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

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

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

Brian F. Allen

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

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

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

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

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

The district court dismissed the Jones Act claims because the barges were not vessels in navigation and the plaintiff was not a seaman. In response to defendants' summary judgment motions for the LHWCA claims, plaintiff argued for the first time that Weeks was liable under New York Labor Law §§ 200 and 241(6). The district court generously construed the reference to state law as a motion seeking to amend the complaint, but later denied the plaintiff the right to amend. The district court granted Weeks' motion for summary judgment. Plaintiff appealed.

On appeal, plaintiff conceded that he did not have a cause of action against Collazo because of the LHWCA's provisions granting no-fault compensation payments to employees for work-related injuries and barring suits against their employers. The Second Circuit first addressed the plaintiff's Jones Act claims. The appellate court stated that the barges were not vessels in navigation, and that even if they were, the duration and nature of the plaintiff's work was insufficient to establish a connection to the vessel. Over the course of his five-month employment, the plaintiff had not occupied the barge overnight nor had he assisted in its navigation. The appellate court also noted that the plaintiff lacked a Coast Guard license or other seaman's papers and had failed to show that his duties contributed to the function of the vessel. Instead, the appellate court found, the plaintiff's tasks were limited to the pier and a mere transitory or sporadic connection to the barge was insufficient to confer seaman status.

However, with regard to the plaintiff's LHWCA claims, the Second Circuit concluded that Weeks may have breached its *Scindia* duties as a third-party vessel owner: the duty to intervene and active control duty. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). These duties require the owner of a vessel to warn of those known hazards that are not obvious, to remedy unreasonable hazards, and to intervene if the stevedore (in this case Collazo) fails to exercise reasonable care to protect its employees from harm. When a crane malfunctioned, an employee of Weeks ordered the plaintiff to manually lift heavy equipment, causing the plaintiff's injury. The appellate court found that whether or not this posed an unreasonable risk of harm and whether Weeks actually or constructively knew of the hazard were factual issues that precluded summary judgment.

The Second Circuit also noted that both parties failed to raise the borrowed-servant doctrine, which could have linked Weeks as a dual-capacity defendant. As the issue was not raised, the court did not consider it.

Finally the appellate court reviewed the district court's denial of leave to amend the complaint, for abuse of discretion. Although a new claim may be barred by the statute of limitations and amendment could include the claim if it arose from conduct in the original pleading, the Second Circuit found that the New York Labor Law claims under §200 and §241(6) arose out of the original LHWCA claim that was erroneously dismissed, and thus ordered the lower court to reconsider the matter.

Yee Ling Elaine Lau