BRB No. 06-0367

OLLIE TATE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DALTON STEAMSHIP CORPORATION	)	DATE ISSUED: 11/24/2006
	)	
and	)	
	)	
THE GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2005-LHC-0126) of Administrative Law Judge Richard D. Mills 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 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 worked as a longshoreman for 34 years. On April 25, 1983, claimant was hired by employer from the union hall to work as a member of a longshoremen's gang to discharge cargo from two containers. He testified that he was exposed to loud

noise during this employment. Claimant had worked for half an hour when he was injured lifting a pallet of boards and the boards fell on the forklift. Claimant suffered physical injuries for which he was compensated. Claimant did not return to work following this accident. H. Tr at 13.

Claimant subsequently underwent audiometric testing on May 7, 2004 by Daniel Bode, an audiologist. Cl. Ex. 5 The test revealed a 35.9 percent binaural impairment. *Id*. Mr. Bode opined that claimant suffered work-related noise-induced hearing loss. Claimant also was tested by Dr. Seidemann, Ph.D., on July 27, 2004. Cl. Ex. 6. The test revealed a 30.3 percent binaural impairment. *Id*. Dr. Seidemann stated that claimant's hearing loss did not appear to be the result of occupational noise exposure. Moreover, Dr. Seidemann opined that the half hour of noise exposure claimant experienced on April 25, 1983, could not have caused or aggravated his hearing impairment. Subsequently, claimant filed a claim against employer for his loss of hearing.

The administrative law judge found that the evidence establishes invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's hearing impairment is work-related. The administrative law judge found that claimant credibly testified regarding his exposure to noise at work and to the fact that he did not wear hearing protection. However, the administrative law judge found that employer established rebuttal of the presumption with Dr. Seidemann's opinion that claimant's hearing loss was not caused or aggravated by work-place noise exposure with employer on April 25, 1983. Therefore, the administrative law judge denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that he was not exposed to injurious noise with employer. Claimant avers that the half hour of exposure to work-place noise on April 25, 1983, may not have actually caused or contributed to his hearing loss, but that it was the type of injurious noise stimuli to which he was exposed over the course of his employment history which resulted in his overall hearing impairment. Thus, claimant contends that employer is liable for benefits for his hearing loss as his last covered employer. Employer responds, urging affirmance of the administrative law judge's decision.

The responsible employer rule is a judicially-created rule for allocating liability among employers in cases where an occupational disease develops after prolonged exposure. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). It is well established that the employer responsible for paying benefits in an occupational disease case is the last covered employer to expose claimant to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

In this case, the administrative law judge invoked the Section 20(a) presumption, finding that claimant presented evidence that he was exposed to injurious noise on April 25, 1983. In finding the Section 20(a) presumption rebutted, the administrative law judge found that employer established it is not the liable employer. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998). Employer may establish that it is not the responsible employer in one of two ways: by establishing that claimant was not exposed to injurious stimuli while he worked for employer or that claimant was exposed to injurious stimuli while working for a subsequent covered employer. *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); *see also Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). In this case only the former option is available to employer as claimant did not work anywhere after his accident on April 25, 1989.

In finding that employer is not liable for benefits, the administrative law judge relied on Dr. Seidemann's opinion that claimant was not exposed to levels of work-place noise on April 25, 1983, that could have caused or contributed to a hearing impairment. Specifically, Dr. Seidemann testified in his deposition that claimant was not exposed to injurious noise on the day of his work-related accident with employer as he only worked half an hour. Emp. Ex. 2 at 24. Moreover, Dr. Seidemann testified that, as a forklift operator, claimant was not exposed to noise above the 90 decibel level required to produce noise-induced hearing loss. *Id.* at 25, 40. Dr. Seidemann concluded that the exposure claimant had on April 25, 1983 did not cause or aggravate claimant's hearing loss because claimant was not exposed to injurious levels of noise. *Id.* at 42-43.

We affirm the administrative law judge's finding that claimant was not exposed to injurious stimuli on April 25, 1983, as it is rational and supported by substantial evidence in the form of Dr. Seidemann's opinion. Moreover, we reject claimant's contention that the decision of the United States Court of Appeals for the Fifth Circuit in *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004), compels a different result in this case. In *Ibos*, the decedent worked for various covered employers for over 50 years. He developed mesothelioma, from which he died, due to work-related asbestos exposure. Claims were filed against decedent's last three employers. The administrative law judge held the last employer, New Orleans Stevedores (NOS), liable for benefits. This employer appealed to the Fifth Circuit the Board's affirmance of this finding. The court affirmed the finding as well, though on different reasoning.

The court initially agreed with the Board that a true causal connection between decedent's exposure to asbestos with NOS and his disease did not have to be established before an employer could be held liable. The court held that this was inconsistent with

the long-standing holding in *Cardillo*, 225 F.2d at 144-145, that the last employer is fully liable even if, from a medical perspective, it is unlikely that the disease is attributable to that last employment. The Fifth Circuit deferred to the interpretation of the Director, OWCP, that the last employer is liable if "the conditions of the employment [are] of a kind that produces the occupational disease." *Ibos*, 317 F.3d at 485, 36 BRBS at 96(CRT).

The court further held, however, that the Board erred in articulating the legal standards by which an employer can establish it is not the liable employer, although this error was held to be harmless. The Board had held that an employer can be absolved of liability if it established that the decedent's exposure with that employer did not have the potential to cause the occupational disease. The Fifth Circuit held that this was not the correct focus; rather, the court held that employer can rebut the employee's *prima facie* case by establishing either that the exposure to injurious stimuli did not cause the employee's occupational diseases or that the employee was exposed to injurious stimuli with a subsequent covered employer. *Id.*, 317 F.3d at 485, 36 BRBS at 96(CRT); *cf. Picinich*, 914 F.2d at 1320, 24 BRBS at 39(CRT) (exposure to injurious stimuli is not sufficient to hold employer liable if it establishes that the exposure was to a quantity that did not have the potential to cause disease). As NOS was the last employer, its only potential avenue of rebuttal was to establish that exposure to asbestos did not cause decedent's mesothelioma. As it did not do so, the court affirmed the liability of NOS.

The holding in *Ibos* is premised on the employee's exposure to injurious stimuli over the course of his employment with more than one employer. The Fifth Circuit's decision explains an employer's burden in establishing it is not the liable employer under such circumstances. Importantly, the court did not hold that an employer is liable even if it establishes that it did not expose the employee to injurious stimuli at all. In *Ibos*, the administrative law judge had found that the decedent was exposed to injurious stimuli while in the employ of NOS, and this finding was not contested on appeal. *Ibos*, 317 F.3d at 482, 36 BRBS at 94(CRT). Indeed, the court's reliance on *Cardillo* suggests that exposure to injurious stimuli remains the first requirement for liability to be assessed against an employer. The *Cardillo* rule states, "Congress intended that the employer during the last employment *in which the claimant was exposed to injurious stimuli . . .* should be liable for the full amount of the award." *Ibos*, 317 F.3d at 485, 36 BRBS at 96(CRT), *quoting Cardillo*, 225 F.2d at 145 (emphasis added); *see also Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001).

In this case, claimant filed a claim against only one employer, alleging exposure to injurious noise in his one-half hour of employment on April 25, 1983. Employer introduced evidence refuting the alleged injurious nature of the claimant's exposure, and the administrative law judge credited Dr. Seidemann's opinion in this regard. In the absence of exposure to injurious stimuli while in the employ of the only employer against

whom a claim was filed, the administrative law judge properly denied benefits. Therefore, we affirm the denial of benefits. *See generally Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993) (noise-induced hearing loss does not progress in the absence of exposure to injurious stimuli).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge 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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BETTY JEAN HALL
Administrative Appeals Judge