BRB No. 92-1636

JACK HOLLINGS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ITO CORPORATION/ATLANTIC & GULF STEVEDORING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

John M. Sartin, Jr. and Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-2294) of Administrative Law Judge Kenneth A. Jennings 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 worked as longshoreman for approximately 38 years prior to retiring on December 26, 1985. On April 3, 1987, claimant filed a claim under the Act for a 10.3 percent binaural noise-induced hearing loss against his last maritime employer, ITO Corporation,[1] based on the results of a February 27, 1987, audiometric examination administered at the University of South Alabama Speech and Hearing Center. CX. 5; Tr. at 12. Employer filed its Notice of Controversion on

[1]During the month of December 1985, claimant worked for at least four out of the seven local stevedoring companies. ITO Corporation is the successor company to Atlantic Gulf & Stevedore Company.

November 13, 1987. The case was referred to the Office of Administrative Law Judges for a formal hearing on May 23, 1990. A second audiometric examination, administered by Jim D. McDill, Ph.D., on December 4, 1990, revealed a 16.6 percent binaural impairment. CX. 6; EX. 9.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that employer established rebuttal. Without weighing the relevant evidence to determine whether claimant's hearing loss was work-related, the administrative law judge turned to the responsible employer issue. After consideration of the evidence, he denied the claim, finding that as claimant was not exposed to injurious levels of noise on December 26, 1985, no logical connection existed between any hearing impairment claimant suffered due to noise and the noise to which he was exposed on December 26, 1985.[2] Decision and Order at 10.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in finding that the noise levels at employer's facility were not of a sufficient level to cause hearing impairment. Claimant further contends that in concluding that his hearing loss is not related to noise exposure but rather is due to the aging process or carotid stenosis, the administrative law judge misconstrued Dr. Muller's opinion and improperly credited Dr. Seidemann's testimony over that of Drs. Muller and Mr. Holston, both of whom personally examined claimant, in violation of the true doubt rule.

Employer responds, urging affirmance. Employer argues, however, that the question of whether the administrative law judge erred in crediting Dr. Seidemann's testimony that claimant's hearing loss was not work-related over Dr. Muller's opinion that the hearing loss evidenced on the 1987 audiogram is consistent with past noise exposure is not properly before the Board. Employer asserts that the causation issue was addressed by the administrative law judge only in *dicta* and that the administrative law judge specifically indicated that the denial of benefits was based on his finding that claimant was not exposed to injurious noise while working for employer on December 26, 1985.

We are unable to affirm the denial of benefits in this case because the administrative law judge intermixed and equated his causation and responsible employer determinations. The question of causation deals solely with whether claimant's injury is work-related. The responsible employer

[2]The administrative law judge indicated, however, that if causation had been established, employer would have been liable for the full amount of claimant's hearing loss including the effects of aging. He further concluded that the 1987 audiogram would have been employed for determining the extent of claimant's hearing loss inasmuch as both Drs. Seidemann and Muller agreed that the progression between the 1987 and 1990 audiograms was attributable to carotid stenosis or aging rather than to noise exposure. The administrative law judge further determined that claimant's binaural hearing loss would be compensable under Section 8(c)(13)(B), 33 U.S.C. §908(c)(13)(B), and that as employer did not timely pay benefits or controvert the claim, employer would be liable for a Section 14(e), 33 U.S.C. §914(e), assessment.

rule, which comes into play once causation is established, however, 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). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially injurious stimuli is all that is required. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992).

In the present case, the administrative law judge properly found that claimant was entitled to invocation of the Section 20(a) presumption, as two audiograms of record indicate that he suffers a hearing loss and claimant testified[3] that he was exposed to loud noise during his longshoring activities with various stevedoring companies, including the employer. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981).

Once the Section 20(a) presumption is invoked, employer may rebut it by producing facts to show that claimant's employment did not cause, aggravate, or contribute to his injury. *See Peterson v. General Dynamics Corp.* 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). In the present case, the administrative law judge found rebuttal established based on the fact that claimant had only worked for employer for 7.5 hours on December 26, 1985, and the results of the April 21-23, 1991, noise survey conducted by Dr. Seidemann, which measured sound exposure levels which were below the 90 decibels for an eight-hour day recognized as injurious by the Occupational Safety and Health Administration (OSHA). The administrative law judge also credited affidavit testimony submitted by employer, indicating that the noise levels tested

were representative of those present in previous years.[4] The administrative law judge also credited

[3]Claimant stated that he has performed most jobs during the loading and unloading operation and also that he worked around machines that did not have working mufflers. Tr. at 10-12. Claimant testified that he worked for employer as a hook-up man on the dock on his last day of employment, December 26, 1985, and that on that day he was around crane and forklift noise. Tr. at 24. He further testified that he often drove the forklift and operated the crane 8 - 10 hours a day. Tr. at 63.

[4]Employer submitted affidavits from a general superintendent and two managers of ITO Corporation in the Mobile, Alabama facility. In these affidavits, the employees averred that ITO longshore workers would not be exposed to noise from Ryan-Walsh operations as they operate from different berth areas. EX. 13-15. Rryan-Walsh had been cited by OSHA for noise violations. CX. 9. These employees also averred that operating conditions were typical and representative of operating procedures throughout the years and that the noise levels were not greater in the preceding years. EX. 3-5. The affidavits of two of these employees, as well as that of a forklift operator, indicate that forklifts with defective mufflers would be repaired immediately. EX. 4, 5, 17. The

the opinion of Dr. Seidemann.

While the aforementioned evidence relating to the degree of exposure at employer's facility is more relevant to the responsible employer determination than to whether claimant's hearing impairment is related to noise at work, the administrative law judge properly found rebuttal established based on the testimony of Dr. Seidemann. Dr. Seidemann opined that based on OSHA age correction tables, the hearing loss evidenced on the 1987 audiogram was entirely attributable to the aging process. Dr. Seidemann further opined that the progression of claimant's hearing loss from 1987 to 1990 could not be attributed to noise as claimant had retired. The administrative law judge's finding that the Section 20(a) presumption was rebutted is thus affirmed. *See Phillips v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 94 (1988).

Once the administrative law judge found the Section 20(a) presumption rebutted, the issue of causation should have been based on an evaluation of the record as a whole. The administrative law judge, however, did not weigh the relevant medical evidence to determine whether claimant's hearing loss was caused or aggravated by noise exposure. Rather, after finding rebuttal established, he stated that the threshold issue presented was the responsible employer and proceeded to determine whether a rational connection existed between claimant's exposure to noise on his last day of work for employer and the documented hearing loss. Inasmuch as the administrative law judge erred in failing to resolve the causation issue, we must vacate the denial of benefits in this case. On remand, the administrative law judge must resolve the causation issue independently of the responsible employer issue by weighing the evidence as a whole to determine whether claimant's hearing loss is noise-related.[5] *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985). In this regard, in addition to Dr. Seidemann's testimony, the record contains the opinions of Dr. Muller and Mr. Holsten, an audiologist, both of whom opined that the hearing loss demonstrated on the 1987 audiogram is related to noise exposure. *See* CX. 5, 6.

On remand, if the administrative law judge determines that claimant's hearing loss is noise-induced, the last employer to expose the claimant to potentially injurious stimuli is liable as the

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administrative law judge credited this evidence over contrary affidavits submitted by two co-workers of claimant because these employees did not work exclusively for employer over the years. Decision and Order at 9.

[5]In his brief, claimant erroneously assumes that the administrative law judge found no causation, when, in fact, he never resolved this issue. Claimant argues that in concluding that claimant's hearing loss is not related to noise exposure but rather due to the aging process or carotid stenosis, the administrative law judge misconstrued Dr. Muller's opinion that the increase in claimant's hearing loss between the 1987 and 1990 audiograms was attributable to carotid stenosis. Claimant further asserts that the administrative law judge erred in crediting Dr. Seidemann's opinion over that of Dr. Muller in violation of the "true doubt" rule. Claimant's "true doubt" argument is moot in light of United States Supreme Court's recent decision in *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251 (1994)(true doubt rule inapplicable under the Act).

responsible employer; an actual causal relationship between the hearing loss and work on the last day he worked for employer is not necessary. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989). In *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed the employer's burden of proof with regard to the issues of causation and the determination of the responsible employer. In *Suseoff*, the Board indicated that once claimant demonstrates *prima facie* entitlement to benefits by showing that "he sustained physical harm and that conditions existed at work which could have caused the harm," there exists a presumption of a compensable claim. Employer can rebut this presumption by showing that exposure to injurious stimuli did not cause the harm alleged, *i.e.*, that claimant's hearing loss is not due to noise exposure in any employment, but is due to other causes. Employer may also establish that it is not the responsible employer, by showing that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Id.*, 19 BRBS at 151. *See Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In the present case, as employer stipulated that it was claimant's last maritime employer, pursuant to *Suseoff*, if claimant's hearing loss is noise-related it can avoid liability as the responsible employer only by showing that it did not expose claimant to injurious noise at its facility. In concluding that employer did not, in fact, expose claimant to injurious noise levels on the last date he worked, the administrative law judge credited the noise level survey conducted by Dr. Seidemann which recorded sound levels between 77.7 decibels and 89.3 levels, and the affidavits submitted by employer.[6] EXS. 1, 3-6. The administrative law judge also credited Dr. Seidemann's opinion that impairment to a person's hearing generally will not occur at exposures less than 90 decibels. Tr. at 66. While recognizing that Dr. Seidemann did admit that some hearing loss can occur at 85 decibels, as was also recognized by Dr. McDill, the administrative law judge found this concession insignificant. He noted that "no evidence had been submitted to suggest that claimant was susceptible of hearing loss at this lower level." Decision and Order at 7. Moreover, the administrative law judge determined that, even assuming that 85 decibels was the benchmark level for hearing impairment, the only two jobs with recordings above that level were the forklift driver and crane operator, neither of which claimant had performed on December 26, 1985.

The administrative law judge erred in dismissing Dr. Seidemann's concession that exposure to noise levels at 85 decibels could result in hearing damage based on the fact that claimant did not introduce any evidence to indicate that he was susceptible of hearing loss at this lower level. In *Avondale Industries*, the United States Court of Appeals for the Fifth Circuit, in which circuit this

[6]Contrary to claimant's assertions, the administrative law judge did not infer from these affidavits that the noise levels were greater at the time of the survey than in previous years. Rather, as discussed in footnote 4, *supra*, he inferred that the noise levels at the time of the survey were representative of those present in prior years, a reasonable inference from the evidence in question. *See* Decision and Order at 5, 9

case arises, adopted the position taken by the Board in *Suseoff*, 19 BRBS at 150, that where, as here, the claimant has established a *prima facie* case, the employer rather than the claimant bears the burden of proof with regard to establishing the responsible employer. *Id.*, 977 F.2d at 190-191, 26 BRBS 113-114(CRT). Moreover, while the administrative law judge could properly find that claimant did not work as a forklift or crane operator on December 26, 1985, he did not consider the evidence of record that claimant worked that day as a hookup man on the dock loading paper and that noise levels in excess of 85 decibels were recorded for that job.[7] Because Dr. Seidemann's opinion leaves open the possibility that hearing loss can occur at 85 decibels, and the administrative law judge did not consider whether claimant was exposed to this level of noise while working as a hook-up man for employer on December 26, 1985, his responsible employer determination must be vacated. On remand, the administrative law judge should reconsider the responsible employer issue in light of all of the relevant evidence, placing the burden of proof on the employer consistent with *Avondale Industries* and *Suseoff*. *See Lins*, 26 BRBS at 65.

[7]The noise survey recorded levels of 68 to 85 decibels for hooking cables to lumber bundles on the dock and 70 to 95 decibels for hooking lumber. *See* Ex. 1, p.6.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge