BRB No. 98-435

MALCOLM P. ZERINGUE	)	
	)	
Claimant-Respondent	)	DATE ISSUED: Dec. 8, 1998
	)	
v.	)	
	)	
McDERMOTT, INCORPORATED	)	
	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis R. Stevens (Gibbens, Blackwell and Stevens), New Iberia, Louisiana, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-743) of Administrative Law Judge Clement J. Kennington 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 worked for employer from January 14, 1974 to July 31, 1987, when he retired on an unrelated disability. He filed a claim for an occupational hearing loss, and subsequent audiometric testing revealed that he suffered a 45.3 percent binaural hearing impairment. The administrative law judge found that claimant's employment was covered under the Act, *see* 33 U.S.C. §902(3), as claimant

participated in load-out operations.[1] The administrative law judge also found that claimant's injury occurred on a covered situs, *see* 33 U.S.C. §903(a), in that the load-outs were conducted at a section of employer's yards adjacent to water where employees customarily loaded the completed decks and jackets of oil rigs onto barges for shipment. The administrative law judge further found that the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), was invoked and that it was not rebutted, and he concluded that claimant's hearing loss was at least in part caused by his employment with employer. The administrative law judge held that employer was the responsible employer as it was the last employer to expose claimant to injurious stimuli. Consequently, the administrative law judge awarded claimant disability benefits for a 45.3 percent binaural hearing loss, medical benefits, and interest, payable by employer.

On appeal, employer challenges the administrative law judge's findings regarding situs, status, and causation/responsible employer. Claimant did not file a response brief.

Situs

Employer initially contends that the administrative law judge erred in finding that claimant met the situs test as the location of claimant's work was in employer's fabrication yards, which it contends are not "adjoining areas" within the meaning of the Act as their purpose is not for a significant maritime activity. Employer also argues that the situs requirement was not met in the instant case based on *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97 (CRT)(5th Cir. 1989)(*en banc)*, wherein the court held that employer's fabrication shop in Amelia, Louisiana, at one of the same yards here, is not a covered situs under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 *et seq.,* an extension of the Act. Employer further argues that its Bayou Black yard, a fabrication facility similar to the Amelia yard, also

[1]In a load-out operation, claimant used a bulldozer to help load jackets and deck sections onto barges where they then would be taken to an offshore location to be used in oil and gas production. Tr. at 112-113. A deck section is the top section of an offshore oil platform which is used for the collection, separation, or drilling of oil and gas. Tr. at 115-116. A jacket section is the bottom section which secures itself to the ocean floor and allows the deck section to sit on top of it. Tr. at 115. An hydraulic jack would raise up the deck and the bulldozers would push the tracks and dollies under the deck. Tr. at 141-143. The bulldozer operator would also pull winch lines off the barge to hook to the deck section which was ultimately loaded onto the barge. *Id.* The Board has previously described load-out operations in *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989).

is not a covered situs under *Mills*.

Section 3(a) of the Act, 33 U.S.C. §903(a), provides coverage for disability or death resulting from

> an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

33 U.S.C. §903(a)(emphasis added). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has adopted a broad view of the situs requirement under the Act and has defined "other adjoining area" as a site close to or in the vicinity of navigable waters or in a neighboring area customarily used in loading or unloading a vessel; the area's exclusive use need not be maritime. *Texports Stevedore Co. v. Winchester*, 632 F.3d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). In *Winchester*, the court concluded that a determination of whether an "adjoining area" is covered under the Act should focus on the functional relationship or nexus between the "adjoining area" and marine activity on navigable waters. *See also Motoviloff v. Director, OWCP*, 692 F.2d 87, 14 BRBS 526 (9th Cir. 1982); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

We affirm the administrative law judge's finding that claimant's injury occurred on a covered situs. Claimant performed load-out operations at both the Bayou Black and Amelia yards, which are adjacent to navigable waters. Tr. at 42-44, 48-49, 115, 144. The administrative law judge properly found that these sites are "customarily used for significant maritime purposes" because the rig sections are loaded onto barges and shipped from these points. Decision and Order at 9; *Winchester,* 632 F.2d at 515, 12 BRBS at 727; *see Smith v. Universal Fabricators, Inc.*, 21 BRBS 83, 86 (1988), *aff'd,* 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). Thus, as the yards are used for loading vessels, and have both a functional and geographical nexus with navigable waters, we reject employer's contention that the administrative law judge erred in finding the situs requirement satisfied.[2] *Cf. Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998);

[2]Contrary to employer's argument, the court's holding in *Mills* did not require the administrative law judge to find that situs was not established in the instant case. The claimant in *Mills* did not meet the situs requirement under the OCSLA and thus was not covered under that Act because he was not injured on the outer continental shelf. *Mills*, 877 F.2d at 356, 22 BRBS at 97 (CRT). The instant case does not involve a claim filed under OCSLA, but rather the Longshore Act, and for this reason *Mills* is not on point. *See Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22

Melerine v. Harbor Constr. Co., 26 BRBS 97 (1992)(situs requirement was not met where shipping bay and steel mill where claimants were injured were located ¼ to ½ mile from the Mississippi River and as they were not used for loading vessels).

Status

Employer next contends that the administrative law judge erred in determining that claimant met the status test after wrongly concluding that claimant participated in load-out operations as part of his regular duty assignments. Employer contends that claimant's employment with employer as a bulldozer operator whose regular duties encompassed grading roads and filling in holes on the employer's yards is not maritime employment and that claimant's participation in load-outs was so momentary and episodic that it was insufficient to confer status under the Act.

Generally, an employee satisfies the "status" requirement if he is engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). To satisfy this requirement, he must "spend at least some of his time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977). The load-out process is an indisputably longshoring operation and a claimant's regular participation in load-out operations on an as-needed basis is sufficient to confer status under the Act. *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989); *Smith*, 21 BRBS at 85. Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than episodic, momentary, or incidental to non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.3d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990). The United States Court of Appeals for the First Circuit has held that work, to be considered "episodic," must be "discretionary or extraordinary" as opposed to that which is "a regular portion of the overall tasks to which [claimant] could have been assigned." *Levins v. Benefits Review Board*, 724 F.2d 4, 8, 16 BRBS 24, 33 (CRT)(1st Cir. 1984).

BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

The administrative law judge's finding that claimant met the status requirement under the Act is affirmed as it is supported by substantial evidence and in accordance with law. *See Levins*, 724 F.2d at 4, 16 BRBS at 24 (CRT); *Thornton*, 23 BRBS at 75; Decision and Order at 7-8. Claimant worked as a heavy equipment operator at the Bayou Black yard from August 1977 to October 1982, when he was transferred to employer's Amelia yard. Cl. Ex. 1; Emp. Ex. 3. In both of these yards, claimant's primary function was to straighten and maintain the yards with a bulldozer. Tr. at 41-42, 48-49. However, claimant testified that he also used a bulldozer to assist in load-out operations approximately every two months at the Bayou Black yard and every three to four months at the Amelia yard. Tr. at 42-44, 51. In addition to claimant's testimony regarding his participation in load-out operations, the parties stipulated post-hearing that claimant performed load-out operations over 6.84 percent of his time from 1978 to 1987 while employed with employer. Decision and Order at 3. Moreover, employer's records indicate that claimant participated in load-out operations each year from 1978 to 1986.[3] Emp. Ex. 2. Thus, we affirm the administrative law judge's finding that claimant met the status requirement since claimant participated in indisputably maritime activities, load-out operations, as part of his regular duty assignments, even though he did not participate in every load-out and the load-outs occurred infrequently, because claimant's participation in the load-outs was more than episodic, momentary, or incidental to non-maritime work.[4] *See Levins* 724 F.2d at 4, 16 BRBS at 24 (CRT); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *Jones v. Aluminum Co. of America* , 31 BRBS 130 (1997)*; Thornton*, 23 BRBS at 75; *see also Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996), Decision and Order at 7-8; Emp. Ex. 2; Tr. at 44, 51.

Causation/Responsible Employer

[3]Employer's records show that for each year listed below claimant spent the corresponding number of days performing load-outs:

1978 - 21 days 1979 - 19 days 1980 - 4 days 1981 - 13 days 1982 - 43 days
1983 - 39 days 1984 - 48 days 1985 - 5 days 1986 - 13 days.

Emp. Ex. 2.

[4]The administrative law judge properly noted that coverage is not negated because claimant also was exposed to loud noise during portions of his employment when he was not assisting in load-outs. *Fulks v. Avondale Shipyards, Inc.,* 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied,* 454 U.S. 1080 (1981); *Meardry v. Int'l Paper Co.,* 30 BRBS 160 (1996); Decision and Order at 9.

Lastly, employer contends that the administrative law judge erred in finding causation established with respect to employer, as it avers claimant's hearing loss occurred prior to his employment with employer and as hearing protection was available for claimant's use while he was employed with employer.

Initially, we note that employer confuses the issues of causation and responsible employer on appeal. In its brief, employer erroneously characterizes this case as a causation case in that it contends that the administrative law judge erred in finding that claimant established his *prima facie* case, asserting that claimant did not establish that his hearing loss was caused by his employment with employer, and not by his employment with a prior employer. However, the question of causation in the instant case deals solely with whether claimant's hearing loss is related to his exposure to loud noise in the workplace or to some other cause. Once it is determined that claimant's employment exposures as a whole are causally linked to his hearing loss, then the responsible employer analysis is applied, involving whether a specific employer exposed claimant to injurious stimuli. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In this case, the administrative law judge properly invoked the presumption pursuant to Section 20(a) as he credited claimant's testimony that he was exposed to loud noise while working in employer's yards. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT)(9th Cir. 1998); Tr. at 38, 44-45, 50. As employer is trying to escape liability on appeal by asserting that claimant was exposed to loud noise at a prior employer or, if claimant was exposed to loud noise at its yards, it was because claimant did not wear the hearing protection that employer had made available, employer's argument challenges the administrative law judge's finding that employer is the responsible employer, and we will now review this finding.

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case, as is this hearing loss case, is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd,* 694 F.2d 327 (4th Cir. 1982). Employer bears the burden of establishing that it is not the responsible employer. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *Susoeff*,

19 BRBS at 149. In order to establish that it is not the responsible employer, employer was required to establish either that the employee was not exposed to loud noise while he worked for employer in sufficient quantities to have the potential to cause his hearing loss or that the employee was exposed to loud noise while working for a subsequent covered employer.[5] *Todd Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36 (CRT)(9th Cir. 1990); *Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989); *Black*, 717 F.2d at 1280, 16 BRBS at 13 (CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). The administrative law judge properly noted that it is irrelevant under *Cardillo* to show that claimant's hearing loss existed while working for a previous employer. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984); Decision and Order at 11 n. 4. Moreover, the fact that employer had hearing protection available but that claimant did not wear it is irrelevant to the issues of causation and responsible employer as it does not establish that claimant's hearing loss is not work-related or that claimant was not exposed to loud noise in sufficient quantities to have the potential to cause his hearing loss while employed with employer. Thus, the administrative law judge's finding that employer is the responsible employer is affirmed as it was the last employer to expose claimant to injurious stimuli prior to the sole audiogram of record found to be determinative of claimant's hearing loss. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991); *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[5]There is no allegation in this case that claimant had subsequent covered employment.

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge