BRB No. 97-1213

LEONARD IOVELLI	)	
	)	
Claimant-Respondent	)	DATE ISSUED: _____
	)	
v.	)	
	)	
SELECT CARGO SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Jorden N. Pederson, Jr. (Baker, Garber, Duffy & Pedersen, P.C.), Hoboken, New Jersey, for claimant.

Christopher J. Field (Gallagher & Field), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-1360) of Administrative Law Judge Ralph A. Romano 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, who worked at various times for employer as a cooper, sought

benefits under the Act based on the results of audiometric testing on July 25, 1995, which Dr. West interpreted as reflecting a 40 percent binaural neurosensory hearing loss due to occupational noise exposure.[1] CX-5. On January 25, 1996, claimant was also evaluated by Dr. Katz, who determined that claimant had a 15 percent impairment in his left ear, a 1.9 percent impairment to his right, or a binaural impairment of 4 percent. Dr. Katz opined that claimant had a progressive asymmetrical type hearing loss, which is more akin to age than noise exposure, and determined that corrected for age, he had a 0 percent hearing loss binaurally. EX-3

In his Decision and Order, the administrative law judge found that claimant had successfully established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption based on Dr. West's opinion relative to the existence of a hearing loss and claimant's testimony regarding working conditions which the administrative law judge found credible. The administrative law judge then determined that employer had not introduced evidence sufficient to rebut the presumption, specifically rejecting employer's contention that it did so by reasons of conformance to the noise level standards set by the Occupational Health and Safety Administration (OSHA) or by means of its noise survey. Weighing the evidence regarding the degree of hearing loss, the administrative law judge accorded determinative weight to the opinion of Dr. West, and awarded claimant compensation for a 40 percent binaural hearing loss pursuant to 33 U.S.C. §908(c)(13)(B).

On appeal, incorporating its brief below, employer challenges that administrative law judge's findings regarding causation and the extent of claimant's hearing loss. In addition, employer argues that claimant was required to prove that he received injurious exposure while working for employer in order for employer to be held liable as the responsible employer. Claimant responds, urging affirmance.

Section 20(a) provides claimant with a presumption that the injury he sustained is causally related to his employment if he establishes a *prima facie* case by showing that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the ultimate disability. *Manship v. Norfolk & Western Railway Co.*, 30 BRBS 175 (1996); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Once claimant has invoked the presumption, the burden shifts to employer to rebut it with substantial

[1]Claimant testified that he was exposed to noise from, *inter alia*, forklifts, toploaders and hustlers. EX-8 at 13-14; Transcript at 24-25.

countervailing evidence. *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North American v. U.S. Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996). If the administrative law judge finds the Section 20(a) presumption is rebutted, then all relevant evidence must be weighed to determine if causation has been established. *See Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

We affirm the administrative law judge's finding that claimant's hearing loss is work-related, as it is rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe,* 380 U.S. at 359. Employer does not contest the administrative law judge's determination that claimant was entitled to invocation of the Section 20(a) presumption.[2] Rather, employer argues that it introduced evidence sufficient to rebut the presumption and establish the absence of causation in the record as a whole through the testimony of Mr. Bragg based on noise studies he performed in November 1996, the medical opinion of Dr. Katz, and the lay testimony of Mr. Gaska. Employer avers that in finding to the contrary, the administrative law judge held employer to a standard far in excess of that required under applicable law.

Contrary to employer's assertions, however, neither the noise study performed by Mr. Bragg nor his testimony regarding the survey is sufficient to rebut Section 20(a). This evidence does not establish that claimant does not have a noise-induced hearing loss. In fact, it does not even prove that he was not exposed to loud noise during his years of employment; all it establishes is that during the time reflected in the study, the levels of noise in the various places claimant had previously worked did not exceed that allowed by OSHA, *i.e.*, over 90 decibels per 8 hours. As the administrative law judge stated, however, conformance with the OSHA standards is not sufficient to rebut the Section 20(a) presumption, as such evidence cannot demonstrate the absence of a work-related injury. Additionally, the noise survey performed in November 1996 is indicative only of the level of noise during the period from November 8, 1996, through November 12, 1996, when the survey was performed. Inasmuch as the record reflects that claimant last worked for employer in May 1995, the administrative law judge properly determined that because the time frame of the survey did not coincide with claimant's period of

[2]Although much of employer's brief below was directed at invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, employer abandoned this argument on appeal.

employment, the survey was irrelevant to the causation issue presented.[3]

[3]Employer argues that Judge Romano erred in determining that the Board has unequivocally held that noise survey evidence is always insufficient for rebuttal. We need not address this argument, however, as Judge Romano did not conclude that the Board has always deemed noise survey evidence insufficient for rebuttal; he found that where, as here, the time of the survey and the time of claimant's employment with employer do not coincide, the noise survey evidence is insufficient for rebuttal. *See* Decision and Order at 4-5

The administrative law judge's finding that the opinion of Dr. Katz was insufficient to rebut the Section 20(a) presumption is also affirmed. Although Dr. Katz stated at his deposition that claimant's audiogram was consistent with hearing loss caused by aging, the administrative law judge rationally found that his opinion was insufficient to rebut Section 20(a) because it was based in part on the Bragg noise survey. Moreover, he also rationally concluded that while Dr. Katz opined in his January 25, 1996, report that the asymmetrical nature of claimant's hearing loss was more akin to age than noise exposure, this opinion did not rule out noise exposure as a causative factor. *See generally Brown v. Jacksonville Shipyards Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); s*ee also Worthington v. Newport New Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986). In addition, the administrative law judge determined that Dr. Katz's conclusion that there was no objective documentation of claimant's exposure to injurious noise at employer's facility, EX-9 at 70, was not entitled to any weight in the absence of any evidence establishing Dr. Katz's competency as an expert in noise levels at employer's facility.[4]

The administrative law judge also rationally rejected the testimony of Mr. Gaska, the operations manager for employer, who opined that the level of noise exposure a cooper would receive is not injurious. The administrative law judge found that Mr. Gaska was not a noise expert, and that his testimony as a whole more corroborated than refuted claimant's testimony, in that he conceded that coopers are exposed to noise when cargo is being lifted onto chassis and flatbeds and while working near the hi-lo's in the warehouse. To the extent that Mr. Gaska disagreed with claimant regarding whether it was possible to carry on a normal conversation in claimant's work environment, the administrative law judge determined that this was best explained as a difference of perception. The administrative law judge also found Mr. Gaska's testimony that a cooper would never go inside a container for anything, Tr. at 39-40, misleading and deceptive in light of his contradictory deposition testimony acknowledging that from May 1994 until the spring of 1995, the period at issue here, coopers had worked at employer's facility inside containers, EX-10 at 22, 24, 51-53, 60, 63-64, which according to claimant produced the highest level of noise. EX-7 at 12, 14-16, 22-24, 52-53; Decision and Order at 5-6. In

[4]Inasmuch as the administrative law judge provided several reasons for rejecting Dr. Katz's opinion regarding causation, employer's assertion that the administrative law judge erred in summarily rejecting this opinion without comment is without merit.

addition, he discredited Mr. Gaska's testimony that a cooper comes no closer than 40 to 60 feet from toploaders and is able to carry on normal conversations in favor of claimant's testimony that his proximity to toploaders, hustlers and forklifts was between 3 and 20 feet, rendering normal conversation an impossibility. Tr. at 24, 25, 32. Such credibility determinations are within the administrative law judge's discretionary authority, and employer has not established that the administrative law judge's rejection of Mr. Gaska's testimony was either inherently incredible or patently unreasonable. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, as the administrative law judge rationally determined that employer did not introduce evidence sufficient to rebut the Section 20(a)presumption, *see Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976), his conclusion that claimant's hearing loss is causally related to his employment is affirmed. *See generally Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1994).

Next, employer argues that in determining the extent of claimant's hearing loss, the administrative law judge erred in crediting the opinion of Dr. West over that of Dr. Katz. We reject this assertion, and affirm the administrative law judge's finding regarding the extent of claimant's hearing loss. After considering the relevant opinions of Drs. West and Katz, the administrative law judge acted within his discretion in according greater weight to Dr. West's opinion. In so concluding, he found that Dr. West's opinion as to the percentage loss of hearing was the most reliable, probative, and documented opinion in the record, characterized his credentials as impressive, and determined that the explanations underlying his opinions as set forth in his deposition, CX-5 at 4-6, 17-18, 29-32, were rational and well-explained. In contrast, the administrative law judge found that Dr. Katz's opinion was tainted by the ineffectual Bragg noise survey. Moreover, he questioned the overall integrity and the objectivity of Dr. Katz's conclusions regarding the accuracy and reliability of the additional tests, which according to employer rendered Dr. West's audiological evaluation incomplete, in light of Dr. Katz's "apparent preconceived mind-set," as reflected in his deposition testimony, that noise induced hearing loss is not possible where the levels of noise are below the OSHA standards, EX-9 at 48-50. While employer argues on appeal that in so concluding the administrative law judge erred in commingling the issues of causation and the extent of disability, we conclude that the administrative law judge acted within his discretionary authority in declining to accord determinative weight to Dr. Katz's testimony for the stated reasons.

Contrary to employer's assertions, neither Dr. Katz's testimony that Dr. West had not performed some tests which are considered part of a complete audiological

examination nor his testimony that it would be necessary to shout in order to communicate with someone with a 40 percent loss of hearing, which was not necessary when claimant testified in this case, mandates that the administrative law judge reject Dr. West's impairment rating. It is within the administrative law judge's authority to weigh the evidence, and in the present case he simply was not persuaded by Dr. Katz. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Inasmuch as employer has failed to establish that the administrative law judge erred in according greatest weight to Dr. West's impairment rating, we affirm his finding that claimant sustained a 40 percent binaural hearing loss based on this opinion. *See John W. McGrath Corp. v. Hughes*, 280 F.2d 403 (2d Cir. 1961).

Finally, we reject employer's argument, raised in its closing brief below and incorporated on appeal, that in order for it to be held liable as the responsible employer under the last injurious exposure rule set forth in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), claimant was required to establish that he was exposed to injurious stimuli on the last day or days he worked for employer. The last employer to expose claimant to potentially injurious stimuli which could have contributed to the disability evidenced on the determinative audiogram is the employer liable for benefits for claimant's hearing loss. *See Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). Contrary to employer's assertion, employer bears the burden of proof in establishing that it is not the responsible employer. *See Avondale Industries, Inc. v. Director, OWCP,* 997 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *General Ship Service v. Director, OWCP* 398 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Suseoff v. The San Francisco Stevedore Co.*, 19 BRBS 149 (1986). Employer may do so by establishing that it did not expose claimant to injurious stimuli or that claimant was exposed while performing work for a subsequent covered employer. In the present case, inasmuch as employer conceded that it was the last covered employer prior to the July 25, 1995, filing audiogram, which the administrative law judge found to be determinative, Emp. Tr. Brief at 24-35, and the administrative law judge rationally rejected employer's evidence in favor of claimant's testimony that he was exposed to injurious noise levels throughout his employment with employer, we affirm his finding that employer is liable as the responsible employer. *See generally Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge