BRB Nos. 02-0608
and 02-0608A

ROSARIO GIACALONE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent Cross-Respondent	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED: May 29, 2003
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents Cross- Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of William Dorsey, Administrative Law Judge, United States Department of Labor.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, L.L.P.), San Diego, California, for Marine Terminals Corporation and Majestic Insurance Company.

William N. Brooks, II (Law Offices of William N. Brooks), Long Beach, California, for Matson Terminal, Incorporated.

Whitney R. Given (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals, and Marine Terminals Corporation (Marine Terminals) cross-appeals, the Decision and Order (1999-LHC-2296; 2001-LHC-1624) of Administrative Law Judge William Dorsey 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, a longshoreman, underwent audiometric testing on November 16, 1984, which revealed a binaural hearing loss. Cl. Ex. 6. Claimant filed a claim against Eagle Marine for this hearing loss, as well as for a separate impairment to his right knee. These claims were settled pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i), for a total of $20,000, plus reimbursement of medical expenses. Cl. Ex. 7.

Thereafter, claimant worked for Matson Terminals, where, it is undisputed, he was exposed to injurious noise. Claimant underwent audiometric testing on March 16, 1995, which revealed a 36.6 percent binaural hearing impairment. Cl. Ex. 1. Claimant purchased a hearing aid which cost $3,650, on December 14, 1996. Cl. Ex. 4. On August 21, 1997, claimant filed a claim against Matson Terminals for work-related hearing loss. Matson Terminals denied the claim, but the claim was not adjudicated. Beginning in November 1997, claimant began working as a steady foreman for Marine Terminals. Claimant underwent additional audiometric testing on August 25, 1998, which revealed a 40.6 percent bilateral hearing loss. Claimant filed a claim against Marine Terminals for work-related hearing loss.

Before the administrative law judge, the parties stipulated that the audiograms of March 16, 1995, revealing a 36.6 percent binaural hearing loss, and of August 25, 1998, revealing a 40.6 percent binaural hearing loss, are valid, credible, and reliable. They also stipulated that claimant was exposed to injurious noise on March 15, 1995, while working for Matson Terminals, and on August 24, 1998, while working for Marine Terminals. The parties further stipulated that claimant is entitled to $2,750 for self-procured medical care and that claimant received $8,411.73 for a 10.6 percent binaural hearing impairment pursuant to the previous settlement agreement with Eagle Marine. In his decision, the administrative law judge applied the Board's decision in *Benjamin v. Container Stevedoring Co.*, 34 BRBS 189 (2001)[*rev'd sub nom. Stevedoring Services of America v. Director, OWCP,* 297 F 3d 797, 36 BRBS 28(CRT) (9th Cir. 2002)], adjudicated the two claims as one, and found that Marine Terminals as the last employer, is liable for claimant's 40.6 percent hearing loss. The administrative law judge also found that Marine Terminals is responsible for the cost of claimant's hearing aids, and that Marine Terminals is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Lastly, the administrative law judge found that the credit of $8,411.73 shall be applied to the Special Fund's liability and, if any credit is left, the remainder shall be applied to Marine Terminal's liability.

[1] The appeal of the Board's decision in *Benjamin* was pending before the United States Court of Appeals for the Ninth Circuit at the time the administrative law judge issued his decision.

[2] Specifically, Marine Terminals was held liable for the difference between the 40.6 percent and 36.6 percent hearing losses and the Special Fund was held liable for the pre-existing 36.6 percent loss. *See* 33 U.S.C. §908(f)(1).

On appeal, Marine Terminals contends that the administrative law judge's finding that it is liable for the totality of claimant's hearing loss, pursuant to the last employer rule, is not appropriate because the administrative law judge should have adjudicated the two claims separately. Moreover, Marine Terminals contends that the August 1998 audiogram should not be considered "determinative" of claimant's hearing loss because it does not conclusively show an occupationally related hearing loss and that the earlier test is a better measure of claimant's actual hearing loss. Marine Terminals also contends that the administrative law judge erred in ordering it to pay for hearing aids that were purchased a year before claimant's employment with Marine Terminals began. In his appeal, the Director also contends that the administrative law judge erred in consolidating the two hearing loss claims because claimant suffered two separate injuries with two separate employers. Subsequent to the filing of the appellate briefs in this case, the United States Court of Appeals for the Ninth Circuit reversed the Board's decision in *Benjamin* and held that there need not be only one responsible employer where there are two separate claims filed based on two valid audiograms. *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002). Thus, Marine Terminals and the Director submitted reply briefs, urging the Board to modify the administrative law judge's decision in the instant case pursuant to the Ninth Circuit's decision in *Benjamin*.

In *Benjamin,* 34 BRBS 189, the claimant underwent valid audiometric testing in 1991, which revealed a 28.5 binaural hearing loss. Claimant filed a claim against Container Stevedoring, but continued to work as a longshoreman. Claimant retired in 1994 and filed a second claim under the Act. After his retirement, claimant underwent additional audiometric testing and the test in September 1996 revealed a binaural loss of 34 percent. Prior to his retirement, claimant was employed by Stevedoring Services of America (SSA). The administrative law judge found that the test administered in September 1996 was the best measure of claimant's hearing loss, and thus found that SSA, as the last employer to expose claimant to injurious stimuli prior to the examination in September 1996, is the employer responsible for the totality of claimant's hearing loss. The Board affirmed the administrative law judge's decision and held that since both the 1991 and 1994 claims were for the same injury, hearing loss due to noise exposure, the administrative law judge properly treated claimant's two claims as one and applied the responsible employer rule to hold the last employer liable for the totality of claimant's hearing loss. *Benjamin*, 34 BRBS at 191.

SSA appealed this decision to the United States Court of Appeals for the Ninth Circuit. The court reversed the Board's decision, and held that as claimant filed separate claims against separate employers based on two reliable audiograms, the evidence established two separate injuries. Thus, "it was error to treat the claims stemming from two valid audiograms as relating to one, undifferentiated injury." *Benjamin*, 297 F.3d at 804, 36 BRBS at 33(CRT). The court held that, under the circumstances presented, the Board erred in holding that there could be only one responsible employer, as both Container Stevedoring and SSA were responsible employers with regard to the separate injuries the claimant sustained in each employer's employ. *Id.,* 297 F.3d at 803-804, 36 BRBS at 32(CRT), *citing Bath Iron Works Corp. v. Director, OWCP,* 506 U.S. 153, 26 BRBS 151(CRT) (1993) (hearing loss injury results in immediate disability). Thus, the court concluded that Container Stevedoring was liable for 28.5 percentage points of the 34 percent hearing loss shown on the last audiogram.

As this case arises within the jurisdiction of the Ninth Circuit, the court's decision in *Benjamin* is controlling. As in *Benjamin*, claimant in the instant case filed a claim against Matson Terminals for a binaural hearing loss after receipt of an audiogram in 1995. This claim had not been resolved by the time claimant filed his second claim against Marine Terminals for an increased hearing loss. The administrative law judge merged the two claims for adjudication, pursuant to the Board's decision in *Benjamin.* Under the Ninth Circuit's decision, however, the two claims should have been adjudicated separately, since the parties agreed that claimant had been exposed to injurious noise during his employment prior to the two relevant audiograms and that the audiograms of March 16, 1995 and August 25, 1998, are valid, credible, and reliable. S*ee Benjamin,* 297 F.3d at 804, 36 BRBS at 32-33(CRT). Therefore, based on this intervening case law, we agree with Marine Terminals and the Director that the administrative law judge erred in assessing liability solely against Marine Terminals for claimant's 40.6 percent hearing impairment, and we hold that Matson Terminals is liable for 36.6 percentage points of the 40.6 percent hearing loss reported on the last audiogram, based on claimant's average weekly wage at the time of the March 16, 1995 injury. *See Benjamin*, 297 F.3d at 804, 36 BRBS at 33 (CRT). In addition, as the responsible employer during this period, we hold that Matson Terminals is liable for medical treatment received by claimant prior to the audiometric testing performed in August 1998, including reimbursement for claimant's hearing aids purchased in 1996. 33 U.S.C. §907; 20 C.F.R. §702.402; *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

[3] Marine Terminals nonetheless contends on appeal that the administrative law judge erred in finding the August 1998 audiogram is the best measure of claimant's hearing loss. *See, infra,* at 6.

This case, however, raises additional questions which were not at issue in *Benjamin* concerning Section 8(f) and claimant's proper average weekly wage. With regard to Section 8(f), Matson Terminals also filed an application for relief from continuing compensation liability pursuant to Section 8(f), which the administrative law judge did not address as he found that Matson was not liable for any benefits. Matson Terminals Ex. 5. As we hold that Matson Terminals is now liable for benefits, we remand the case for the administrative law judge to determine whether it is entitled to Section 8(f) relief. *See generally Fucci v. General Dynamics Corp.,* 23 BRBS 161 (1990)(Brown, J., dissenting); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986). If, on remand, the administrative law judge finds that Matson Terminals is entitled to Section 8(f) relief, the credit for the previous hearing loss settlement in 1984 would properly be applied to reduce the liability of the Special Fund, as Matson is fully liable for claimant's "second injury." *Blanchette v. Director, OWCP*, 998 F.2d 109, 27 BRBS 58(CRT) (2d Cir. 1993); *Director, OWCP v. Bethlehem Steel Corp. [Brown]*, 868 F.2d 759, 22 BRBS 47(CRT) (5th Cir. 1989); *Strachan Shipping Co. v. Nash,* 782 F.2d 513, 18 BRBS 45(CRT)(5th Cir. 1986)(*en banc)*.

Finally, there remains claimant's claim against Marine Terminals based on the audiometric testing in August 1998, which revealed a 40.6 percent binaural hearing impairment. Marine Terminals does not contest that claimant was exposed to injurious noise during his employment at its facility prior to the administration of the test. Marine Terminals challenges the administrative law judge's finding that the audiogram from August 1998 is the best measure of claimant's work-related hearing loss based on the lack of symmetry shown on that audiogram. The administrative law judge found that this audiogram is evidence that claimant's increased hearing loss is related to occupational noise exposure as Dr. Grossnan, while testifying that there may have been several factors contributing to claimant's hearing loss, opined that claimant's continued work and continued noise exposure on the dock was the most likely reason for the increased hearing impairment between 1995 and 1998. Matson Terminals Ex. 14 at 269. Marine Terminals has not identified any error in the administrative law judge's decision to find that this audiogram demonstrated an increase in claimant's work-related hearing loss.

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[4] The administrative law judge ordered the Special Fund to pay benefits pursuant to Section 8(f) for the pre-existing 36.6 percent impairment, which we now hold is the liability of Matson Terminals. Therefore, Matson Terminals must reimburse the Special Fund for any payments made pursuant to the administrative law judge's finding. In addition, Matson Terminals must pay interest on the unpaid compensation from the date the compensation became due until the date the compensation was paid by the Special Fund.

Thus, we affirm the administrative law judge's finding that claimant is entitled to benefits for a 40.6 percent hearing loss based on the August 1998 audiogram. The Ninth Circuit's decision in *Benjamin* does not disturb the basic principles of determining claimant's entitlement under the aggravation rule, which provides that the employer at the time of the aggravating injury is liable for the entire disability at the average weekly wage in effect at the time of the aggravating injury. *See, e.g., Port of Portland,* 932 F.2d 836, 24 BRBS 137(CRT). The court held only that the employer against whom an earlier claim had been filed was liable for the extent of hearing loss at that time for that injury. *Benjamin,* 297 F.3d at 804, 36 BRBS at 33(CRT). Thus, each claim against an employer for consecutive hearing loss must be adjudicated. Where a prior employer is liable for a portion of claimant's hearing loss, the credit doctrine works with the aggravation rule to provide the most recent employer with a credit for amounts paid by a prior employer for the same injury. *See Nash,* 782 F.2d 513, 18 BRBS 45(CRT). Therefore, we hold that Marine Terminals is liable for claimant's 40.6 percent binaural hearing impairment based on claimant's average weekly wage at the time of the 1998 audiogram and is entitled to a credit for the dollar amount of the benefits claimant receives on his prior hearing loss claims. In addition, Marine Terminals, as the most recent responsible employer, is liable for claimant's continuing medical treatment pursuant to Section 7 of the Act. 33 U.S.C. §907; 20 C.F.R. §702.402.

Accordingly, the decision of the administrative law judge finding Marine Terminals to be the responsible employer for the totality of claimant's hearing loss is reversed. Matson Terminals is liable for a 36.6 percent binaural hearing loss at claimant's 1995 average weekly wage as a matter of law, as well as for claimant's medical treatment from that date until the date of the 1998 audiogram. Marine Terminals is liable for claimant's 40.6 percent binaural hearing impairment based on claimant's average weekly wage at the time of the 1998 audiogram, and is entitled to a dollar for dollar credit for the amount claimant receives for his prior hearing loss injuries. The case is remanded to the administrative law judge for consideration of Matson Terminals' entitlement to relief from continuing compensation liability pursuant to Section 8(f).

SO ORDERED.

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[5] Consequently, with regard to the administrative law judge's finding that Marine Terminals is entitled to relief pursuant to Section 8(f), the Special Fund is liable for the additional compensation attributable to the pre-existing impairments based on the higher average weekly wage in effect at the time of the second injury in 1998.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge