

BRB No. 00-0867

DOROTHY DUFRENE ROGERS)
(Widow of EDMOND A. ROGERS))
)
 Claimant)
)
 v.)
)
 SONAT OFFSHORE DRILLING,) DATE ISSUED:
 INCORPORATED)
)
 Self-Insured)
 Employer-Petitioner)
)
 AVONDALE INDUSTRIES,)
 INCORPORATED)
)
 Self-Insured)
 Employer-Respondent) DECISION and ORDER

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

Timothy W. Cerniglia and Charles E. Weaver (Sharp, Henry, Cerniglia, Colvin &
Weaver, L.L.C.), New Orleans, Louisiana, for Sonat Offshore Drilling, Incorporated.

Joseph J. Lowenthal, Jr. (Jones, Walker, Waechter, Poitevent, Carrère & Denègre,
L.L.P.), New Orleans, Louisiana, for Avondale Industries, Incorporated.

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

PER CURIAM:

Sonat Offshore Drilling, Incorporated (Sonat) appeals the Decision and Order Awarding Benefits (99-LHC-0083) 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).

Edmond A. Rogers (decedent)¹ sought benefits under the Act for a noise-induced hearing loss allegedly sustained during the course of his employment with Avondale Industries, Incorporated (Avondale), and with Sonat.² The claim is based on an audiogram administered by Daniel Bode on March 9, 1995, which revealed a 33.1 percent binaural hearing loss.

¹On January 3, 1998, Edmond A. Rogers died of congestive heart failure unrelated to the present claim. His widow was substituted as the claimant in November 1998.

²Claimant originally worked for Southern Production Company, Incorporated, which subsequently became Sonat Offshore Drilling, Incorporated. Sonat has since become Transocean Offshore, Incorporated, and that entity has agreed to assume all obligations of Sonat.

Decedent worked at Avondale between 1942 and 1951 as a machinist and told Mr. Bode that during this time he was exposed to noisy tools such as chippers and grinders. Avondale did not challenge this information and instead argued that it is not liable for benefits as it was not the last maritime employer to expose decedent to injurious noise levels. Social Security records indicate that decedent was employed by Sonat between 1951 and 1965, and decedent noted on his claim form that he worked as a “roughneck.” Most of Sonat’s employee records for the time period in question were destroyed in the mid-1980s,³ and Sonat was able to produce only a single page record which lists decedent’s name, several dates (apparently indicating job title changes), several work types or positions, and a series of numbers presumably referring to specific drilling rigs owned and operated by Sonat.⁴ This document indicates, and Sonat agrees, that decedent worked at various times as a helper, base radio operator, and painter. Sonat, however, denied that decedent was ever employed as a roughneck. Sonat also submitted depositions from two of its former employees, Charles Lofton and Curtis Arabie, who provided information regarding Sonat’s operation in an attempt to establish that decedent’s employment was not subject to the Act’s coverage, and, alternatively, to refute decedent’s allegation that he was exposed to noise during this employment.

In his decision, the administrative law judge found that decedent’s receipt of the March 9, 1995, audiogram apprised him of his work-related hearing loss, and thus he concluded that the claim, filed on September 24, 1994, was timely against both Avondale and Sonat. *See* 33 U.S.C. §§912, 913. The administrative law judge next found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a), and that neither Avondale nor Sonat established rebuttal. He then determined that Sonat, and not Avondale, was the last employer to expose claimant to injurious noise, and furthermore that Sonat did not prove that decedent was excluded from the Act’s coverage as a member of a crew. Accordingly, the administrative law judge ordered Sonat to pay claimant compensation for a 33.1 percent binaural hearing loss pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13).

On appeal, Sonat challenges the administrative law judge’s determination that it is the responsible employer in this case. Avondale responds, urging affirmance.

Sonat contends that the administrative law judge erred as a matter of law by requiring it to prove that decedent was a member of a crew excluded from the Act’s coverage, as

³The parties stipulated that Sonat destroyed most company records in excess of 20 years old in about 1985.

⁴Decedent recalled working on five rigs (numbers 16, 53, 55, 21, and 12). A comparison with Sonat’s document reveals two number matches (53 and 12).

opposed to requiring Avondale, the first employer against whom this hearing loss claim was filed, to prove that Sonat was a subsequent maritime employer. Sonat additionally argues that there is no evidence in the record to contradict its position that decedent was, at all times during his employment with Sonat, a member of a crew, and thus it avers that the administrative law judge's finding to the contrary is not supported by substantial evidence. In this regard, Sonat asserts that the evidence establishes that decedent spent at least 80 percent of his time on rigs classified as "vessels" under current precedent.⁵

⁵Sonat's argument turns on the fact that four of the five rigs on which decedent purportedly worked, rigs #16 and #53 (submersible rigs), #55 (a jack-up rig), and # 21 (a small platform with a tender vessel assigned), are considered, as the administrative law judge found, vessels as defined under the Act.

As an initial matter, we reject Sonat's argument that the administrative law judge applied the wrong burden of proof in resolving the responsible employer issue in this case. As the record establishes that Sonat was decedent's last employer, the burden is properly on Sonat to establish that it is not the responsible employer. *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); *Suseoff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see generally Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). Accordingly, the administrative law judge properly placed the burden on Sonat to establish that it is not the responsible employer; in this case, Sonat alleged that decedent was a member of a crew excluded from coverage, and that the decedent was not exposed to injurious stimuli while he worked for Sonat.⁶ *Everson*, 33 BRBS at 152; *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

⁶There is no contention that decedent was exposed to injurious stimuli while working for a subsequent covered employer.

We turn, then, to Sonat's contention that decedent was a member of a crew excluded from the Act's coverage. In order to be covered by the Act, claimant must meet the status and situs requirements of Section 2(3) and 3(a) of the Act, 33 U.S.C. §903(a). A claimant who meets these requirements may nonetheless fall outside of the Act's coverage if employer establishes that one of the specific exclusions is applicable.⁷ At issue here is Section 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), which excludes from coverage "a master or member of a crew of any vessel." The United States Supreme Court has held that the Longshore Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or member of a crew of any vessel" under the Longshore Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991). "The key to seaman status is an employment-related connection to a vessel in navigation It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Wilander*, 498 U.S. at 354, 26 BRBS at 83(CRT). The employee must have a connection to a vessel that is substantial in terms of both its nature and duration in order to separate sea-based workers entitled to coverage under the Jones Act from land-based workers with only a transitory or sporadic connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT)(1997); *Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996). The issue of whether a worker is a seaman/member of a crew is primarily a question of fact, and the Board will defer to the administrative law judge's determination of crew member status if it has a reasonable basis. *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

In considering the issue of decedent's alleged member of a crew status, the administrative law judge initially considered whether decedent's work contributed to the mission or function of a vessel or fleet of vessels. He noted that Sonat's operation involved

⁷The administrative law judge found that decedent was covered under the provisions of the pre-1972 Act by virtue of his exposure to noise on navigable waters in the course of his employment. *See* 33 U.S.C. §903(a) (1970)(amended 1972). This finding alone entitles decedent to the Act's coverage, *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), regardless of whether the administrative law judge properly found that the pre-1972 Act coverage provision applies to this hearing loss case, under the Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (1993). *Cf. INA v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT)(9th Cir. 1990)(holding applicable the Act's coverage provisions in effect at the time an occupational disease becomes manifest). Even if the amended Act applies, pursuant to *Perini*, a claimant injured on navigable water while in the course of employment meets the requirements of both Sections 2(3) and 3(a). Employer has raised no reversible error in the administrative law judge's finding in this regard.

the use of various types of drilling rigs whose primary function was offshore oil exploration/extraction. Specifically, the administrative law judge found that Sonat's land-based and fixed platform rigs were not vessels, while its submersible and jack-up rigs, and their accompanying tenders, were vessels, and that they constituted a "fleet" under *Papai*, 520 U.S. 548, 31 BRBS 34(CRT). The administrative law judge then found that at least some of decedent's work on the vessels clearly contributed to the mission and function of these vessels.⁸ Additionally, he found that although there was a disagreement regarding decedent's duties as a helper, at least some of this work would as well have contributed to the function or mission of the vessel. The administrative law judge therefore concluded that decedent's employment with Sonat, to the extent that it occurred on a vessel, contributed to the function or mission of the vessels, and accordingly, he concluded that Sonat satisfied this aspect of the member of a crew test.

The administrative law judge concluded, however, that Sonat did not establish that decedent's assignments to the vessels were substantial in terms of their duration and nature. *See Papai*, 520 U.S. 548, 31 BRBS 34(CRT); *Chandris*, 515 U.S. 347. Specifically, he relied on Sonat's employment card which shows that decedent's assignments as a painter and base radio operator were for less than two years of decedent's total employment of about 14 years. Moreover, he found that there was no evidence of the amount of time claimant spent in the other jobs (MECO, helper) or of what portion of his duties in any of his jobs were actually performed aboard vessel rigs. This finding is supported by the testimony of Mr. Arabie and Mr. Lofton. Both stated that all of decedent's work as a base radio operator would have occurred on land at Sonat's Amelia, Louisiana office. SX C at 26-27, D at 23. Additionally, they stated that during decedent's work as a helper and as a painter he may have been assigned to work at Sonat's base. SX C at 24, 26, D at 21. Mr. Arabie also testified that employees were frequently moved from one rig to another and were never permanently assigned to any particular rig. SX C at 41, 43. The administrative law judge therefore determined that Sonat did not establish that decedent had a connection to a vessel or fleet of

⁸The administrative law judge noted testimony that decedent worked as an "able-bodied seaman," and stated that, assuming this was true, this work contributed to the mission of the vessel, as did decedent's work as a MECO (turning saltwater to fresh for use aboard the rigs and tenders). The administrative law judge stated that decedent's alleged work as a "helper" and "roughneck" could have contributed to the vessels' functions or missions but that there is a disagreement in the evidence presented as to what such jobs actually entailed.

vessels that was substantial in duration and nature. As the administrative law judge's findings are rational, supported by substantial evidence, and in accordance with law, we affirm the administrative law judge's conclusion that Sonat did not establish that decedent is excluded from coverage as a member of a crew. *See generally In Re Endeavor Marine*, 234 F.3d 287 (5th Cir. 2000); *Hufnagel v. Omega Serv. Industries, Inc.*, 182 F.3d 340, 33 BRBS 97(CRT) (5th Cir. 1999).

Sonat alternatively argues that contrary to the administrative law judge's finding, the record establishes that decedent was never exposed to injurious stimuli during his employment with Sonat. Additionally, Sonat contends that any noise to which decedent may have been exposed during this employment was not of a sufficient decibel level to cause any hearing loss.

The responsible employer in a hearing loss case 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. Thus, Sonat bears the burden of establishing that it did not expose decedent to injurious stimuli. *Avondale Industries*, 977 F.2d 186, 26 BRBS 111(CRT); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT)(9th Cir. 1998); *see Everson*, 33 BRBS at 152; *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997). The administrative law judge initially found that decedent was exposed to loud noise during his employment with Sonat. Specifically, he relied on decedent's interrogatory answer that his work as a motorman exposed him to loud noise, something that Mr. Lofton and Mr. Arabie both acknowledged was possible. In addition, he found that the depositions of Mr. Lofton and Mr. Arabie described the potential for injurious noise exposure to employees of Sonat through the operation of chipping guns and grinders. The administrative law judge also considered the testimony of both Mr. Lofton and Mr. Arabie that Sonat was very safety-conscious, and that it provided and required the use of hearing protection equipment. The administrative law judge, however, accorded little weight to this testimony as neither Mr. Lofton nor Mr. Arabie testified to knowing decedent for more than a few days, or as to whether he usually wore hearing protection. Moreover, the administrative law judge properly rejected Sonat's suggestion that the burden was on claimant to show that decedent did not wear hearing protection. *Zeringue*, 32 BRBS 275. As Sonat did not establish that decedent was not exposed to injurious noise while he worked for Sonat, *see generally Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981), *cert. denied*, 454 U.S. 1080 (1981), and there is no evidence that decedent was exposed to injurious noise while working for a subsequent covered employer, the administrative law judge's conclusion that Sonat is the responsible employer is affirmed. *See Ramey*, 134 F.3d 954, 31 BRBS 206(CRT); *Everson*, 33 BRBS 149; *Zeringue*, 32 BRBS 275; *Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996).

Lastly, we hold that Sonat's contention that the administrative law judge erred in summarily refusing to consider Sonat's defense of laches is without merit as the doctrine of

laches does not apply to cases arising under the Act because the Act has a specific statute of limitations. *See, e.g., Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); 33 U.S.C. §§908(c) (13)(D), 913.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge