BRB No. 00-293

TERRY OLSON	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Nov. 21, 2000
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
ROGERS TERMINAL & SHIPPING	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Determining Responsible Employer of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Stevedoring Services of America and Homeport Insurance Company.

Robert E. Babcock, Lake Oswego, Oregon, for Rogers Terminal & Shipping.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative

Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Stevedoring Services of America appeals the Decision and Order Determining Responsible Employer (99-LHC-662) of Administrative Law Judge Paul A. Mapes 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, who began working as a longshoreman in 1970, underwent audiometric testing in 1984 which revealed a 12 percent binaural hearing loss. He filed a claim and was awarded benefits. He continued to work as a longshoreman. Claimant underwent audiometric testing on June 20, 1997, which revealed a 41.25 percent loss in the right ear. The test was improperly performed on the left ear, and a follow-up test on June 23, 1997, revealed a 43.125 percent hearing loss in the left ear. These tests combined to reveal a 41.6 percent binaural hearing loss. There is no evidence that claimant was provided with a copy of the audiograms or received an explanation of the likely cause for his hearing loss. Marine Terminals last employed claimant before the 1997 audiograms. Claimant continued working as a longshoreman and continued to be exposed to work-related noise. He underwent an additional audiometric test on June 29, 1998, which revealed a 45 percent binaural hearing loss. Stevedoring Services of America (SSA) was claimant's last employer prior to administration of the audiometric test on June 29, 1998. Claimant filed a claim under the Act on August 18, 1998, and continued working. He was tested again on January 11, 1999; this test revealed a 37.8 percent binaural hearing loss. Rogers Terminal & Shipping (Rogers Terminal) was claimant's last employer prior to the exam on January 11, 1999.

In his decision, the administrative law judge found that the test administered on June 29, 1998, was the best measure of claimant's hearing loss. Thus, as he found it to be the "determinative audiogram," the administrative law judge found SSA, the last employer to expose claimant to injurious stimuli prior to the administration of the examination on June 29, 1998, is the responsible employer.[1]

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[1]Claimant and the various employers stipulated that SSA would pay claimant's compensation award, and that SSA could seek reimbursement from the liable employer if the administrative law judge found a different employer liable.

On appeal, SSA contends that the administrative law judge erred in finding the audiogram performed on June 29, 1998, to be the determinative audiogram, and thus in finding SSA to be the responsible employer. Rogers Terminal responds, urging affirmance of the administrative law judge's decision.

In an occupational disease case, the responsible employer or carrier is the employer or carrier during the last employment where claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been aware he was suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). In *Cardillo*, the court specifically stated that:

> the employer during the last employment in which claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Cardillo, 225 F.2d at 145. Thereafter, in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, stated that the "onset of disability is a key factor in assessing liability under the last injurious-exposure rule." In *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), the Ninth Circuit reviewed the issue of responsible employer under *Cardillo* and *Cordero* in a hearing loss case, and held that the responsible employer or carrier 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 for which claimant is being compensated. The court also relied on the statement in *Cordero* that there must be a "rational connection" between the onset of the claimant's disability and his exposure; thus, the court held liable the last employer who, by injurious exposure, could have contributed causally to the claimant's disability evidenced on the determinative audiogram. *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT); *see Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). In the context of calculating average weekly wage, the Ninth Circuit adopted the Board's definition of "determinative" audiogram as being the one the administrative law judge determines is the best measure of claimant's hearing loss. *Ramey v. Stevedoring Services of America,* 134 F.3d 954, 31 BRBS 206(CRT)(9th Cir. 1998); *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

We reject SSA's contention that the administrative law judge erred in finding the June 29, 1998 audiogram to be determinative of claimant's hearing loss and, therefore, of the responsible employer issue. Contrary to SSA's contention, the administrative law judge did not rely mechanically on the fact that the results of the June 29, 1998 audiometric testing

revealed the highest percentage of hearing loss to find it was the determinative audiogram. Rather, the administrative law judge first found that the increase in percentage of hearing loss shown on the June 1998 reflects additional hearing loss claimant suffered as a result of increased exposure after the testing in 1997. Where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer is liable for the entire resultant condition. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1996). There is no evidence that claimant received the results of the audiometric testing in 1997, and he continued to work for another year, with exposure to work-related noise. Moreover, Dr. Hicks testified that exposure to workplace noise within 14 hours of an audiogram can affect the validity of that audiogram, Tr. at 80-81, and the administrative law judge found that the test on the right ear on June 20, 1997 was administered within 14 hours of claimant's exposure to noise at work. Therefore, we affirm the administrative law judge's finding that the audiograms performed in 1997 are not determinative of the extent of claimant's disability.

Furthermore, the administrative law judge found that the results of the June 1998 audiometric test administered by Dr. Lipman were a better measure of claimant's hearing loss than the test administered in January 1999 by Dr. Hicks. The administrative law judge noted that Dr. Lipman used the "Houston-Westlake" descending technique which the administrative law judge found is more commonly used in medical offices, suggesting that it is the most accurate measure of hearing loss in cases such as this that do not involve malingering. The administrative law judge is entitled to weigh the medical evidence, and to determine which evidence is to be accorded determinative weight. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In this case, SSA has not raised any reversible error in the administrative law judge's consideration of the audiometric evidence, and the administrative law judge's finding is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's finding that the audiogram dated June 29, 1998 is determinative of claimant's hearing loss, and therefore that SSA is the responsible employer as the last employer to expose claimant to injurious stimuli prior to this audiogram. *See Port of Portland,* 932 F.2d at 836, 24 BRBS at 137(CRT); *Mauk*, 25 BRBS at 118.

Accordingly, the Decision and Order of the administrative law judge finding Stevedoring Services of America liable for claimant's compensation is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge