



## Article: Ninth Circuit decision highlights the value of medical evidence in rebutting section 20(a) presumption in aggravating injury case

### Introduction

The Longshore and Harbor Workers' Compensation Act (LHWCA) is a US statute that provides for the payment of compensation to longshore and harbor workers who sustain injuries in the course of their employment.

The LHWCA follows a three-step process for adjudicating claims:

1. A claimant can invoke a section 20(a) presumption that the injury is work-related by showing that (1) he suffered a harm, and (2) workplace conditions could have caused, aggravated, or accelerated the harm. 33 U.S.C. § 920(a).
2. The administrative law judge ("ALJ") determines as a matter of law whether the employer has presented substantial evidence that the claimant's harm was not work-related, rebutting the section 20(a) presumption.
3. If the employer rebuts the section 20(a) presumption, the ALJ weighs the evidence as a whole to determine whether the claimant has met his burden of establishing a causal link between the claimant's harm and his employment.

Under the "aggravation rule," an employer can be held liable for a claimant's entire disability if employment conditions aggravated or accelerated an employee's pre-existing condition, even if the aggravating injury only partially caused the claimant's resulting disability. In the opinion summarized below, the claimant asserted that his pain at work from an underlying condition qualified as an aggravating injury that made his resulting disability compensable under the LHWCA. The decision may be of importance to members because it establishes the utility of expert medical testimony to dispute causation in LHWCA claims that allege aggravating injuries.

### Summary

In *Calabrese v. BAE Sys. Haw. Shipyards*, Nos. 18-72644, 18-0155, 2020 U.S. App. LEXIS 5075, 2020 WL 777652 (9th Cir. Feb. 18, 2020), the United States Court of Appeals for the Ninth Circuit rejected the broad proposition that pain at work necessarily equates to an aggravation of an earlier condition because medical evidence had established that the claimant's employment did not cause his underlying condition and resulting permanent disability.

The claimant worked as a production support/maintenance foreman at his employer's facility at Pearl Harbor. During a period off from work, the claimant developed optic neuritis. Steroid treatment for the claimant's optic neuritis caused him to develop bilateral avascular necrosis of the hips. The claimant alleged that he experienced pain while at work due to his hip condition, which ultimately rendered him disabled.

The claimant conceded that his employment did not cause his underlying hip condition, but he asserted that the pain he experienced at work while walking up his employer's stairway constituted an "aggravation" that entitled him to benefits under the LHWCA.

The ALJ denied his claim for benefits, and the Benefits Review Board (the "Board") affirmed the ALJ's finding that the employer had rebutted the section 20(a) presumption.<sup>i</sup> The claimant petitioned the Ninth Circuit to seek review of the Board's order.

The Ninth Circuit denied the claimant's petition as the record supported the Board's finding that the employer had presented substantial evidence to rebut the section 20(a) presumption. The Ninth Circuit relied on the opinion of the employer's medical expert that established: (1) the claimant's employment did not cause the claimant's avascular necrosis or any resulting disability; (2) the claimant would experience pain regardless of his activity, whether he was at work or at home laying in bed; and (3) the disability resulted from a natural progression of the pre-existing condition rather than from an employer-related aggravation.<sup>ii</sup> The Ninth Circuit also held that the cases cited by the claimant were distinguishable.<sup>iii</sup>

The key takeaway from the *Calabrese* opinion is that practitioners should ensure that they utilize medical expert testimony. The decision highlights the critical value of medical evidence to rebut the causal connection between employment-related activities and a claimant's disability. Although a claimant carries the burden of persuasion throughout the claim, medical evidence is crucial in defending against LHWCA claims premised on aggravation of a pre-existing condition—provided that the medical opinion establishes that the claimant's employment did not cause any aggravation or acceleration of a prior injury, or that the claimant's disability resulted from the natural progression of the pre-existing condition.

The full text of the *Calabrese* decision is available on the Ninth Circuit's website [here](#).

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<sup>i</sup> The ALJ determined that the claimant invoked the section 20(a) presumption because he testified that he had experienced pain in his left hip when he climbed the stairs while at work. However, the ALJ denied the claim because the employer produced substantial evidence to rebut the section 20(a) presumption, and after weighing the evidence as a whole, the ALJ determined that the claimant had failed to prove that he suffered a work-related aggravation or acceleration of his underlying hip condition. The Board noted that the ALJ improperly applied the "aggravation rule" by citing to portions of the employer's medical expert's report that characterized the claimant's pain at work as "at most a temporary aggravation to [the claimant's] hip condition". The Board stated that, "[u]nder the aggravation rule, it is sufficient if the circumstances of employment cause the underlying condition to become painful or otherwise symptomatic, even if that underlying condition is not made worse by the employment." The Board found that the excerpts cited by the ALJ standing alone did not constitute substantial evidence of the absence of aggravation and thus would have been insufficient to rebut the section 20(a) presumption. However, the Board still affirmed the ALJ's finding that the employer had rebutted the presumption of causation because the employer's medical expert's report, when read in

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its entirety, concluded that work-related aggravations had not caused the claimant's disability. Instead, the natural degeneration of the claimant's underlying hip condition caused his disability.

<sup>ii</sup> The Ninth Circuit stated that it had previously discussed the difference between an aggravation and a natural progression. See *Metro. Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102 (9th Cir. 2003) ("If the worker's ultimate disability is the result of the natural progression of the initial injury and would have occurred notwithstanding a subsequent injury, the employer of the worker on the date of the initial injury is the responsible employer. However, if the disability is at least partially the result of a subsequent injury aggravating, accelerating or combining with a prior injury to create the ultimate disability, we have held that the employer of the worker at the time of the most recent injury is the responsible, and therefore liable, employer.").

<sup>iii</sup> See *Kelaita v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 799 F.2d 1308, 1309 (9th Cir. 1986) (lacked any mention of medical testimony establishing pain was unrelated to employment); *Bath Iron Works Corp. v. Fields*, 599 F.3d 47, 55-57 (1st Cir. 2010) (employer did not rebut presumption of causation where employer's expert did not suggest claimant's disabling pain was unrelated to his employment); *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 65 (2d Cir. 2001) (affirming ALJ's findings that employee suffered angina due to job stress where employee's treating physician's report supported findings). At the oral argument before the Ninth Circuit, a member of the Court found the circumstances in *Calabrese* to be analogous to those in the Fifth Circuit case *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 286 (5th Cir. 2003) (un-rebutted medical testimony established that the decedent's death at work was coincidental rather than work-related because ongoing heart attack would have escalated to fatal cardiac arrest no matter where the decedent was).