BRB Nos. 90-2082
and 90-2082A

KEITH L. SHARBONO	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
MARINE INDUSTRIES NORTHWEST	)	DATE ISSUED:_____)
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order and Order Denying Reconsideration of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Matthew S. Sweeting, Tacoma, Washington, for claimant.

Robert C. Manlowe (Williams, Kastner & Gibbs), Seattle, Washington, for employer/carrier.

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order and Order Denying Reconsideration (89-LHC-3672) of Administrative Law Judge Henry B. Lasky denying benefits 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, a shipfitter, underwent audiometric testing in 1985 with his previous employer, Tacoma Boatbuilding, which showed that he suffered a 19 percent binaural impairment. Claimant was hired as a shipfitter by employer on November 15, 1988. Prior to his pre-employment physical examination, claimant, on November 21, 1988, filed a claim against employer for a work-related hearing loss. Claimant underwent his "pre-employment" audiometric evaluation on December 2, 1988, which revealed a 23 percent binaural hearing loss. An April 24, 1989, audiogram yielded a 19 percent binaural loss. Employer voluntarily paid claimant benefits for a 19 percent hearing loss. The parties, including the Director, Office of Workers' Compensation Programs, stipulated that claimant has a 19 percent hearing loss arising out of and in the course of his employment, and that the hearing loss "occurred" on November 21, 1988. The only issue presented for adjudication was employer's entitlement to relief from compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). Neither claimant nor his attorney was present at the hearing.

In his Decision and Order, the administrative law judge accepted the parties' stipulation that claimant suffered a 19 percent hearing impairment. He found, however, that claimant was aware of the hearing loss diagnosed in 1985 during his employment with his previous employer, that such hearing loss has not progressed as evidenced by the results of the audiograms, and that claimant, therefore, was not exposed to injurious stimuli during his employment with employer. The administrative law judge thus denied benefits as he found that claimant's injury did not arise out of his employment with employer. With regard to employer's claim for Section 8(f) relief, the administrative law judge found that a "second injury" did not occur, assuming, *arguendo*, that employer did expose claimant to injurious stimuli. The administrative law judge therefore denied the claim for Section 8(f) relief. Employer's and claimant's motions for reconsideration were summarily denied.

On appeal, employer contends that the administrative law judge erred in rejecting the parties' stipulations that claimant incurred a hearing loss arising out of his employment with employer since the Director participated in and agreed to be bound by the stipulations. Alternatively, employer contends that, once the stipulations were rejected, the administrative law judge erred in deciding the case on the merits without allowing the parties the opportunity to present evidence on the issues. Employer also contends that the administrative law judge erred in concluding that claimant suffered no hearing loss injury while working with employer, as only proof of exposure to injurious stimuli is necessary to prove the existence of an injury. Employer contends that claimant was so exposed, and that therefore a "second injury" occurred for purposes of its claim for Section 8(f) relief.

In his cross-appeal, claimant contends that the administrative law judge erred in rejecting, without prior notice, the parties' stipulations that claimant incurred a hearing loss injury arising out of his employment and in concluding that employer is not liable for his work-related hearing loss. The Director responds to both appeals, urging that the case be remanded as the administrative law judge failed to provide notice to the parties that he was *sua sponte* raising the uncontested issue of claimant's entitlement to compensation.

We agree that the case must be remanded. The Board has held that an administrative law judge may not reject the parties' stipulations without giving the parties prior notice that he will not automatically accept them. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 (1985). Under such circumstances, the administrative law judge must allow the parties the opportunity to present evidence in support of their positions. *Dodd*, 22 BRBS at 250; *see also* 20 C.F.R. §702.336. On remand, the administrative law judge must hold a new hearing at which all parties are represented, or otherwise give all parties the opportunity to submit evidence in support of their positions.

With regard to the issue of whether employer is liable to claimant for his hearing loss, it is well established that the employer responsible for paying benefits in an occupational hearing loss case is the last employer to expose claimant to injurious stimuli prior to the date upon which claimant becomes aware that he is suffering from an occupational disease arising out of employment. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In determining that employer is not the responsible employer in this case, the administrative law judge found that claimant was aware of the work-relatedness of his hearing loss in 1985 when he worked for Tacoma Boatbuilding. In the time since the administrative law judge issued his decision in this case, the United States Court of Appeals for the Ninth Circuit decided *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991). In this case, the court held that the responsible employer is the one on the risk at the time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability. *Id.*, 932 F.2d at 840, 24 BRBS at 143 (CRT); *see also Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). Moreover, in determining the responsible employer, it is not necessary that claimant's exposure to noise actually cause or contribute to claimant's hearing loss, contrary to the administrative law judge's statement; it is necessary only that claimant be exposed to injurious stimuli while in employer's employ. *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part sub nom. Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989). We, therefore, vacate the denial of benefits to claimant, and we remand the case for consideration of claimant's entitlement to benefits in light of this case law.

On remand, the administrative law judge also must reconsider whether employers is entitled to Section 8(f) relief. In a hearing loss case where claimant is entitled to benefits for fewer than 104 weeks, employer is liable for the extent of the hearing loss attributable to the subsequent injury, and the Special Fund is liable for the pre-existing loss. 33 U.S.C. §908(f)(1)(1988); *see generally Reggiannini v. General Dynamics Corp.*, 17 BRBS 254 (1985). The administrative law judge correctly stated that there must be a "second injury" or an actual aggravation before Section 8(f) may apply, and that mere exposure to injurious stimuli is insufficient to establish this element. *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988); *Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993). Moreover, increases in hearing loss at certain frequencies which are not reflected in the impairment rating calculated under the American Medical Association *Guides to the Evaluation of Permanent Impairment* are an insufficient basis for an award of Section 8(f) relief. *McShane v. General Dynamics Corp.*, 22 BRBS 427 (1989). If, on remand, the administrative law judge again finds that claimant did not sustain a second injury, Section 8(f) is inapplicable. *Skelton*, 27 BRBS at 31.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Reconsideration are vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge