BRB No. 02-0694

MELVIN SIDWELL Claimant-Petitioner v VIRGINIA INTERNATIONAL TERMINALS Self-Insured Employer-Respondent	)	DATE ISSUED: JUN 30, 2003 DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden), Norfolk, Virginia, for claimant.

R. John Barrett (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order of Administrative Law Judge Fletcher E. Campbell, Jr., 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 if they 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).

At the time of the formal hearing on March 1, 2002, claimant had been employed by International Longshoremen's Association Local 1970 (ILA Local 1970) on a full-time basis as its president and business agent for approximately five years.

[1] Prior to his employment for ILA Local 1970, claimant worked as a container repair

mechanic for Virginia International Terminals (VIT).

[2] Claimant filed a claim against VIT for benefits under the Act for an occupational hearing loss after audiometric testing was performed on February 20, 2000. The parties stipulated that claimant has a noise-induced hearing loss on the basis of a subsequent audiogram performed on May 11, 2000, demonstrating a 2.8 percent binaural hearing loss. The parties also stipulated that VIT was claimant's last maritime employer before he became full-time president of ILA Local 1970. At the hearing, VIT disputed that it is the responsible employer, asserting that claimant was exposed to injurious noise while working as a maritime employee for ILA Local 1970

[3] and that, therefore, ILA Local 1970 is the employer responsible for benefits for claimant's hearing loss.

In his Decision and Order, the administrative law judge found that ILA Local 1970 is claimant's last maritime employer, having determined that claimant's position as local president qualifies as maritime employment. Next, the administrative law judge determined that employer adduced sufficient evidence that claimant was exposed to injurious noise while working as president of ILA Local 1970. On the basis of his conclusion that ILA Local 1970 was claimant's last maritime employer where he was exposed to injurious stimuli, the administrative law judge denied claimant's claim against VIT.

On appeal, claimant contends that the administrative law judge erred in denying his claim against VIT. Specifically, claimant contends first that the administrative law judge erroneously found that claimant' work as a union president is maritime employment under the Act. 33 U.S.C. §902(3). Claimant also argues that the administrative law judge erred in finding that employer met its burden of establishing that claimant was exposed to injurious noise while performing his duties as union president. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

The administrative law judge in the instant case correctly recognized that the responsible employer in a hearing loss case is the last employer covered under the Act to expose the claimant to injurious noise prior to the audiogram found to be determinative of claimant's hearing loss. *See Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). *See also Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS

71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The employer who is claimed against bears the burden of establishing that it is not the responsible employer. *See Faulk,* 228 F.3d 378, 34 BRBS 71(CRT); *Cuevas,* 977 F.2d 186, 26 BRBS 111(CRT); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Everson,* 33 BRBS 149; *Zeringue,* 32 BRBS 275. In order to establish that it is not the responsible employer, the employer against whom the claim is filed must establish either that the employee's exposure with employer did not have the potential to cause his hearing loss or that the employee was exposed to injurious noise while working for a subsequent employer in employment covered under the Act. *See Faulk,* 228 F.3d 378, 34 BRBS 71(CRT); *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Everson,* 33 BRBS 149; *Zeringue,* 32 BRBS 275.

In addressing this issue, the administrative law judge in the instant case initially stated that, as claimant worked in maritime employment at a covered situs for VIT, VIT would be liable for any benefits awarded to claimant unless VIT could shift liability to claimant's subsequent employer, ILA Local 1970. The administrative law judge thereafter concluded that VIT met its burden of shifting liability to a subsequent covered employer, having determined that claimant's work for ILA Local 1970 constituted maritime employment and that claimant was exposed to injurious noise in the course of that employment. We must first consider claimant's contention that the administrative law judge erred in determining that claimant's work as ILA Local 1970 president qualifies as maritime employment under Section 2(3) of the Act, 33 U.S.C. §902(3).

Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker . . . ." 33 U.S.C. §902(3). An employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 275-276, 6 BRBS 150, 166 (1977). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear an integral relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). In *Schwalb*, the United States Supreme Court held that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered under the Act, as their work is an integral part of and essential to

those overall processes. *Id.* The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has held that in determining whether the employee is engaged in maritime employment, the inquiry is "whether the employee's *assigned* job requires his spending *some of his time in indisputably longshoring operations.*" *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 169, 32 BRBS 125, 129(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 547 (1998). Rejecting the notion that "maritime employment is determined by some defined percentage of an employee's work," the Fourth Circuit in *Shives* acknowledged that coverage is not extended to those employees whose maritime activities were merely "momentary" or "episodic." *Id.* The court in *Shives* determined that where the employee's maritime work was an assigned portion of his duties necessary to the efficient functioning of the terminal, this maritime work was neither "momentary" or "episodic." *Id.; see also Boudloche v. Howard Trucking Co.,* 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied,* 452 U.S. 915 (1981). The United States Court of Appeals for the First Circuit has held that to be considered "episodic," work must be discretionary or extraordinary as opposed to a regular portion of the duties claimant could be assigned. *Levins v. Benefits Review Board*, 724 F.2d 4, 8, 16 BRBS 24, 33(CRT) (1st Cir. 1984); *see also Maher Terminals, Inc. v. Director, OWCP [Riggio],* 330 F.3d 162 (3d Cir. 2003), *aff'g* 35 BRBS 104 (2001); *Zeringue,* 32 BRBS at 277.

In the instant case, the administrative law judge found that claimant's job as ILA Local 1970 president involves the negotiation of the collective bargaining agreement, the handling of job disputes, grievances, and medical claims, and attendance at funerals of members and retirees. *See* Decision and Order at 3; Tr. at 24; EX 5 at 8-9. The administrative law judge stated that claimant estimated that he worked 60 to 75 hours per week as union president and that he spent an hour or less per week at the terminals. *See* Decision and Order at 3-4; Tr. at 24; EX 5 at 7. The administrative law judge further found that claimant is called to the terminals by both employers and union members to handle labor problems regarding pay, productivity and overtime rotations, and also to check on working conditions. *See* Decision and Order at 4; Tr. at 24-25, 43. In addition, the administrative law judge found that, in the course of his work as ILA Local 1970 president, claimant serves on between 15 and 18 joint union-management committees related to the operation of the port and to longshoring work. Among the functions of these committees are to increase productivity in the port, to ensure the workers' safety, and to deal with work jurisdiction issues. *See* Decision and Order at 4; Tr. at 25-26, 39-41, 44-50; EX 5 at 9. The administrative law judge found that claimant's activities on behalf of the members of his union have a significant impact on both the safety and productivity of the union members whose work is essential to the loading and unloading process. Decision and Order at 9. Moreover, the administrative law judge rejected claimant's contention that his maritime duties were merely episodic. Lastly, in

finding that claimant's work as ILA Local 1970 qualifies as maritime employment pursuant to Section 2(3), the administrative law judge found persuasive the conclusions by the administrative law judge, the Board, and the United States Court of Appeals for the Second Circuit that a union shop steward employed by a stevedoring company had status as a maritime employee in *American Stevedoring, Ltd. v. Marinelli,* 248 F.3d 54, 35 BRBS 41(CRT) (2[d] Cir. 2001), *aff'g* 34 BRBS 112 (2000).

We agree with the administrative law judge that the decision in *Marinelli* supports a finding of coverage for claimant's work as ILA Local 1970 president in the case at bar. The administrative law judge in *Marinelli* found that the claimant's job as union shop steward was integral to the employer's stevedoring business, and thus that he was a covered employee. In *Marinelli,* the administrative law judge found that the claimant facilitated the day-to-day loading and unloading process by removing interpersonal obstacles that might obstruct such operations. The administrative law judge found that the claimant "sided" with employer at times, and not only with the employees, and also directed employees to return to work when stoppages were threatened. The Board affirmed the administrative law judge's conclusion that the claimant's functions as shop steward were integral to the loading and unloading process pursuant to the standard for coverage enunciated by the Supreme Court in *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT). *Marinelli,* 34 BRBS 112. The Second Circuit affirmed the administrative law judge's finding of coverage, rejecting the employer's arguments that the claimant's work did not meet the *Schwalb* "integral or essential test." First, in rejecting the employer's contention that the claimant was not covered because non-union shops perform better than union shops, the court held that the inquiry was whether the claimant was integral to this employer's business of loading and unloading, and not whether his duties were essential to stevedoring operations in general. Second, the court rejected the argument that the employer's ships were loaded and unloaded even when the claimant was not present, holding that pursuant to *Schwalb,* it is irrelevant that the claimant's contribution to the loading process was not always needed. Third, the court rejected the employer's argument that the claimant's job as shop steward was not particular to the stevedoring industry, stating that it makes no difference that the kind of work performed by the claimant might have been performed by a shop steward in another industry. *Marinelli,* 248 F.3d at 59-60, 35 BRBS at 44-45(CRT).

Similar to *Marinelli,* the administrative law judge's finding of coverage here rests on a determination that claimant's job as union president has a significant impact on the safety and productivity of the workers who are essential to the loading and unloading process. Decision and Order at 9. This finding is supported by claimant's credited testimony that his work involves negotiating the

collective bargaining agreement and handling labor problems and grievances regarding pay, productivity, overtime rotations and working conditions, as well as membership on numerous joint labor-management committees whose mission entails increasing productivity in the port, ensuring the workers' safety and dealing with work jurisdiction issues. Decision and Order at 3-4; Tr. at 24-25, 39-41, 44-50; EX 5 at 7-9. This testimony supports the administrative law judge's conclusion that claimant's functions as ILA local 1970 president are integral to

the loading and unloading process, consistent with the decisions in *Schwalb* and *Marinelli*.[5]

We also reject claimant's argument that the administrative law judge erred in rejecting his argument that claimant's maritime duties as president of the local were too episodic to establish maritime employment. Claimant's own testimony establishes that he was called to the terminals to resolve labor-management disputes as a regular part of his job. Although the administrative law judge found that those visits averaged only about one hour per week, they constitute a regular portion of claimant's duties necessary to the efficient functioning of the terminal. See Shives, 151 F.3d at 170, 32 BRBS at 130(CRT). In addition, the administrative law judge found that claimant's regular duties also included attendance at labor-management committee meetings held outside the terminals, which qualified as maritime activity. See generally Riggio, 330 F.3d 162. We therefore affirm the administrative law judge's determination that claimant's maritime activities are not merely episodic as it is supported by substantial evidence and in accordance with applicable law. See Shives, 151 F.3d at 170, 32 BRBS at 130(CRT); Levins, 724 F.3d at 8, 16 BRBS at 33(CRT); Boudloche, 632 F.2d 1346, 12 BRBS 732; Zeringue, 32 BRBS at 277; see also Riggio, 330 F.3d 162. Accordingly, the administrative law judge's conclusion that claimant's job as union president was integral to the longshoring process, and thus constitutes covered maritime employment under Section 2(3) of the Act, is affirmed.

We next consider claimant's contention that the administrative law judge erred in finding that employer met its burden of establishing that claimant was exposed to injurious noise while working as ILA Local 1970 president. The United States Court of Appeals for the Fourth Circuit has held that in order for the employer who is claimed against to shift liability to a subsequent covered employer, the first employer must produce substantial evidence that the claimant's exposure in his subsequent employment was injurious, *i.e.,* had the potential to cause his injury. *See Faulk,* 228 F.3d at 385, 34 BRBS at 75-76(CRT); *see also Brown,* 194 F.3d at 5, 33 BRBS at 165(CRT); *Everson,* 33 BRBS at 153; *Zeringue,* 32 BRBS at 278; *Lins v. Ingalls Shipbuilding, Inc.,* 26 BRBS 62, 64 (1992).

In the instant case, the administrative law judge credited claimant's testimony that he visits terminals on an average of one hour per week where he is exposed to noise for short time periods. Decision and Order at 4; Tr. at 26-27. Specifically, claimant testified that he has been inside shops while loud tools are in operation, the loudest of which are zip guns, pneumatic grinders, pneumatic impacts, welding machines, and air compressors. Decision and Order at 4; Tr. at 35. He also has been present at the interchange complex which he considers to

be very noisy. Decision and Order at 4; Tr. at 36-38. The record also includes deposition testimony of several management representatives of the employers who employ the members of ILA Local 1970. EXs 10-17. These individuals testified that they had observed claimant, in his capacity as union president, present at the terminals where he would have been exposed to noise for brief periods of time. Id. The administrative law judge cited these depositions as well as claimant's testimony in determining that VIT adduced "ample and uncontradicted evidence that claimant was sporadically exposed to loud noises while performing his duties as local president." Decision and Order at 10. The administrative law judge concluded that this evidence was sufficient to meet employer's burden of showing that claimant was exposed to injurious noise while working as local president. Decision and Order at 11. We affirm the administrative law judge's conclusion as it is supported by substantial evidence and in accordance with law. In so doing, we reject claimant's argument that the administrative law judge was required to reject VIT's evidence of claimant's subsequent noise exposure while employed by ILA Local 1970 on the basis that the evidence was not sufficiently precise with regard to the source, duration and dates of claimant's exposure to loud noises in his employment as local union president.

We are guided in this regard by the decision of the United States Court of Appeals for the Ninth Circuit in *Jones Stevedoring Co. v. Director, 0WCP,* 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). In *Jones,* the court upheld an administrative law judge's reliance on a claimant's testimony where he did not have a specific recollection of the precise noises he experienced but, rather, described the various kinds of noise he generally heard on the job. The court concluded that this testimony was a reasonable basis for the administrative law judge's finding that the claimant was exposed to harmful levels of noise. *Id.,* 133 F.3d at 692, 31 BRBS at 185(CRT). We hold that the administrative law judge in the instant case reasonably determined that the uncontradicted evidence that claimant was intermittently exposed to loud noises in his employment as union president was sufficient to establish exposure that had the *potential* to cause claimant's hearing loss. *See Faulk,* 228 F.3d at 385, 34 BRBS at 75-76(CRT); *see also Jones,* 133 F.3d at 692, 31 BRBS at 185(CRT). We therefore affirm the administrative law judge's determination that VIT met its burden of establishing that claimant was exposed to injurious noise while working in subsequent covered employment with ILA Local 1970, and the administrative law judge's consequent denial of the claim against VIT for benefits for claimant's hearing loss.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge