BRB No. 92-1936

CHARLES L. RITCHIE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Quentin P. McColgin, Administrative Law Judge, United States Department of Labor.

Rebecca Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for the claimant.

Ruth E. Bennett (Franke, Rainey and Salloum), Gulfport, Mississippi, for the employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-1610) of Administrative Law Judge Quentin P. McColgin 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 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 was exposed to loud noise while working for employer as a fitter and welding inspector for nine months in 1958. Thereafter, claimant was employed as an insurance salesman

until 1980, when he commenced employment with McDermott, another maritime employer, as a tool room attendant/inside machinist. Claimant testified that at cDermott welding, chipping, hammering, and possibly grinding took place in the craft shop, and that he was exposed to shop noise which he characterized as minimal for approximately two years, until he left in October 1983. Claimant also admitted that he never wore a hearing protection device, although he conceded that they were available. Based on audiometric testing performed on March 7, 1987, which was interpreted by Dr. James Wold as indicating a binaural hearing impairment of 53.3 percent, claimant filed a claim for occupational hearing loss benefits under the Act against employer.

The administrative law judge found that inasmuch as claimant had established an injury which could be due to exposure to high levels of noise, he was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that his hearing loss was causally related to his employment. Without determining whether employer had introduced evidence sufficient to establish that claimant's hearing loss was not work-related, the administrative law judge found that consistent with *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), employer had rebutted the Section 20(a) presumption by establishing that it was not the responsible employer because claimant was exposed to injurious noise in his subsequent covered employment with McDermott. The administrative law judge further noted that although claimant made a motion at the hearing, after he rested his case in chief, to join McDermott in his claim against Ingalls, the motion was denied because claimant should have presented the motion prior to the hearing. In addition, the administrative law judge stated that pursuant to *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), claimant was required to move for joinder within one year of his awareness that the last responsible employer doctrine would be argued, and that as claimant knew of employer's defense as early as September 1988 by virtue of its notice of controversion, the statute of limitations had long run against McDermott by the time of the hearing.

On appeal, claimant contends that the administrative law judge erred in relying on the testimony of Mr. Lewis, claimant's supervisor at McDermott, which employer introduced for impeachment purposes, as substantive evidence sufficient to establish that he was exposed to injurious noise in his subsequent maritime employment with McDermott. Claimant also contends that he was prejudiced by employer's last minute identification and use of this witness. Claimant maintains that if employer had introduced Mr. Lewis's testimony or other evidence supporting its subsequent injurious exposure defense earlier, he would have requested joinder of McDermott prior to the end of the hearing and the responsible employer issue could have been addressed in one judicial setting. Claimant also contends that the administrative law judge erred to the extent he inferred that it was claimant's burden to join McDermott, and in finding that any claim claimant might have had against McDermott would be barred by the statute of limitations. Employer responds, urging affirmance.

We initially reject claimant's argument that the administrative law judge erred in relying on Mr. Lewis's testimony as "substantive evidence" because he was only called as an impeachment witness. Contrary to claimant's assertions, the administrative law judge is not bound by formal rules of evidence, and has the discretion to credit such testimony according to his own judgment. 33

U.S.C. §923(a); *see generally Bogdis v. Marine Terminals Corp.*, 23 BRBS 136 (1989). Claimant's contention that Mr. Lewis's eleventh-hour appearance prejudiced his case similarly must fail; claimant was clearly aware that employer would attempt to establish that claimant had subsequent injurious exposure with McDermott based on employer's motions for dismissal filed on November 18, 1988, and February 22, 1991. Claimant's argument that the other relevant evidence of record, his testimony and that of his son, indicates that any noise exposure claimant may have had at McDermott was episodic and sporadic at best, is also rejected as the administrative law judge's decision to credit Mr. Lewis was within his discretion. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979).

Mr. Lewis testified that claimant checked in and tested tools at McDermott and that claimant was exposed to loud noise from buckeye grinders, needle guns, power drills, and sledge hammers in the shop area. Tr. at 43-45. Mr. Lewis also stated that the tool room where claimant worked was in close proximity to steel fabrication operations which included the joining of plates together, and putting stiffeners on and welding them. Tr. at 49. Based on this testimony, the administrative law judge rationally found that claimant was exposed to loud noise in his subsequent covered employment with McDermott which could have contributed to the hearing loss shown on the March 7, 1989, audiogram. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge's finding that employer established that claimant was exposed to noise in subsequent maritime employment is thus supported by substantial evidence.

While we thus reject claimant's contentions that the administrative law judge erred in crediting Mr. Lewis and finding Ingalls is not the responsible employer on the record before him, we cannot affirm his denial of benefits as claimant's alternate contentions have merit. Specifically, we agree with claimant that the administrative law judge erred in denying his motion to join McDermott as a party. Pursuant to the Board's holding in *Susoeff*, 19 BRBS at 151-152, and the decision in *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1991), which is controlling in this case which arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, once claimant establishes a *prima facie* case of entitlement, it is employer's burden to establish that it is not the responsible employer. Moreover, on the facts presented, where employer filed motions to dismiss on November 18, 1988, and on February 22, 1991, based on claimant's later maritime exposure, the administrative law judge's failure to reopen the record and join the potentially liable subsequent employer is an abdication of his duty to resolve disputed questions of fact. *See generally Sans v. Todd Shipyards Corp.*, 19 BRBS 24, 28-29 (1986). Under 20 C.F.R. §§702.336 and 702.338, the administrative law judge is empowered to resolve any issue arising during the course of proceedings and must fully inquire into matters that are fundamental to the dispositions of the issues in a case. *See generally Jourdan v. Equitable Equipment Co.*, 25 BRBS 317, 325 (1992)(Dolder, J., dissenting on other grounds). Given the administrative law judge's duty to resolve matters fundamental to the disposition of a case, his denial of claimant's motion to join McDermott on the basis that claimant should have filed his motion earlier cannot be affirmed.

In denying claimant's motion to join McDermott, the administrative law judge also reasoned that claimant's claim against McDermott was untimely. The administrative law judge stated that under *Smith,* 647 F.2d at 518, 13 BRBS at 391, claimant was required to file a claim within one year of his awareness that the responsible employer defense would be raised by Ingalls. In *Smith,* however, the United States Court of Appeals for the Fifth Circuit held that in an occupational disease case where there are successive employers and a claim is timely filed against a later employer, the limitation periods for providing notice and filing a claim do not begin to run against a prior employer until claimant becomes aware, or should have become aware, that liability may, under the last employer doctrine, be asserted against that particular employer. A claim is timely under *Smith* so long as it is filed within one year of an adjudication that more recent employers are not liable. Thus, the administrative law judge erred in concluding *Smith* requires filing once employer raised the responsible employer defense, as a claimant may timely file against another employer under *Smith* within one year of a decision releasing the employer in the initial claim. While *Smith* specifically applies to cases where a later employer is released from liability and a prior employer becomes potentially liable, in *Osmundsen v. Todd Pacific Shipyard,* 18 BRBS 112 (1986), the Board found the same reasoning applicable where, as here, the administrative law judge found the prior employer released and the subsequent employer thus potentially liable. In *Osmundsen*, the Board held that where a prior employer is released from liability and a subsequent employer becomes potentially liable, the claim against the subsequent employer is not time-barred where the initial claim is timely. Consistent with this case law, claimant could raise a timely claim against McDermott at the hearing.

In addition, in *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992), the Board noted that there is no requirement that claimant file against potentially liable employers in any specific order. In *Lins*, the Board addressed arguments regarding employer's burden of proof on the responsible employer issue, consistent with *Avondale Shipyards* and *Susoeff,* and it is in the context of the responsible employer issue that the administrative law judge here made his comments on timeliness. The timeliness defense is one which should be raised by the affected party, in this case McDermott, before it is considered by the administrative law judge. It thus is not a proper basis for refusing to join McDermott. We therefore vacate the administrative law judge's denial of benefits and remand this case for further proceedings with McDermott being joined as a party to the proceedings. *See generally Susoeff,* 19 BRBS at 152. As McDermott was not a party before the administrative law judge in the initial proceedings, the administrative law judge must grant McDermott the opportunity for a hearing to present its own evidence on the issues, including the claimant's last injurious exposure.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge