BRB No. 01-0553

JAMES JESCHKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: March 21, 2002
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order-Motion for Reconsideration of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Robert H. Madden (Madden & Crockett), Seattle, Washington, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order-Motion for Reconsideration (99-LHC-2573) of Administrative Law Judge Donald W. Mosser 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 if they are rational, supported by substantial evidence, and in accordance with applicable law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant has worked as a longshoreman for various employers since 1959. During this time, he was exposed to loud noise. Claimant's hearing loss was measured in February 1991, and he was prescribed bi-neural analog hearing aids. Claimant began wearing completely-in-the-canal hearing aids in 1994 to reduce wind noise. On February 16, 1998, claimant filed a hearing loss claim in which he alleged that Jones Stevedoring Company (Jones) and Stevedoring Services of America (SSA) were the responsible employers. The

claim was based on a January 28, 1998, audiological evaluation, which revealed an 14.68 binaural impairment. The parties reached a compromise settlement that provided for a lump sum payment from SSA and Jones to claimant of $12,891.16 for claimant's work-related hearing loss. The agreement additionally stipulated that Jones would be liable for future medical expenses, and that SSA would be dismissed from any further liability. Claimant and employers then requested approval of the settlement by the district director pursuant to Section 8(i) of the Act, 33 U.S.C. §908(i). On March 5, 1999, the district director issued a compensation order approving the settlement, which she stated effects a final disposition of the claim. Sometime thereafter, claimant obtained state-of-the-art digital hearing aids, which cost $4,140. Claimant sought payment of this expense from Jones, which Jones denied, contending that the upgrade and replacement of claimant's hearing aids was based on hearing loss that pre-existed the February 1998 claim.

In his decision, the administrative law judge rejected Jones's contention. The administrative law judge found that Jones conceded in the settlement agreement that claimant has a work-related hearing loss and that it is responsible for claimant's future medical expenses. Alternatively, the administrative law judge found claimant entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), linking claimant's hearing loss to his employment, which Jones failed to rebut. Finally, the administrative law judge credited evidence that claimant's digital hearing aids are a reasonable and necessary medical expense. Jones's motion for reconsideration was rejected.

On appeal, Jones challenges the administrative law judge's finding that it is liable for the cost of claimant's digital hearing aids. Claimant responds, urging affirmance.

Jones contends that the full extent of claimant's hearing loss was measured when claimant underwent an audiometric evaluation in February 1991 and began wearing hearing aids, and that Jones was not the responsible employer at that time. Jones argues that, in the absence of any subsequent aggravation of claimant's hearing loss, the employer at the time of the February 1991 audiogram is responsible for claimant's upgrade to digital hearing aids. In this regard, Jones notes that the evidence establishes that the reason for the new hearing aids is the technological superiority of the newer devices and not a change in claimant's hearing. *See, e.g.,* EX 3; CX 10 at 33.

Section 8(i) of the Act, 33 U.S.C. §908(i),[1] provides for the discharge of employer's

[1]Section 8(i)(1) states:

Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy

liability for benefits where an application for settlement is approved by the district director or administrative law judge. A Section 8(i) settlement is the equivalent of a final adjudication of the issues resolved therein, and may not be collaterally attacked by the parties in a subsequent proceeding. *Vilanova v. United States*, 851 F.2d 1, 21 BRBS 144(CRT) (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989).

In this case, the administrative law judge rejected Jones's contention that claimant's need for the replacement hearing aids was not related to his employment with Jones. The administrative law judge found that claimant has a work-related hearing loss, and that Jones accepted liability for claimant's future medical expenses in the settlement agreement. The administrative law judge therefore concluded that the principal issue was whether the digital hearing aids are a reasonable and necessary medical expense. *See* 33 U.S.C. §907(a).

> commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

The settlement agreement between claimant, Jones, and SSA resolves the issue presented here. The agreement acknowledges that "[t]here are a number of audiograms that could be used to establish the target date for hearing loss and may involve multiple additional employers." EX 1 at 2. Nevertheless, Jones explicitly agreed therein, "that pursuant to Section 7, Mr. Jeschke's future medical expenses will remain the responsibility of Jones." *Id.* Based on the plain language of the settlement agreement, we hold that the administrative law judge properly found that Jones is liable for all future reasonable and necessary medical expenses for treatment of claimant's work-related hearing loss. The argument Jones attempts to raise regarding other potential liable employers is an attempt to evade the agreement it entered.[2] The settlement agreement specifically states there is evidence by which employers other than Jones and SSA could be found responsible for claimant's compensation and medical benefits. Although Jones had the opportunity to contest its liability based on this evidence, it chose not to do so. Instead, Jones agreed to pay claimant compensation under the schedule for his hearing loss, 33 U.S.C. §908(c)(13)(B), and it accepted liability for claimant's future medical expenses arising from his work-related hearing loss. *Id.* The terms of the settlement conclusively resolved the issue of the responsible employer for claimant's future medical benefits. The district director's approval of the settlement agreement was the final adjudication of claimant's hearing loss claim, *see generally Sharp v. Johnson Brothers*

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[2]In addition, Jones's legal premise is erroneous. Jones argues claimant must prove that medical benefits are a "reasonable and necessary result of *an injury at Jones*." Brief at 9 (emphasis in original). However, in order to be awarded, medical benefits must be necessary for treatment of a work-related injury, *i.e.,* an injury due to claimant's employment as a whole. Once claimant's injury is found related to his work place noise exposure, as here, then where claimant has had several employers, the case law for determining the responsible employer applies. *See Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998). A distinct aggravation need not be shown in hearing loss cases in order to establish the responsible employer. The responsible employer is the last one to expose claimant to potentially injurious stimuli prior to the administration of the determinative audiogram, *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997); *see also Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), and it is employer's burden to establish that the claimant was not exposed to potentially injurious stimuli while in its employ. *Jones Stevedoring Co.,* 133 F.3d 683, 31 BRBS 178(CRT). Thus, regardless of whether claimant previously had hearing aids or claimant's hearing loss progressed from the date of his initial audiogram in 1991 to January 28, 1998, when claimant last underwent audiometric evaluation prior to filing his claim on February 16, 1998, Jones is not necessarily absolved from liability, as it was claimant's last longshore employer prior to January 28, 1998, and there is no evidence that claimant was not exposed to potentially injurious stimuli while in its employ.

Corp., 973 F.2d 423, 26 BRBS 59(CRT) (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993), and Section 8(i) settlement agreements are not subject to modification under Section 22 of the Act, 33 U.S.C. §922. Jones is therefore precluded from challenging its liability for claimant's replacement hearing aids on the basis it is not the responsible employer under the Act. *Vilanova*, 851 F.2d 1, 21 BRBS 144(CRT); *see also Kelly v. Bureau of National Affairs*, 20 BRBS 169 (1988).

In summary, the administrative law judge found that claimant's new hearing aids are a reasonable and necessary medical expense for treatment of claimant's work-related hearing loss. This finding is not challenged on appeal and is affirmed. Jones accepted liability for future medical benefits due to claimant's work-related injury by virtue of the Section 8(i) settlement; thus, it is the responsible employer in this case. Accordingly, we affirm the administrative law judge's determination that Jones is the employer liable for payment for the expense of claimant's digital hearing aids.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order- Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge