BRB No. 92-0783

ROBERT L. PAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples and Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr., and Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Karen B. Kracov (Thomas S. Williamson, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (89-LHC-390) 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. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a machinist by employer for approximately one year during 1970-1971, during which time he was exposed to loud industrial noise; claimant was subsequently employed in similar positions for several other employers covered by the Act.[1] EX 15. Claimant underwent an audiometric examination conducted by Dr. Wold on February 20, 1985, which revealed a 0.3 percent binaural hearing impairment. JX 1. The parties stipulated that claimant's average weekly wage is $412.42, with a resulting weekly compensation rate of $274.95.

A hearing was held on June 27, 1991, wherein the parties disputed causation, employer's liability for medical benefits, and liability for attorney fees. Employer additionally argued that it was not the responsible employer and thus not liable for any medical benefits. In his Decision and Order, the administrative law judge discussed claimant's testimony regarding his exposure to noise levels during his employment with various employers subsequent to 1971 and found that employer was the last employer to expose claimant to high levels of injurious industrial noise; therefore, the administrative law judge, after determining that claimant has a 0.3 percent binaural hearing impairment based upon the sole audiometric evaluation of record, found that employer is responsible for disability benefits for a 0.3 percent impairment pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge further found that employer is liable for medical benefits in connection with claimant's hearing loss and interest on all past due benefits.

Thereafter, claimant's counsel submitted a fee petition to the administrative law judge, requesting an attorney's fee of $2,843.75, representing 22.75 hours of services at $125 per hour, and $73.25 in costs. Employer subsequently filed objections to the fee petition. In his Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge, addressing employer's objections to the fee requested, disallowed 6.375 of the 22.75 hours requested by counsel and reduced the hourly rate sought to $110 per hour. The administrative law judge therefore awarded counsel a fee of $1,801.25, representing 16.375 hours of legal services at $110 per hour, plus $73.25 in expenses.

On appeal, employer challenges the administrative law judge's finding that it is the responsible employer and the amount of the attorney's fee awarded to claimant's counsel by the administrative law judge. Claimant responds, urging affirmance of both of the administrative law judge's decisions. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging affirmance of the administrative law judge's determination that employer is liable for claimant's compensation.

Employer initially argues that the administrative law judge erred in finding that it is the employer responsible for the payment of benefits to claimant. In the instant case, the administrative law judge implicitly invoked the Section 20(a), 33 U.S.C. §920(a), presumption and found that

[1]Claimant testified that he was employed at various job sites at the ports of Gulfport and Pascagoula for many companies, including Ryan-Walsh, Cooper Stevedoring, Pate Stevedoring, and Atlantic and Gulf Stevedores. EX 15 at 11-22.

claimant's hearing loss is causally related to his employment. To rebut the presumption, employer must present facts to show that exposure to injurious noise did not cause claimant's hearing loss. Employer also may avoid liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *see also Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976).

The responsible employer rule is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last covered employer to expose claimant to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Id.*, 225 F.2d at 137; *Susoeff*, 19 BRBS at 149. In the instant case, the responsible employer is the last maritime employer to expose claimant to injurious noise stimuli prior to his date of awareness, the date of the only audiogram of record, February 20, 1988. Employer asserts that it is not the responsible employer, pointing out that it is undisputed that claimant subsequently worked in covered maritime employment for numerous employers and that claimant testified as to the level of noise exposure experienced while working for those subsequent employers.

It is uncontroverted that claimant worked as a winch, crane, payloader or bulldozer operator for various maritime employers subsequent to his employment with employer. *See* EX 15 at 6-12. Moreover, claimant testified that he had been exposed to loud noise caused by payloaders, forklifts and bulldozers during his subsequent employment, but that at no time did he wear hearing protection. *See id.* at 15-20, 24. In his decision, the administrative law judge noted claimant's admission that he did not wear hearing protection while subsequently working around loud noise. The administrative law judge further found, however, that employer failed to submit any proof, such as dosimeter studies or medical testimony, that claimant was exposed to "injurious stimuli" subsequent to his employment with employer; thus, he concluded that employer is responsible for claimant's benefits. *See* Decision and Order at 3-4.

Contrary to the administrative law judge's implicit finding, the standard for identifying a responsible employer does not mandate that an employer present either scientific or medical evidence; rather, employer, after establishing that claimant's subsequent work was maritime employment, must show that claimant was exposed to injurious stimuli while subsequently working in that employment. *See Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991)(Board affirms an administrative law judge's reliance on decedent's sworn statements regarding his exposure to asbestos). In the instant case, the record contains testimony which, if credited by the administrative law judge, could support a finding that claimant was exposed to injurious noise while working for maritime employers subsequent to 1971. Specifically, claimant unequivocally stated during his deposition testimony that he had worked for numerous maritime employer's subsequent to 1971, that he had been exposed to loud noise, and that he had not worn ear protection devices at any time. *See* EX 15 at 11-20, 24. As the administrative law judge in this case did not render a credibility

determination regarding claimant's testimony, we vacate his finding that employer is responsible for the payment of claimant's benefits, and we remand the case for the administrative law judge to consider claimant's testimony regarding this issue.[2]

Employer additionally contends, citing *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), that claimant must make his claim for disability benefits against potentially liable employers in the reverse order of his employment, beginning with the most recent and proceeding backwards, and that it should be entitled to invoke the Section 20(a) presumption on its behalf against claimant's subsequent employer. In *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992), the Board specifically rejected these identical arguments, noting, *inter alia*, that there is no precedent requiring that claimant file against potential responsible employers in a specific order, and that the Section 20(a) presumption is a presumption of compensability which has no bearing on the responsible employer issue. For the reasons set forth in *Lins*, we reject employer's contentions.

Lastly, employer challenges the administrative law judge's award of an attorney's fee to claimant's counsel. As we must vacate the decision below and remand the instant case for reconsideration of the responsible employer issue, the issue of the attorney's fee is not ripe for adjudication at this time; accordingly, we decline to address employer's contentions of error regarding the awarded fee.

[2]In her response brief, the Director asserts that it is employer's responsibility to join any alleged, subsequent maritime employers to the instant cause of action; as employer failed to do so, Director argues employer must be held liable for benefits. Arguments related to joinder should be presented to the administrative law judge. *See Avondale Shipyards, Inc.*, 977 F.2d at 186, 26 BRBS at 111(CRT). On remand, the administrative law judge may reopen the record and permit the joinder of additional parties. *See generally, Jordan v. Equitable Equipment Co.*, 25 BRBS 317 (1992)(Dolder, J., dissenting on other grounds).

Accordingly, the administrative law judge's Decision and Order Awarding 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