BRB No. 05-0624

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| TED CARMONA | ) | |
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| Claimant | ) | |
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| v. | ) | |
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| MAERSK PACIFIC, LIMITED | ) | |
| | ) | |
| and | ) | |
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| SIGNAL MUTUAL INDEMNITY ASSOCIATION | ) | DATE ISSUED: 01/30/2006 |
| | ) | |
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| Employer/Carrier-Petitioners | ) | |
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| CONTAINER STEVEDORING, INCORPORATED | ) | |
| | ) | |
| | ) | |
| Self-Insured Employer- Respondent | ) | DECISION and ORDER |

Appeal of the Order Granting Summary Dismissal of Container Stevedoring and the Order Denying Reconsideration and Maersk's Motion for Continuance of William Dorsey, Administrative Law Judge, United States Department of Labor.

James P. Aleccia and Courtney B. Adolph (Aleccia, Conner & Socha), Long Beach, California, for Maersk Pacific Limited and Signal Mutual Indemnity Association.

Wayne P. Tate (Ostendorf, Tate, Barnett & Wells, L.L.P.), Rancho Santa Margarita, California, for Container Stevedoring Services.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Maersk appeals the Order Granting Summary Dismissal of Container Stevedoring and the Order Denying Reconsideration and Maersk's Motion for Continuance (2004-LHC-0450) of Administrative Law Judge William Dorsey 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).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 was hired daily out of the union hall. Between June 29, 1997, and January 21, 2001, the last day recorded on the Pacific Maritime Association records in evidence, claimant worked steadily as a group steward for Coast Maritime, although occasionally he was assigned to other shipyards as a dockworker or shipworker. On October 11, 1999, claimant worked for Maersk for eight hours as a dockman, and the next day he returned to his group steward position. M/Join at exh. 3. On October 13, 1999, claimant underwent an audiogram, performed by an otolaryngologist, Dr. Grossman, who determined that claimant had a 26 percent binaural hearing loss attributable to noise exposure. M/Join at exh. 1. Claimant filed a claim for compensation against Maersk on November 15, 1999, and Maersk controverted the claim on November 17, 1999. Cl's Brief in Support of Container's M/SJ at exhs. 1, 3. On November 30, 2000, at Maersk's request, claimant underwent an audiogram under the supervision of Dr. Buchholtz which revealed a 13.4375 percent binaural impairment. M/Join at exh. 2.

Having proceeded with discovery and learned of claimant's earlier audiograms, Maersk filed a motion on July 1, 2004, to join Container to the proceedings. There being good cause and no opposition, the administrative law judge granted the motion to join, and he postponed the hearing. On November 12, 2004, Container filed a motion in opposition to the motion to join. The administrative law judge denied Container's motion. On December 30, 2004, Container filed a motion for summary decision, contending there is no basis for a claim against it. Claimant filed a brief in support of Container's motion, and Maersk filed a brief opposing the motion. The administrative law judge granted Container's motion and dismissed it from the case; he subsequently denied Maersk's motion for reconsideration.

[1]In an Order dated July 6, 2005, the Board accepted Maersk's appeal of the administrative law judge's interlocutory orders on the grounds of due process and judicial efficiency, stating that it was inadvisable for the case to proceed on the merits without the participation of all potentially liable employers.

Maersk appeals the orders, arguing that the administrative law judge erred in granting the motion for summary decision and in dismissing Container from the case. Container responds, urging the Board to reject Maersk's arguments.

Initially, Maersk argues that Container's motion for summary decision was filed in an untimely fashion and violated not only the administrative law judge's pre-trial order but also the regulation at 29 C.F.R. §18.40(a).[2] Maersk received the motion the day before the scheduled hearing, and it argues that Container's failure to file the motion sooner should not be excused because Container was put on notice of the August 2004 pre-trial order and should have complied with it. We reject Maersk's argument that Container's motion for summary decision should have been denied as untimely.

In his November 16, 2004, Order denying the dismissal of Container as a party, the administrative law judge explained that several notices in this case had not been properly served on the parties. In particular, the order joining Container and the August 2004 pre-trial order were not served on Container. Consequently, the administrative law judge granted a continuance. In the November 23, 2004, continuance order setting the hearing for January 4, 2005, the administrative law judge nevertheless stated: "The parties may rely on any pretrial filings they have made. Should they wish to amend or supplement them, they must be filed within the period for filing set in the pretrial order of August 3, 2004."[3] Container filed its pre-trial statement, exhibit list, witness list and motion for summary decision on December 30, 2004, five days before the scheduled hearing. Because Maersk did not receive the filings until January 3, 2005, the administrative law judge again amended the briefing schedule, granting claimant and Maersk until February 2, 2005 to respond, and setting the calendar call for April 4, 2005. Thus, although he did not specifically find that Container violated the pre-trial order, or penalize Container for purportedly doing so, he remedied the situation by allowing the other parties additional time to respond to Container's motion. The administrative law judge is bound "to best ascertain the rights of the parties," 20 C.F.R. §702.339, and has been given the requisite authority to achieve that end, 29 C.F.R. §18.29(a); it was reasonable for him to accept the motion and to give the other parties additional time to respond. The administrative law judge has broad discretion in directing the proceedings before him, including postponing the hearing, 20 C.F.R. §702.337(c).

[2]Section 18.40(a) provides that a motion for summary decision must be filed at least 20 days before the hearing.

[3]The August 2004 pre-trial order required documents to be filed no later than 30 days before calendar call.

Next, Maersk contends the administrative law judge erred in granting Container's motion for summary decision. The party filing a motion for summary decision must establish the absence of genuine issues of material fact. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Summary decision also is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When a party has supported its motion for summary decision with affidavits, pleadings or other materials, the party opposing a motion for summary decision must "set forth specific facts showing that there is a genuine issue of fact for the hearing" in order to defeat the motion. 29 C.F.R. §18.40(c). The non-moving party must show there is an issue involving a "material," relevant fact, but also one that is "genuine." Mere statements are insufficient to show that a dispute is "genuine;" the non-moving party "must produce at least some 'significant probative evidence tending to support' [the] claim." *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). If a rational trier of fact might resolve the issue in favor of the non-moving party, summary decision must be denied. *Id.* at 289. The administrative law judge may grant the motion for summary decision if there are no factual disputes, when all reasonable inferences are made in favor of the non-moving party. *Brockington*, 903 F.2d 1523; *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(d), 18.41(a). The reviewing court must view the evidence in the light most favorable to the non-moving party and determine whether there are any genuine issues of material fact and whether the lower court correctly applied the relevant substantive law. *Han v. Mobil Oil Corp.*, 73 F.3d 872 (9th Cir. 1995). In a hearing loss case, the responsible employer is the last one to expose the employee to injurious stimuli prior to the administration of the determinative audiogram. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991). Thus, to satisfy its burden on the motion for summary decision, Container, as the moving party, must establish there is no genuine issue of fact related to the responsible employer issue. If Container succeeds, the burden shifts to Maersk, as the non-moving party, to show that a genuine issue of material fact does, indeed, exist.

In this case, the administrative law judge stated that Maersk did not present sufficient "evidence of an essential element to carry its ultimate burden of persuasion," that is, he found that Maersk did not prove that Container was claimant's last employer before the 1995 audiogram, which Maersk avers was determinative. Order Granting Summary Dismissal at 1. The administrative law judge found there is nothing in the record to establish whether claimant's hearing was evaluated before or after he began work for Eagle Marine on September 12, 1995; therefore, due to the ambiguity of when claimant was last exposed to noise prior to that evaluation, the administrative law judge found that the 1995 audiogram was not "determinative," he concluded that Container

demonstrated there is no genuine issue of material fact, that Maersk cannot show otherwise, and he dismissed Maersk's claim against Container. *Id.* at 2-3.

On appeal, Maersk argues that it has presented sufficient evidence to demonstrate there are genuine issues of fact pertaining to the 1995 audiogram and whether it establishes the potential liability of Container. Container argues that the administrative law judge correctly determined that the evidence does not definitively establish that it was the last covered employer for whom claimant worked prior to undergoing an audiogram on September 12, 1995. The record reflects Maersk submitted reports of the Pacific Maritime Association establishing that claimant worked the second shift for Container on September 11, 1995, and that he worked the second shift for Eagle Marine on September 12, 1995. M/Join at exh. 3. The evidence also establishes that claimant underwent audiometric testing on September 12, 1995. *Id.* at exh. 1. The parties have engaged in a prolonged debate over how this evidence should be interpreted. Maersk asserts that the evidence proves that claimant worked at Container on September 11, 1995, and then prior to working the second shift at Eagle Marine on September 12, 1995, he underwent an audiogram which revealed a hearing loss, making Container the last covered employer prior to the 1995 audiogram. Container argues that because neither claimant nor the audiologist who conducted the test could remember what time of day the 1995 audiogram took place, M/SJ at exhs. 10, 13, the evidence does not prove that it was claimant's last employer prior to the examination. However, Maersk need not definitively establish Container's last employer status to defeat the motion for summary decision; it must establish only that an issue of fact exists as to whether Container potentially was the last covered employer prior to the September 12, 1995 audiogram. *First Nat'l Bank of Arizona*, 391 U.S. at 289-290. It need not, as the administrative law judge stated, put forth evidence to "carry its ultimate burden of persuasion." Because the evidence is subject to both employers' interpretations, Maersk has demonstrated the existence of a genuine issue of fact. Therefore, it was erroneous for the administrative law judge to hold Maersk to a burden of persuasion standard in addressing the motion for summary decision. *Id.* In doing so, he resolved a genuine issue of material fact to find that there was no genuine issue of material fact.

The administrative law judge also addressed a question of fact when he concluded that the 1995 audiogram was not "determinative." He so concluded, not because of any technical inadequacy, but rather because of the ambiguity of when claimant was last exposed to potentially injurious noise prior to that evaluation. Order Granting Summary Dismissal at 3. However, as yet, there has been no evidence put forth regarding noise exposure at any of claimant's jobs. Moreover, the "determinative" audiogram is the one which most reliably represents the claimant's hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). Although it need not be the audiogram on which the claimant based his claim, it

is the one on which benefits are based because it best reflects the claimant's loss of hearing caused by the responsible employer. *See Cox*, 25 BRBS at 208. As Maersk has shown, the parties adduced a number of audiograms which could be found to be the "determinative" audiogram, including the one conducted in 1995. Thus, this issue also requires that the administrative law judge make a finding of fact.[4] *Id.* Because there remain material issues of fact as to when claimant underwent the 1995 audiogram, whether it is the determinative audiogram, and whether Container was the last covered employer prior thereto, we vacate the administrative law judge's Order Granting Summary Dismissal of Container Stevedoring and his Order Denying Reconsideration, and we remand this case for a hearing on the merits.

Although we have vacated the administrative law judge's orders granting dismissal of Container, we reject Maersk's contention that *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002), *rev'g Benjamin v. Container Stevedoring Co.*, 34 BRBS 189 (2001), applies to this case. *Benjamin* involved two separate claims filed by the claimant against two employers for compensation based on two different audiograms. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that the Board erred in merging the claims and in holding one employer liable for the totality of the claimant's hearing loss. The court held that each claim should have been adjudicated separately, thereby making more than one employer potentially liable for the claimant's hearing loss, and making the credit doctrine available to the second employer to prevent a double recovery by the claimant. *Benjamin*, 297 F.3d 797, 36 BRBS 28(CRT); *see also Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003). This case differs in that, unlike the situation in *Benjamin*, it involves only one claim for compensation against Maersk, and Maersk joined another potentially liable employer. Thus, there cannot be more than one responsible employer, and this case must be treated as a traditional responsible employer case.

[4]Container argues that the 1995 audiogram cannot be the determinative one because there is no proof that a copy was given to claimant or that a report was sent with it. Contrary to Container's arguments, receipt of the audiogram and report is irrelevant outside the timeliness issues of Sections 12 and 13, 33 U.S.C. §§912, 913. *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991). Additionally, we reject Container's argument that the claim against it should be barred by the doctrine of laches. Laches precludes the prosecution of stale claims. Because the Act contains specific statutory periods of limitation, which are not at issue here, and because the issue of which employer is responsible for a claimant's benefits is related to the claimant's claim for benefits, the doctrine of laches does not apply. *See Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27, 32-33 (2004).

In a hearing loss case, the responsible employer is the last employer to expose the claimant to potentially injurious noise prior to the administration of the determinative audiogram, that is, the audiogram that most reliably reflects the extent of the claimant's hearing loss. *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT); *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT); *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35 (2002); *Cox*, 25 BRBS 203; *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). Each employer bears the burden of establishing it is not the responsible employer. *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). In order to establish that it is not the responsible employer, each employer is required to establish either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his hearing loss or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT). On remand, the administrative law judge must fully address the responsible employer issue.

Accordingly, the administrative law judge's Order Granting Summary Dismissal of Container Stevedoring and his Order Denying Reconsideration and Maersk's Motion for Continuance are vacated. The case is remanded for a hearing on the merits consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge