with the claimant's employment ("step-one"). (*Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981)*; Hamptom v. Bethlehem Steel Corp.,* 24 BRBS 141, 143 (1990)).

If claimant successfully invokes the section 20(a) presumption, the employer can rebut the presumption with substantial countervailing evidence showing a lack of industrial causation ("step-two"). *(Hawaii Stevedores Inc. v. Ogawa*, 608 F.3d 642, 651 (9th Cir. 2010)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. (*Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 149 (1997), *quoting Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). The substantial evidence standard is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence." (*Ortco Contractors, Inc. v. Charpenier,* 332 F.3d 283, 287 (5th Cir. 2003)).

It is well established that on rebuttal the burden is one of "production". *(Hawaii Stevedores, Inc., supra*, at p.651*).* The employer satisfies its burden by producing substantial evidence that is "specific and comprehensive enough to sever the potential connection

between the disability and the work environment." *(Id.)*. In other words, "the ALJ's task is to decide, as a legal matter, whether the employer submitted evidence that could satisfy a reasonable fact finder that the claimant's injury was not work-related." *(Id.)*. The employer is not required to prove that any specific non-industrial agency caused the injury or to positively "rule out" employment as the source. Under the LHWCA, "the hurdle is far lower." (*O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *Webb v. Corson & Gruman*, 14 BRBS 444 (1981); *see also Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999); *Lennon v. Waterfront Transport*, 20 F.3d 658, 662 (5th Cir. 1994)).

If an employer successfully rebuts the presumption, it "disappears" or "falls out of the case" and the issue of causation must be resolved on the evidence as a whole. ("step-three"). (*Hawaii Stevedores, Inc.*, *supra*, at p.651; *Kier v. Bethlehem Steel Corp.,* 16 BRBS 128, 129 (1984); *Devine v. Atlantic Container Lines, G.I.E.*, 25 BRBS 15, 21 (1991); *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935)). In this case the ALJ correctly found that DUTRA rebutted the § 920(a) presumption of causation; as such the ALJ was obligated weigh the evidence as a whole with ZARADNIK bearing the burden of proof.

**4. The Claimant Bears The Ultimate Burden Of Persuasion.**

The Administrative Procedure Act (APA), 5 U.S.C. 556(d) applies to adjudications under the LHWCA. Section 7(c) of the APA states that, except as otherwise provided by statutes, the proponent of a rule or order has the burden of proof. Once, as here, the Section

920(a) presumption is rebutted and drops out of the case, the ALJ must weigh all of the evidence relevant to the causation issue, with the claimant bearing the burden of proving that his injuries are work-related. (*See Hawaii Stevedores, Inc., supra; Duhagon, supra; Greenwich Collieries, supra,* at p. 271.).

In "step-three" of the causation analysis, there is no shifting of burden to the employer to *disprove* industrial injury, nor any presumptions in favor of the claimant. In fact, the Supreme Court has determined that the so-called "true doubt rule" that was previously used to resolve factual doubt in favor of Longshore claimants in cases where the evidence was evenly balanced, violates Section 7(c) of the APA, which specifies that the proponent of a position has the burden of proof and, thus, the burden of persuasion. (*Greenwich Collieries*, *supra*, at p.281). Ultimately a claimant must show by the preponderance of the evidence that he or she suffered an industrial injury within the meaning of the Act. It is at this step that the ALJ and BRB erred.

## STANDARD OF REVIEW

This Court reviews a BRB decision for errors of law and adherence to the substantial evidence standard, which governs the BRB's review of the ALJ's factual determinations. (*Alcala v. Director, OWCP*, 141 F.3d 942, 944 (9th Cir. 1998)). As set forth by this Court in *General Constr. Co. v. Castro,* when reviewing a decision of the BRB under the LHWCA, "we review BRB decisions 'for errors of law and for adherence to the substantial evidence standard.' (*cites omitted*) The BRB must accept the ALJ's factual findings if they are supported by substantial evi-

dence. (*cites omitted*) 'Like the [BRB], this court cannot substitute its views for the ALJ's views.'" (*General Constr. Co. v. Castro* 401 F.3d 963 (9th Cir. 2017) citing *Container Stevedoring Co. v. Dir., OWCP*, 935 F.2d 1544, 1546 (9th Cir. 1991)). The appellate court "is to review the decisions of the Benefits Review Board for errors of law, and to make certain that the BRB adhered to its scope of review provision." (*Sun Shipbuilding & Dry Dock Co. v. McCabe*, 593 F.2d 234, 237 (3rd Cir. 1979)). "An appellate court's review of the Benefits Review Board (BRB) is limited in scope to considering errors of law and making certain that the BRB adheres to its statutory standard of review of factual determinations, that is, whether the administrative law judge's findings of fact are supported by substantial evidence and are consistent with the law." (*Ortco Contrs., Inc., supra*, at p. 287 (5th Cir. 2003)). "On questions of law, including interpretations of the LHWCA," the Court of Appeal exercises *de novo* review. *(Gilliland v. E.J. Bartells Co., Inc., 270 F.3d 1259, 1261 (9th Cir. 2001)*.

## SUMMARY OF ARGUMENT

The ALJ's assertion that "the dispute over causation boils down to a disagreement about the definition of injury under the Act" highlights uncertainty as to injury standards, and willingness to entertain alternative causation requirements, which ultimately resulted in the erroneous legal analysis and standards used. *(ER 95).* This case provides the vehicle to clarify once and for all that there are not ever changing or unknowable causation standards that can be manipulated to fit different matters. Although there should be no such confusion as to what constitutes

injury as the LHWCA and case law have clearly set forth the definition and the requisites for proving injury in disputed liability, disputed injury, one-employer litigation, as shown here, without more definitive guidance, the opportunity to utilize an incorrect standard and call it a "dispute over causation" will remain.

The question of what constitutes substantial evidence of injury and whether speculation and conjecture alone is sufficient to support a claim for cumulative trauma is one that is ripe to be addressed here. The ALJ's misapplication of the appropriate legal standard and the BRB's affirmation results in reversible legal error. As such, in utilizing the correct legal standard without speculation on the current record, the finding of industrial injury should be reversed and benefits denied.

## ARGUMENT

### I. THE ALJ AND BRB ERRED IN APPLYING AN INCORRECT LEGAL STANDARD FOR INDUSTRIAL CAUSATION.

#### A. Genesis of the Last Responsible Employer Rule.

The "last responsible employer doctrine" was established to mitigate the difficulties and delays inherent in trying to apportion liability among numerous maritime employers for disability due to cumulative exposure in occupational disease cases.[6]

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[6] The rule of Last Responsible Employer was established in the case of *Travelers Insurance Company v. Cardillo*, 225 F.2d 137 (2nd Cir.) cert. denied 350 U.S. 913 (1955) While *Cardillo* was a

The last maritime employer to have exposed the worker to "injurious stimuli" prior to the date of injury is held liable for the entire resulting disability. The determination of the "responsible employer" evolved to include cumulative trauma where allocation depends on whether the claimant's disability is the result of the "natural progression" of a work related injury or an "aggravation" of that injury. If the disability results from the natural progression of an initial injury, then the employer at the time of that initial injury is the "responsible employer". If the conditions of employment with a subsequent employer aggravated, accelerated, or combined with the earlier injury, then the employer at the time of the second injury is liable for the entire resulting disability. (*Cordero v. Triple A Mach.* Shop, 580 F.2d 1331 (9th Cir. 1978) cert. denied, 440 U.S. 911 (1979)).

### B. It Was Legal Error for The ALJ to Employ *Price* and Other Last Responsible Employer Cases as The Legal Standard for Assessing Causation.

The ALJ's decision to follow the *Price* last responsible employer policy and standard for an allocation of liability among multiple employers in this single employer disputed liability matter is quintessential legal error. This legal error cannot be undone, justified or explained away by post trial and post ruling

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hearing loss case, it was later applied to occupational disease cases. In occupational disease cases, exposure which has the potential to cause disease can result in the assignment of liability. As used in traumatic injury cases there must be an aggravation, acceleration, or contribution to an existing impairment, constituting a new injury.

rationalization or speculative reasoning as to what the ALJ actually intended so as to uphold the award of benefits. The ALJ's evaluation of the facts, evidence, testimony and trial arguments were tainted by incorrect legal scrutiny and the end result remains reversible legal error.

The only cases discussed by the ALJ in this single employer, single injury case under the heading "Legal Standard" are multiple employer, last responsible employer cases, most notably *Price. (ER 96-97).* On Motion for Reconsideration the ALJ acknowledged DUTRA is the only employer in this case, yet wrongly reaffirmed his legal reliance on the *Price* framework stating "*Price* is, nevertheless, instructive on how to identify the responsible employer in a cumulative trauma claim. The Benefits Review Board may disagree with my treatment of the *Price* decision, but that is an issue more appropriate for appeal than reconsideration." *(ER 47-48)*. The ALJ, in suggesting that the BRB may disagree with whether *Price* is instructive to our case, affirms either his uncertainty as to the standard for injury to be used, or his uncertainty as to creating a new and expanded scope of industrial injury as suggested by ZARADNIK. The ALJ seemingly wanted the issue punted to the BRB. The BRB, in lieu of tackling the legal issue of what standard for injury causation should apply, assumed role of cobbler and mightily attempted to shoehorn the Decision into existing law by making assumptions that are simply at odds with the record. The cobbled together result is an ill-fitting shoe and improper legal framework.

In inferring what the ALJ "thought", the BRB assumed those things necessary to allow the Decision

to be upheld without having to address whether the Decision is legally correct when properly applying the correct injury standard to the *actual* record. However, one could just as easily infer and assume the opposite, *i.e.* that the ALJ searched for a standard that would allow him to make an industrial injury finding without a legal footing. The inferences were without foundation and just by virtue of having to infer or speculate what the ALJ meant demonstrates in and of itself the error in the BRB Decision.

On appeal, rather than address the legal error, the BRB declared without further explanation: "the administrative law judge's citation of *Price* was for the purpose of recognizing that a work-related aggravation of an underlying condition constitutes an "injury" under the Act". *(ER 32).* While there is no dispute with the proposition that aggravation of an underlying condition is an injury, how does one know the ALJ's purpose in crafting a Decision if the Decision itself does not indicate the same within? One of course would not know the ALJ's purpose, yet the BRB affirmed the decision in any event. *(ER 31-32).* It certainly does explain why the ALJ anticipated disagreement by the Board with his reliance on *Price*.

Again, on DUTRA's Motion for Reconsideration *En Banc*, the BRB found no error with the ALJ's evaluation of causation under *Price*. *(ER 18-20).* This again was legal error. Moreover, the BRB's determination that the ALJ properly applied section 920(a) to find causation is not supported by substantial evidence nor is the determination that the ALJ did not "err in addressing causation in this case" for which it cites to *Hawaii Stevedores Inc., supra,* and presumably the aggravation rule espoused therein. The BRB's

contention that "both the Board's original decision (*cites omitted*) and this order elucidate the applicable causation law in a single covered employer case" is flawed. *(ER 19)*. The ALJ's legal analysis stalls at step 2 of the section 920(a) evaluation and the burden of proof is wrongly shifted to DUTRA to disprove injury or apparently disprove the irrelevant issue that it was the last responsible employer. The ALJ evaluated the evidence using an incorrect legal standard—it is error to try to put the pieces back together when the framework used is flawed and broken.

The ALJ treatment of *Price* is schizophrenic. In one paragraph he cites to the rationale behind the development of the last responsible employer rule:

> From the inception of the last responsible employer rule in *Travelers Ins. Co v. Cardillo*, the appellate court understood that the rule would leave an employer and its carrier "liable for the full amount recoverable, even if the length of employment was so slight, that, medically, the injury would, in all probability, not be attributable to that last employment. *(ER 97)*

In the next sentence, the ALJ states, "Ms. Zaradnik's case does not involve the same last employer issue as in *Price*; DUTRA is the only maritime employer involved." (*ER 97*) Why then is *Price* or *Cardillo* any part of this legal opinion or any part of the ALJ's legal evaluation of the facts? Why discuss the unfairness inherent in the last responsible employer framework at all unless the ALJ intended to utilize at least some portion of it in this matter? Frankly, unlike the BRB, we really need not guess at the ALJ's "thought" or intent or motive—the Decision

itself states "Legal Standard" and then goes on to address *Price*. That is the standard stated and applied. The ALJ's reliance on the last responsible employer rule permeates the legal analysis, the opinion and clearly influenced the award of benefits. To assert otherwise is not only speculation, but simply error.

### C. *Price* Is Factually Distinguishable and Legally Inapplicable to this Case.

Even under the BRB's claimed narrowed reasoning that *Price* is only "instructive on what constitutes aggravation of cumulative trauma", *Price* is inapplicable. Importantly, in *Price* industrial injury causation was not at issue as it is in this case-the claimant Price had an established work related knee injury and was scheduled for surgery. *In that case,* the Court determined the evidence presented supported the ALJ's finding that his work with Metropolitan "caused some minor but permanent increase in the extent of his disability and increased his need for knee surgery." (*Price*, at p.1105). Price testified to an actual work condition that caused him actual aggravation, which was found injurious by physicians based on his condition—pressing on the gas pedal with this injured knee and mounting and dismounting the forklift.

In contrast, in this case, ZARADNIK failed to present credible substantial evidence of actual injury, including aggravation. Due to the absence of substantial evidence to support injury, ZARADNIK fixates on a novel legal theory which expands the definition of injury and avoids proof (*Price),* going all in with this purported linkage due to the fact that DUTRA's expert Dr. Greenfield was also an expert in the *Price*

case. That Dr. Greenfield opined one way on a different case with different facts has no bearing on the case at hand. That the ALJ ignored Dr. Greenfield's testimony in this case and the noted factual and medical differences from *Price* and was in some manner swayed by argument based on Dr. Greenfield's work *on an unrelated matter* to find injury here, is legal error. *Price* does not stand for the legal proposition that in all cases one day of work is always enough to prove injury[7] In discussing *Price* as the "legal standard", the ALJ cites to this testimony: "Although claimant only worked for the last employer one day, it was enough for that employer to be responsible for the entirety of the claimant's injury under the last responsible employer rule." *(ER 96-97).* This again highlights the error in the ALJ's reasoning and order and affirms his evaluation using the incorrect last responsible employer standard to address causation.

Most relevantly, ZARADNIK produced no evidence of increased disability (from its pre-DUTRA level) or evidence of increased need for treatment (from her pre-DUTRA level), arising from her work at DUTRA. Instead, she asserts only: "I believe I was injured due to the work, but not the work at that particular job," and "just the whole lifetime of work." *(ER 300).* Rather than focus on the 48 days of work at DUTRA, during which ZARADNIK did not report an injury, did not complain of symptoms, lost no time from work, sought no medical treatment, required no accommodation and would have continued working but for

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[7] DUTRA concurs that one day "could" cause injury, but that proof is needed to determine if it DID cause injury. The ALJ's analysis conflates the injurious day in *Price* with one day of work equaling injury when alleged that events could have caused injury.

layoff, and which work she sought again post layoff, she looks only to her entire "long career" as proof of an injury that must have occurred. This is not enough. DUTRA has no duty to defend ZARADNIK'S career, but only their period of employment. To indicate otherwise is to deny DUTRA of its due process rights and create an untenable situation wherein an employer becomes responsible not for their own work experience, but for the safety or lack thereof of other employers. There is a reason ZARADNIK indicated that she felt injury and pain from a career, rather than from work at DUTRA-because she had and has no proof of injury with DUTRA. The ALJ and BRB Decisions have removed proof from injury claims and should not be allowed to stand.

*Price* created a framework to be used as a means to efficiently administer benefits and allocate responsibility among multiple responsible employers. The last responsible employer rule has never been held as a substitute for proving injury in the first place (*"actually caused", as opposed to "could have" caused*), and certainly does not stand for the proposition that the necessity for proof of industrial injury has been removed when a cumulative trauma or aggravation has been alleged, which is unfortunately what the BRB has allowed to stand by tortuously affirming the ALJ Decision.

## II. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE FINDING OF INDUSTRIAL INJURY WITH DUTRA *EVEN* IF THE INCORRECT *PRICE* STANDARD IS USED.

A claimant must come forward with both factual and medical evidence to establish injury by a

preponderance of the substantial evidence. "Substantial evidence" is defined as "more than a mere scintilla" or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (*Richardson v. Percales*, 402 U.S. 389, 401 (1971); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Conoco, Inc. v. Director, OWCP* [*Prewitt*], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); *Lockheed Shipbuilding v. Director*, OWCP, 951 F.2d 1143, 1145, 25 BRBS 85, 87 (CRT) (9th Cir. 1991*)*; *Abosso v. D.C. Transit Sys.,* 7 BRBS 47, 50 (1977); *Avignone Freres Inc. v. Cardillo*, 117 F.2d 385, 386 (D.C. Cir. 1940).)

In *Price* there was "some minor but permanent" worsening. (*Price*, at p.1105). ZARADNIK proves no such worsening however minor and the BRB wrongly did not require it. The BRB should have called to task the ALJ language that: "the question of causation hinges more on the conditions of her work at DUTRA than on objective changes in her physical condition while employed there." *(ER 46)*. The question of causation certainly does not hinge on mainly working conditions. Under this faulty logic, difficult or arduous work conditions would be enough to prove injury—*even* if a worker had no change in their physical or psychological condition!

The ALJ (and BRB) erred in premising and allowing to stand the Decision based on speculation and guesswork. Neither the facts nor the medical evidence are substantial or sufficient to satisfy ZARADNIK's burden of proving injury under any framework requiring more than speculation. Even if *Price* was instructive on causation as "what constitutes cumulative trauma", the Fifth Circuit's decision in *Berry Brothers General Construction, Inc. v. Director,*

*OWCP (Berry)*, 261 Fed. Appx. 663 (5th Cir. 2008) also demonstrates why *Price* is distinguishable from the case at bar. In *Berry*, the claimant sustained a specific injury to his knee during the course and scope of his employment as a welder for which he received medical treatment and was taken off work for a short period. The claimant later returned to work for other employers. (*Id.* at 665.) When he stopped taking his pain medication, his pain returned, and he again sought medical treatment. (*Id.*) His physicians recommended surgical intervention. (*Id.)* *Berry* relied on four cases, including *Price*, and argued that the claimant's subsequent employment as a welder aggravated his knee condition. (*Id.* at 666-67.) The Fifth Circuit, however, distinguished *Price*, where claimant's condition got progressively worse over one day of work, noting that there was "no indication in the record that [the claimant] suffered from increased pain, a flare-up of pain, or a worsening of his condition caused by his work for a subsequent employer." (*Id.* at 667.) Although claimant's physicians opined that "strenuous activity consistent with welding work would *likely* aggravate an injury like [claimants], nothing indicate[d] that it *actually did*." (*Emphasis added*) (*Id.*). Similarly, with the sole exception of ZARADNIK's after the fact self-serving and post-claim self-reported symptoms, there is no evidence that she experienced a change in symptoms, flare-up of pain, worsening of condition, change in limits, or change in function caused by her work at DUTRA.[8]

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8 In fact, ZARADNIK'S medical expert, Dr. Stark, found her hip pain "*improved* while working in the warm weather of Southern California, specifically Long Beach" (*Emphasis added*) *(ER*

The ALJ derived from *Price* the principle that any arduous work or exposure *can* constitute an aggravation without the evidence needed to satisfy the burden of proof per *Greenwich Collieries*. This is legal error. Relieving ZARADNIK of her burden to prove *actual* injury with DUTRA, the ALJ found that her hips, back and hands "suffer from degenerative conditions that gradually worsened over time because of her arduous work as a pile butt. DUTRA, as Ms. ZARADNIK's last maritime employer, is responsible for the entirely (sic) of her orthopedic injuries." *(ER 100)*. The ALJ's finding of injury and BRB affirmation is not based on a proven injury or aggravation with DUTRA.

## III. THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS; IT WAS LEGAL ERROR TO RULE DUTRA WAS NOT PREJUDICED BY THE LATE NOTICE.

The determination of ZARADNIK'S date of awareness and the ruling that DUTRA was not prejudiced by late notice were both legal error and not supported by substantial evidence. Additionally, in wrongly deciding the prejudice issue, the Decision was based on the clearly erroneous premise that ZARADNIK'S work at Stone and Webster was "light work" *(ER 46)*.

Sections 912 and 913 of the LHWCA bar claims that are untimely noticed or untimely filed. DUTRA's first notice of the claim was over one year after

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*306)*. As to the COPD claim, there is *no evidence* in the medical record that identifies a permanent worsening of her pulmonary condition associated with work at DUTRA. *(ER 151.1)*.

ZARADNIK's termination from DUTRA and over one year after the alleged injury and as untimely noticed and filed it should thus be barred. *(ER 354-356).*

The claim was untimely noticed. An employee has 30 days to provide notice, and the timing commences when reasonable diligence would have disclosed the relationship between injury and employment. (33 U.S.C. § 912(a); 20 C.F.R.§ 702.212(a)). Failure to give timely notice as required by Section 912(a) bars a claim, unless excused under Section 912(d). (*See Kashuba v. Legion Ins. Co.,* 139 F.3d 1273 (9th Cir. 1998)). Failure to provide timely written notice will not bar the claim if the ZARADNIK shows either that the employer had knowledge of the injury during the filing period (Section 912(d)(1)) or that the employer was not prejudiced by the failure to give timely notice (Section 912(d)(2)). (*Addison v. Ryan-Walsh Stevedoring Co*., 22 BRBS 32, 34 (1989) On DUTRA's Motion for Reconsideration the ALJ acknowledged ZARADNIK's notice of the claim was untimely however, he ruled "nothing in the record convinces me that the two week delay prejudiced DUTRA". *(ER 44-46)*

As to the Section 913 timely filing requirement, this case is distinguishable from this Court's decision in *SSA Terminals & Homeport Ins. Co. v. Carrion*, 821 F.3d 1168 (9th Cir 2016). In *SSA Terminals* the claimant tore his meniscus and ACL while working for Matson in 1987 who was later taken over by SSA. Claimant returned to work but continued to experience pain and continued treatment. He retired in 2002 at which point he was advised he would eventually need a knee replacement. In 2008 he filed claims for cumulative knee injury. In that case this Court held that "ongoing pain and required ongoing medical

treatment" . . . "alone are insufficient to establish knowledge of a cumulative trauma. (*Id* at 1172.) In this case the record proves ZARADNIK was not simply treated for hip back and pulmonary conditions she was advised her working conditions were causing and aggravating them. Not only did she experience pain and symptoms she was told by medical providers of the nexus with her employment.

### A. Substantial Evidence Proves ZARADNIK Knew or Should Have Been Aware of Her Claim Well Before August 29, 2011.

ZARADNIK'S last day worked with DUTRA was September 20, 2010. A claim was not filed until October 12, 2011. *(ER 355).* The ALJ ruled ZARADNIK first became aware of her claim when she was seen by Dr. Ezzet on August 29, 2011 and thus he considered only 14 days of delay in his evaluation. *(ER 43-46)* This was legal error as the evidence in this case dictates that she knew or with reasonable diligence should have known the relationship between her alleged injuries (if such in fact existed) and employment *during* her employment with DUTRA. ZARADNIK cannot have it both ways: she cannot testify to a 20-25% increase in her hip symptoms *during* her employment with DUTRA and also claim she had no knowledge of the connection to the work at DUTRA. *(ER 256).* From her own testimony, ZARADNIK believed her condition was worsening at DUTRA, but she purposefully and knowingly did not report it and in fact tried to hide it. *(ER 257).* This contradicts the ALJ's conclusion that she could not report an injury she did not know she had. ZARADNIK had made the link between pile driving employment and her physical conditions/symptoms well before she stepped onto

the DUTRA worksite. For years prior to working for DUTRA she understood her work activities were causing or contributing to her pulmonary and orthopedic complaints. *(ER 198-199; 274)*. She was told to modify her behavior by wearing respirators and masks. *(ER 373; 380)*. She then avoided certain physical positioning at work. She should have known with any reasonable diligence at the very least by her last date of work with DUTRA on September 20, 2010 that she had a work injury which should have been reported and filed. Her years of union membership also imparted her with the understanding that an injury should be reported when it happens. (*ER 200)*. She disregarded this policy and sat on the information for over a year. *(ER 256-257)*. She admits that she was having complaints in her hips and other parts of body, but "would never to go management with that". *(ER 257)*. She admitted that she "tried to hide it" from the foreman. *(ER 256-257)*. She did not give anyone at DUTRA notice of an injury claim before she started working with Stone & Webster.

### B. DUTRA Was Prejudiced By The Untimely Notice And Untimely Claim Filing.

The timely notice requirement of Section 912 is to allow for effective investigations, effective medical services, and preventing fraudulent claims. *(Kashuba v. Legion Ins. Co*. 139 F.3d 1273, 1276 (9th Cir. 1998), *citing Port of Portland v. Director, OWCP*, 932 F.2d 836, 841 (9th Cir. 1991).) In *Kashuba*, the employer did not receive notice of a claim until four months after the alleged injury and nearly six weeks after back surgery. (*Kashuba*, at 1276). The employer contended that the untimely notice precluded it from conducting a prompt investigation to determine

whether the accident had even occurred and its possible relationship to a history of back problems. *(Id.)* As in *Kashuba, supra*, DUTRA was prejudiced by ZARADNIK'S untimely notice. By waiting over a year to provide notice a claim, DUTRA was deprived of its opportunity and right to investigate the injury allegation contemporaneous with her DUTRA employment. It was also prejudiced by this delay because ZARADNIK worked two periods of subsequent, injurious employment[9] elsewhere with Stone & Webster before DUTRA even had the opportunity to have her evaluated by a physician. Similar to *Kashuba, supra,* DUTRA was prejudiced by the fact that it did not have the opportunity to investigate the claim and have her condition evaluated before the subsequent, intervening injurious periods of employment. Contrary to the ALJ's erroneous understanding, her condition changed with Stone & Webster.

One of the purposes of timely injury reporting at the employer level is so that "it can be investigated and making sure that the employee is helped and recovered from an injury if one has occurred." *(ER 159.1)*. DUTRA's medical experts were deprived of the opportunity to examine her contemporaneously with the supposed onset of injury/symptoms. According to Dr. Bressler, the "ideal time" to determine whether any pulmonary problems are related to DUTRA was "in the middle of her work there or just after her work there." *(ER 138)*. From a pulmonary perspective, it is absolutely more difficult seeing ZARADNIK years later and trying to assess the impact of a very

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9 ZARADNIK'S two subsequent employments caused a worsening of her symptoms. *(ER 212-213; 221; 235-236)*.

brief seven-week employment. *(ER 139).* " . . . [T]he ideal time to see her for an evaluation, it would have been immediately after her work at DUTRA to evaluate a claim of injurious lung injury at DUTRA." *(ER 140).* Likewise, from an orthopedic perspective, an evaluation by Dr. Greenfield after she left DUTRA but before she worked at Stone & Webster would have given him insight into her condition at that time. *(ER 123).* ZARADNIK'S two subsequent employments caused a worsening of her symptoms. *(ER 212-213; 221; 235-236).*

Even under the ALJ's 14 days of delay, DUTRA was prejudiced. The ALJ's rational that DUTRA did not propose medical treatment that would have altered "the course of her injuries" is misplaced. The ALJ's apparent presumption that DUTRA would not have done this as it did not "rush" to provide treatment after it received notice is speculative conjecture. It was legal error for the BRB to affirm this ruling.

## IV. THE ALJ IMPROPERLY AND IRRATIONALLY ACCORDED GREATER WEIGHT TO DR. STARK'S AND DR. HARRISON'S MEDICAL TESTIMONY THAN TO DR. GREENFIELD.

Every adjudicatory decision must be accompanied by a rationale, setting forth a determination based on substantial evidence. (5 U.S.C. § 557(c)(3)(A), as incorporated into the LHWCA by 5 U.S.C. § 554(c)(2), 33 U.S.C. § 919(d) and 30 U.S.C. § 932(a)). Findings of fact and conclusions of law of the administrative law judge are affirmed if they are rational, supported by substantial evidence and in accordance with law. (*O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3)). The

ALJ's decision to credit the opinions of Dr. Stark and Dr. Harrison over Dr. Greenfield is not supported by substantial evidence as their opinions are based only on speculation and conjecture.

ZARADNIK's medical expert Dr. Stark, a physiatrist who treats orthopedic and neurological conditions but does not perform surgery, opined on her orthopedic claims. In his Order, the ALJ notes that Dr. Stark concluded she developed "progressive bilateral hip pain from osteoarthritis during the course of her career." *(ER 79).* Dr. Stark concludes ZARADNIK's problems with her lower back, hips, and hands were "caused aggravated or accelerated by her employment activities." *(ER 81; 308.1).* He further asserts her "degenerative changes" were aggravated by "years of hard work, including repetitive bending, lifting, and working in awkward positions. Her chronic low back pain is largely the result of cumulative trauma form years of arduous work." *(ER 81; 304).*

Rather than affirmatively providing evidence and medical opinion that her work at DUTRA caused injury or aggravated an injury, Dr. Stark opined in the negative that "there is simply no way of excluding the physical demands placed on a pile driver/ construction worker as having contributed to [Zaradnik's] hip arthritis." *(ER 82).* The ALJ's reliance on Dr. Stark's opinions results in an incorrect causation standard based only on the type of work performed and not based on the actual facts and medical evidence of the case. He contends that lifting and carrying items at DUTRA and wearing a tool belt are "injurious activities". *(ER 97).* Hard work alone is not synonymous with cumulative injury. If such were the case and the law every worker who ever lifted or carried anything

or wore a tool belt would at some point be subject to cumulative trauma; the level or type of work in and of itself does not mandate injury, aggravation or acceleration. ZARADNIK utterly failed to present the ALJ with any credible evidence proving injury or aggravation resulting from her employment with DUTRA. It is immaterial that a pre-existing condition *may* make someone more vulnerable to cumulative trauma if there is no evidence that it *actually* did so. Such possible speculative statements do not satisfy the substantial evidence standard and it was error to uphold the ALJ's decision.

### A. The ALJ's Determination That ZARADNIK's Orthopedic Injuries Were Caused or Aggravated By Her Work At DUTRA Is Not Supported By Substantial Evidence.

Dr. Stark's "findings" based on the incorrect premise that *if* the work was physically arduous, then it *must* have contributed to the cumulative trauma injury despite evidence to the contrary that ZARADNIK did not exhibit any symptoms until well after her employment ended, do not satisfy the substantial evidence standard. The ALJ incorrectly found that while Dr. Stark's medical report and opinions were sufficient to establish a *prima facie* case, this evidence did not establish the requisite link between ZARADNIK's actual work DUTRA and her claimed injuries, including claimed cumulative trauma. The conclusion that, because the type of work ZARADNIK performed while employed with DUTRA was possibly at times arduous, injury is inevitable, disregards the actual nature of her purported injuries and should not have been given any weight. In contrast, Dr.

Greenfield's medical analysis and opinion is based on the actual injuries claimed, her medical history, the record of her symptoms, and the nature of her work at DUTRA.

### B. There Is No Substantial Evidence Supporting ZARADNIK Claimed Industrial Injury to Her Hip.

The ALJ relied in part on the conclusion by Dr. Stark that "[y]ou can't believe that her hip arthritis was progressing and miraculously stopped progressing during those two months at DUTRA, and then started progressing again." *(ER 97)*. Both Dr. Stark and the ALJ erred in confusing *belief* with *proof*. There is no substantial evidence of worsening during those two months. Instead, Dr. Stark impermissibly speculates as to causation rather than offering medical proof such as objective evidence of progression, need for treatment, limitations, or accommodation due to specific employment with DUTRA. As detailed above, the *could have* argument only establishes the first and second prongs of the *prima facia* case and entitles a claimant to the Section 920(a) presumption. Other than ZARADNIK's unreliable testimony and Dr. Stark's speculation and belief, there is no objective verifiable evidence of any injury, worsening, aggravation, contribution, or even independent confirmation of ZARADNIK's purported symptoms. In fact, the evidence is to the contrary. ZARADNIK stated that she would have continued to work for DUTRA if the job had not ended. Even more compelling is the fact that Dr. Stark found hip pain "*improved* while working in the warm weather of Southern California, specifically Long Beach" (*Emphasis added*) *(ER 306)*. This medical

opinion undermines any other on the issue of industrial causation.

ZARADNIK's prior history of actual hip injuries explains her symptoms. She has had hip pain since at least 2007. *(ER 276)*. Before started working for DUTRA in July 2010 she had been diagnosed with mild osteoarthritis of the hip. *(ER 229)*. On November 17, 2009, x-rays revealed mild bilateral hip osteoarthritis, left greater than right. *(ER 368)*. ZARADNIK worked a construction job in Big Bear in 2010. *(ER 198; 280)*. She complained of left side sciatica "which she believes it is due to the long 4-hour care drive each way as it is intensely worse after each drive. She states she has an old truck with a clutch, which is why her left leg hurts." *(ER 367)*. The drive caused her back and left hip pain. *(ER 198)*. At a doctor's visit on July 16, 2010 (*before* starting at DUTRA), she reported pain in her left hip and hip flexor area for "about the last year." *(ER 366)*. In July 2010, ZARADNIK advised her doctors that she was having back and hip pain, in part, due to the lifting on the job. *(ER 198-199)*. At that time her actual work duties and driving were causing the back and hip pain. *(ER 198-199)*.

ZARADNIK knew the work she was doing before she went to work at DUTRA was aggravating her hip. *(ER 229)*. Before working at DUTRA, she had discussions with doctors during which the doctors advised that the work she was doing may be aggravating her hip. *(ER 229-230)*. The hip condition has been ongoing. *(ER 230-231)*. She was limping even before she went to work for DUTRA. *(ER 239)*. ZARADNIK last worked in January 2012. Her hip has been continually getting worse until the present

time whether working or not. *(ER 241242; 258-259)*. This evidence contradicts Dr. Stark's theory that her condition would have progressed slower had she got office-type work than the work she did at DUTRA. No defendant could defend against a claim citing aggravation to an arthritic joint if simply moving the joint is enough to establish an injury.

### C. There Is No Substantial Evidence Supporting ZARADNIK Claimed Industrial Injury to Her Back.

The ALJ's reasoning supporting his award of benefits for ZARADNIK's back claims is set forth in a single sentence. He states: "Dr. Harrison attributed Ms. Zaradnik's back problems to excessive forces from awkward postures, stooping, and lifting, which slowly led to a cumulative injury." *(ER 98)*. Missing from this conclusion is any reference to the specific work at DUTRA and actual evidence of contribution to this cumulative injury. Work as a pile butt over the course of a career may have been a cause of injury. Such speculation and conjecture is not substantial evidence supporting his findings and it was legal error for the BRB to affirm.

ZARADNIK's hip condition has been changing, worsening, and constantly increasing *after* DUTRA whether or not she is working. *(ER 234; 258-259)*. Dr. Greenfield explained this is expected with her degenerative condition. She has general dysplasia of the hip (CDH) and progressive degenerative osteoarthritis of the left hip. *(ER 120*). The natural history of CDH is that there is going to be progressive degenerative arthritis of the hip which is going to progress whether or not there is any particular stress

being placed on the hip. *(ER 121)*. Similarly, she has congenital stenosis at Lumbar 4-5 which produces a mechanical problem in the back. *(ER 122)*. "When you have a bad joint, it continues to wear all the time, whether or not it's going through significant loading or not." *(ER 127)*.

DUTRA again submitted evidence of other causes of ZARADNIK's back problems not related to her work at DUTRA. In approximately 1998 she was in a car that was in accident and she was "thrown out of the vehicle" and injured her lower back in this accident. *(ER 287)*. She was involved in motor vehicle accidents in 2005 and 2009. *(ER 287-288)*. In 2006 she hurt her back at work carrying a heavy piece of lumbar. *(ER 289)*. In September 2006, ZARADNIK sustained a back injury while working for Flatiron/ECI Bridges Construction. *(ER 307)*. X-rays were obtained revealing degenerative changes. She required chiropractic treatment for her back in 2006. *(ER 288)*. ZARADNIK's back pain became "more of a problem" in approximately September 2012, *i.e.* two years after her employment with DUTRA. *(ER 289)*. She admits her "back feels worse since she has not been working." *(ER 290)*. Again, this admission contradicts Dr. Stark's theory that her condition "would have progressed slower had she got office-type work than the work she did at DUTRA." *(ER 97)*.

### D. There Is No Substantial Evidence Supporting The ALJ's Finding of Industrial Injury To The Hands.

ZARADNIK did not allege injury to upper extremity in her October 12, 2011 Claim for Compensation (*ER 356)*. Two weeks later, she began working

for Stone & Webster. This job ended January 7, 2012. *(ER 309-324)*. Only *after* her work with Stone & Webster did she claim upper extremity injuries. On April 27, 2012, she filed an Amended Employee's Claim for Compensation adding "left upper extremity". *(ER 355)*. ZARADNIK filed a Second Amended Employee's Claim, dated September 5, 2012, adding "bilateral upper extremities." *(ER 354)*.

From October 26, 2011 until January 7, 2012 ZARADNIK assembled furniture up to 11 hours per day. In her own words it required constant use of her hands and was a "very hand-intensive job." *(ER 222)*. The majority of the day, she used hand tools, including screw guns, manual tools, nut drivers, and pry bars. *(ER 222)*. She described her hands "locking up." *(ER 221)*. After working up to an 11 hour day her hands felt worse at the end of the day. *(ER 221; 235-236)*. She used ice, heat, and medication for the pain. *(ER 212; 221-222)*.

In contrast to the attention he gave to her purported job duties while working at DUTRA, Dr. Harrison had virtually no knowledge or information about ZARADNIKs job duties, risks, and hazards as regarding her work with Stone & Webster. Dr. Harrison admits that he did not go into great detail on the topic with ZARADNIK and had no recollection of the type of work that she performed. *(ER 152.1)*. In fact he made no notation whatsoever of her post-DUTRA employment in his report. *(ER 152.1)*. Dr. Harrison does not remember the exact type of work or length of work at Stone & Webster. *(ER 152.1)*. He does not know if ZARADNIK sustained an injury at Stone & Webster and he did not formulate an opinion on this issue. *(ER 152.1)*.

For whatever reason, Dr. Harrison did not consider the record as a whole (which includes this pertinent information), however, the ALJ and BRB must. The opinions by Dr. Harrison are not substantial evidence as they are founded on a partial, incomplete, and ultimately inaccurate history. The ALJ reliance on them was equally flawed as was the BRB's affirmation.

## V. DR. GREENFIELD'S EVALUATION OF CAUSATION WAS LEGALLY AND FACTUAL CORRECT AND SHOULD NOT HAVE BEEN REJECTED.

Dr. Greenfield, a certified orthopedic surgeon, opined based on the evidence presented and the lack of evidence proving injury, symptoms, complaints or aggravation, that ZARADNIK did not sustain an injury or aggravation of injury as a result of her work at DUTRA. Instead, her orthopedic conditions are simply the natural progression of degenerative osteoarthritis. *(ER 295.1)* His opinion is supported by the following:

- ZARADNIK did not report an orthopedic work injury during her employment with DUTRA. *(ER 201; 256-257).*
- ZARADNIK did not seek medical treatment for orthopedic injuries or symptoms during her employment with DUTRA.
- ZARADNIK performed her union pile driver work while employed with DUTRA until she was laid off. *(ER 256).*
- ZARADNIK would have continued her union pile drive work with DUTRA, if she had not been laid off. *(ER 206).*

- After her employment with DUTRA, ZARADNIK sought out and obtained additional work as a union pile driver/carpenter. *(ER 206).*
- During a physical examination which took place after her employment with DUTRA, ZARADNIK did not report any injuries or aggravations which she attributed to her work at DUTRA, nor did she report any injury or problems to her back, hip, or hands. *(ER 361-363).*
- There is no evidence of a diminution of ZARADNIK's functional capacity from the time she left DUTRA before she started working with Stone & Webster. *(ER 124).*
- There is no evidence of any temporary disability after she left DUTRA and before she worked for Stone & Webster. *(ER 124).*
- There is no evidence of any quantifiable permanent worsening after she left DUTRA and before she worked for Stone & Webster. *(ER 124).*
- There is no evidence that after her employment with DUTRA ZARADNIK's physical condition was in any way changed, different or altered from the condition at which she commenced her work with DUTRA. *(ER 129).*
- There is no evidence of a measurable change, however slight, in ZARADNIK's medical condition after working for DUTRA, such as: a need for medications, a need for modified duties, a need for temporary disability, or

> change in radiographic findings. *(ER 128-129).*

The ALJ discards Dr. Greenfield's testimony wrongfully contending he "proceeds from an erroneous premise":

> The legal question is whether conditions at DUTRA were a contributing factor to the Claimant's orthopedic condition. To the extent Dr. Greenfield's analogy, the question is whether it added to the camel's load, not whether it broke the camel's back. Dr. Greenfield's reasoning is inconsistent with the treatment of cumulative trauma injuries in *Price*. *(ER 100).*

He further asserts that every time ZARADNIK would load her hip she in essence suffered an aggravation of her arthritis and he further asserts she loaded her hip with greater weight working at DUTRA than if she had not been working. Lastly, the ALJ claims: "It is unimportant that she did not report any injury, require job modifications or seek medical care during her time at DUTRA. She did all those things later when her injury had progressed further. The changes she experienced working for DUTRA were an aggravation of her injury." (ER 100). Again, the ALJ proffers conclusion without factual foundation. What changes did she experience? Where is the proof? Where is the evidence? The record is outright silent as to evidence of any such "changes".

The ALJ's legally erroneous evaluation of the evidence is further crystallized by the following statement: "the same rationale that applies to Ms. ZARADNIK's hip applies to her back and hands, which

suffer from degenerative conditions that gradually worsened over time because of her arduous work at a pile butt. DUTRA as the last maritime employer is responsible for the entirety of her orthopedic injuries" *(ER 100)*.

While ZARADNIK'S claimed job duties at times strain credulity, as found by the ALJ, such contentions are also largely immaterial. Discrepancy in job duties "makes no difference" to Dr. Greenfield where, as here, there is no evidence of any injurious event; no evidence of limitations in her functional capacity; no evidence of a report of injury; no evidence of temporary/total disability; and no evidence of a change in her ability to work or function. *(ER 117; 125-126)*.

Dr. Greenfield also properly considered and addressed the medical and legal impact of ZARADNIK's employment at Stone & Webster in the context of causation and opined that this work caused the entirety of her hand conditions. *(ER 290.3-291.1)*. *After* working at Stone & Webster ZARADNIK first sought treatment for her hands. *(ER 235)*. Her thumbs became painful in approximately November 2011 and became a "problem particularly" August 2012—again an onset and worsening *after* her employment with DUTRA. Her first day of disability was *after* working at Stone & Webster. *(ER 152.1; 357-359)*. *After* working at Stone & Webster ZARADNIK was approved for Social Security Disability. *(ER 224; 226-227)*. Substantial evidence proves ZARADNIK's work with Stone & Webster produced actual change, and resulted in actual injury. It is the ALJ's job to draw reasonable inferences from the basic facts. (*Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469 (1947)). It is not the ALJ's job to speculate.

## VI. IT WAS UNREASONABLE TO CREDIT ANY PART OF ZARADNIK'S TESTIMONY; SHE IS NOT CREDIBLE AND HER TESTIMONY DOES NOT AMOUNT TO SUBSTANTIAL EVIDENCE.

The administrative law judge, as a fact-finder, "has the discretion to evaluate the credibility of a claimant and to arrive at an independent judgment, in light of medical findings and other evidence." (*Pietrunti v. Director, OWCP, 119 F.3d 1035, 1042* (2d Cir. 1997)). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *(Banks v. Chicago Grain Trimmers Assoc.*, 390 U.S. 459, 467 (1967); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999)). ZARADNIK's pattern of providing incomplete, inaccurate, or deliberately self-serving testimony and information makes it irrational for the ALJ and BRB to accept any of her testimony as evidence.

Despite proving to be "unreliable" witness as to her tobacco, alcohol and illicit drug use, the ALJ improperly accepts "much" of ZARADNIK'S account of her working conditions as true even though he determined she "overstated her exposure to diesel fumes", found her testimony regarding her proximity and duration of work near a generator "implausible" and acknowledged that she "struggled to explain the full range work she had performed in a coherent manner". *(ER 60; 69-70).* He also accepts her testimony that her hip symptoms increased during her employment with DUTRA. The ALJ decided this matter solely on the record and still reached the conclusion that ZARADNIK was "unreliable" as to her testimony.

DUTRA avers that she was not simply unreliable—she was untruthful.

On numerous issues, ZARADNIK provided false and misleading material information to examiners and this Court; she is not a credible witness. It was unreasonable for the ALJ to accept any portion of her testimony as substantial evidence. Her testimony and representations about her recreational drug use are not supported by the medical evidence. At trial, she initially denied illicit drug then changed her testimony testified that once or twice she experimented with drugs in high school, but again she denied drug use since high school. *(ER 187).* She also entirely denied *any* present or past recreational drug use to Dr. Bressler. *(ER 299).* She denied *any* illicit drug use to Dr. Harrison. *(ER 284).*

ZARADNIK'S representations regarding her illicit drug use are contradicted by the medical evidence. *(187-188; 329; 395*). As with illicit drug use, ZARADNIK also provided inaccurate information regarding her use of alcohol. According to Scripps Clinic physician, Dr. Debra Bement, "She drinks two drinks a day and at times four to ten." *(ER 362)* ZARADNIK testified that this is not accurate. *(ER 232).* She downplayed her drinking history to Dr. Greenfield that led him to describe her as a "social user of alcoholic beverages." *(ER 294).* She told Dr. Bressler that her present alcohol use is two to three glasses of wine per month and past use is "[a]bout the same."[10] *(ER 299).* Less than two weeks later, she told Dr. Harrison that she "drinks eight glasses

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[10] Dr. Bressler described her history as a "radical contradiction to the evidence". *(ER 137).*

of wine per week." *(ER 284)*. Once again, multiple entries in the Scripps Clinic records discredit her under/misrepresentation of her history of alcohol use and document a history of alcohol abuse. *(ER 362; 370; 386-392)*. Her false and inaccurate testimony regarding her alcohol use not only impacts her general credibility, but is also a material misrepresentation. As explained by Dr. Bressler, heavy alcohol use is "relevant to me as someone evaluating her lungs because alcohol is a risk factor for reflux, acid reflux, and acid reflux is a risk factor for asthma." *(ER 137)*.

On other instances ZARADNIK provided false information. The occupational history she provided to Dr. Bressler was inaccurate. She told Dr. Bressler that she worked for DUTRA for three to four months, as opposed to 48 days. *(ER 136)* She did not disclose the nature of her 2010 employment at Stone & Webster, which involved concrete form work. *(ER 298)*. When evaluated by Dr. Greenfield she walked with a normal gait. *(ER 295)*. When seen by Dr. Stark seventeen days later she was using a cane. *(ER 308)*. Additionally, the Phalen test administered by Dr. Greenfield yielded a "nonanatomic or physiologic response" in the sense that "it's not possible for that to happen." *(ER 118-119)*. Dr. Greenfield suspected some level of either symptoms magnification or embellishment. *(ER 119)*. ZARADNIK'S testimony should have been rejected and should not have formed the basis for liability.

## VII. THE ALJ'S FINDING OF INDUSTRIAL PULMONARY INJURY IS NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE.

It was unreasonable for the ALJ to credit the opinion of Dr. Harrison over the opinion of Dr. Bressler and equally unreasonable for the BRB to affirm the ALJ's holding as to her pulmonary injury. Dr. Harrison's conclusions without supporting factual foundation do not amount to substantial evidence. Dr. Harrison improperly focuses on what *can* cause injury, not what *did* cause injury. In turn, the ALJ and BRB erred in also finding what *can* cause injury at DUTRA, as opposed to whether anything *did* cause injury.

Although the ALJ found ZARADNIK's testimony regarding the nature and extent of exposure to diesel fumes to be "implausible" he still accepted her testimony on other exposures. *(ER 70).* However, exposure in and of itself is not injury. ZARADNIK's burden was not simply to identify *exposure* to particulates, dust, and fumes. Her burden is to prove actual injury from those exposures. Even Dr. Harrison agrees that other factors are important, such as the "quantity and magnitude" of exposure and "direction of the air flow". *(ER 148.1).* He also concedes that the amount of exposure on a work site is relevant to whether that work site aggravates or causes injurious exposure. *(ER 148.1*). It is the "quantity and magnitude" of exposure that matters. *(ER 148.1).* Yet, Dr. Harrison has no data at all as to the air quality at the DUTRA jobsite during claimant's 48 days of employment. *(ER 151).*

ZARADNIK did not report a pulmonary injury during her employment with DUTRA, did not seek medical treatment contemporaneous with her em-

ployment with DUTRA, did not miss time from work, would have continued working but for layoff, and did not complain of industrial injury or exposures at her annual pulmonary examination on October 7, 2010. ZARADNIK's Treating Physician Dr. Chang felt she was "doing quite well" after her work at DUTRA. Dr. Chang's findings on that contemporaneous examination (the only such examine) are substantial evidence. *(ER 120-121).* She had no cough and her chest was "was "[s]urprisingly clear to auscultation" with [n]o active wheezing" and "[g]ood breath sounds." *(ER 120-121).* Dr. Chang noted ZARADNIK's "tobacco abuse" and the "unfortunate" fact that "she is still smoking a pack a day . . . " *(ER 120-121).* Dr. Chang's examination and findings substantiate Dr. Bressler's opinion that there was no respiratory aggravation or injury with DUTRA. *(ER 141; 142-143).* The ALJ's reasoning for finding respiratory injury claim is based only on possibilities and potentials; not proof of injury and it was error for the BRB to affirm.

### A. The ALJ Impermissibly Placed the Burden On Dutra to Disprove Respiratory Injury.

The ALJ impermissibly called on DUTRA to disprove respiratory injury. According to the ALJ, "Dr. Bressler needed to explain why those conditions [at DUTRA] did not result in injury, not suggest additional potential causes." *(ER 102).* This is clear error, once again sounding in last responsible employer law. ZARADNIK must prove her case. Dr. Bressler was not required to explain away injury. The ALJ wrote, "Working in an open environment would reduce the concentration of particulate matter Ms. Zaradnik inhaled, but that doesn't mean her level of exposure was safe." *(ER 102)* It clearly does not mean or prove

that her level of exposure was *unsafe*. It is ZARADNIK's burden to prove the level of exposure and prove that it was injurious. A burden she failed to meet as the evidence proves the opposite; namely that there was no:

1. Quantifiable evidence or air quality testing to substantiate injurious exposure conditions at the DUTRA job site. *(ER 146; 146.1)*.
2. No evidence of pulmonary complaints during employment with DUTRA. *(ER 139)*.
3. No evidence of reports of pulmonary injury during claimant's employment with DUTRA. *(ER 138)*.
4. No evidence of medical treatment contemporaneous with her employment at DUTRA. *(ER 139)*.
5. No evidence of sore throat, hoarseness or wheezing at claimant's annual pulmonary examination on October 7, 2010 *(ER 364-365)*.
6. No evidence of industrial injury or aggravation as of October 7, 2010. *(ER 364-365)*.
7. No evidence of a worsening of pulmonary condition as of October 7, 2010. *(ER 364-365)*.

In his dissenting opinion, BRB Administrative appeals Judge Boggs observed,

> . . . [T]he administrative law judge did not address whether the record establishes that claimant's work for employer actually aggravated her underlying respiratory conditions. Specifically, which the administrative law judge credited evidence showing that airborne exposures consistent with

> those claimant experienced with employer *might* aggravate her underlying respiratory conditions, he did not assess whether that evidence establishes that claimant's exposures *actually* aggravated her respiratory conditions. . . I would, therefore, vacate the administrative law judge's finding that claimant's asthma/ COPD is related to her work for employer and require, on remand, that the administrative law judge analyze all of the evidence and make a specific determination, with claimant bearing the burden of persuasion, as to whether she sustained an *actual* respiratory injury due to her exposures with employer. *(Emphasis added) (ER 22-23; 67).*

Judge Boggs is correct. DUTRA cannot state it any better.

## VIII. IT WAS LEGAL ERROR TO REQUIRE DUTRA TO OFFER EVIDENCE OF APPORTIONMENT WHEN ZARADNIK'S WORK AT STONE & WEBSTER CAUSED THE ENTIRETY OF ANY INDUSTRIAL INJURY AND INABILITY TO WORK.

Employer is absolved of all liability for further benefits only if the subsequent injury is the sole cause of claimant's disability. (*See Arnold v. Nabors Offshore Drilling, Inc., 35 BRBS 9 (2001)*, *aff'd mem.*, 32 F.App'x 126 (5th Cir. 2002); Wright, 25 BRBS 161.) The ALJ wrongly rejected DUTRA's defense that ZARADNIK's subsequent work at Stone and Webster caused the entirety of her injury or inability to work. There is no need for "affirmative medical proof" of apportionment in this case because DUTRA contends ZARADNIK"S subsequent employment at

Stone and Webster was the sole cause of her changed condition.

In the present case, there is absolutely no evidence that ZARADNIK required treatment or suffered any disability as a result of her employment with DUTRA. In fact, the evidence is to the contrary. Therefore, there is nothing to apportion. ZARADNIK had preexisting orthopedic and pulmonary conditions prior to employment with DUTRA for which she sought medical treatment and on occasion lost time from work. *(ER 248; 253-255; 267-278)*. While working for DUTRA, she did not report any symptoms, did not seek any treatment, and did not lose any time from work. (*ER 256-257*). In fact, she continued working her usual and customary employment after her job with DUTRA ended. (*ER 207; 256*). She would have continued working with DUTRA had the job been available. (*ER 207*). The substantial evidence proves that at the time she left DUTRA, she was capable of performing her usual and customary duties and she obtained union pile driving/carpenter work with Stone & Webster. (*ER 206*). ZARADNIK suffered no disability at that time. (*ER 207*).

ZARADNIK's pre-existing pain in her back and hips increased while she was working for Stone & Webster. (*ER 212*). Only after her employment with Stone & Weber was extensive treatment recommended and she was told she should not return to her job as a pile driver/construction worker. *(ER 167-169)*. There is no evidence of any change or alteration in ZARADNIK's condition or symptoms during or resulting from the 48 days she worked at DUTRA. After her Stone & Webster employment she removed herself from the workforce, sought Social Security disability

and her union retirement. Thus, without proof of inability to work or a change in condition in any negative way related to DUTRA, her change in condition, if any, post Stone & Webster was wholly caused by her subsequent employment with Stone & Webster. No other apportionment is required when the claimed apportionment is 100%.

Additionally, in his dissenting opinion, BRB Administrative appeals Judge Boggs stated,

> . . . I believe the administrative law judge failed to address Dr. Greenfield's opinion that claimant's post-employer work with S & W, and not her work for employer, resulted in a change in her carpal tunnel syndrome. Because the administrative law judge did not address and weigh this evidence in relation to whether claimant's work at S & W alone caused her bilateral carpal tunnel syndrome, I would vacate the administrative law judge's finding that claimant's work with S & W is not an intervening cause of her bilateral hand condition and remand the case for further findings. Since claimant was not disabled prior to her stints with S & W, the proper inquiry is whether claimant's bilateral hand disability and/or need for medical benefits is due to the natural progression of the condition caused by her work with employer, or whether the disabling injury is due solely to an intervening injury at S & W. (internal citations omitted*) (ER 22-23; 40).*

Once again, Judge Boggs is on point and, unlike his colleagues, viewing the evidentiary record as a whole.

## CONCLUSION

For the reasons set forth above, DUTRA respectfully requests that this Court grant its Petition for Review and reverse the BRB's order in its entirety and deny all benefits requested.

Date: March 1, 2018

ENGLAND, PONTICELLO & ST. CLAIR

By /s/ Barry W. Ponticello
/s/ Renee C. St.Clair

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## STATEMENT OF RELATED CASES

There is one related case involving the same or closely related issue of the appropriate standard for industrial injury under the LHWCA and the use of the *Price* line of cases: *Jack Kellison v. Dutra Group, SeaBright Insurance Company and Director, OWCP*; Case No. 17-71143, Benefits Review Board No. 16-0242.

Date: March 1, 2018

ENGLAND, PONTICELLO & ST. CLAIR

/s/ Renee C. St. Clair
Attorney for Petitioners,
Dutra/Seabright

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,744 words, excluding the portions exempted by Fed. R. App. P. 32(f).

2. This brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Date: March 1, 2018

ENGLAND, PONTICELLO & ST. CLAIR

/s/ Renee C. St. Clair
Petitioners The Dutra
Group/SeaBright

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 1, 2018.

**PETITIONERS DUTRA/**
**SEABRIGHT'S OPENING BRIEF**

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /s/ *Renee C. St. Clair*