BRB No. 98-0472

ANTHONY DAMIANO	)	
	)	
Claimant-Respondent	)	DATE ISSUED: Nov. 24, 1998
	)	
v.	)	
	)	
GLOBAL TERMINAL & CONTAINER SERVICE	)	
	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James Guill, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (95-LHC-404) of Administrative Law Judge James Guill 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, a retired longshoreman who worked exclusively for employer from sometime in the early 1970s until 1991, sought benefits under the Act for a noise-induced hearing loss based on an audiogram administered on April 18, 1994, by Dr. West, which revealed a 30 percent binaural impairment. Claimant underwent a subsequent hearing evaluation by Dr. Katz on December 5, 1994, which revealed a 20 percent binaural impairment.

In his Decision and Order, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and that employer could not establish rebuttal thereof. The administrative law judge therefore concluded that claimant's hearing impairment is work-related. The administrative law judge then averaged the results of the two audiograms of record, and determined that claimant is entitled to benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 25 percent hearing impairment. The administrative law judge also awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's finding of causation with regard to claimant's hearing impairment.

Employer initially asserts that, contrary to the administrative law judge's determination, claimant's "subjective, anecdotal, and unsubstantiated" testimony regarding alleged work-related noise exposure is insufficient to show the requisite injurious working conditions necessary to establish a *prima facie* case of causation. It is well-established that claimant bears the burden of proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have potentially caused the harm, in order to establish his *prima facie* case. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990). It is claimant's burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994).

In the instant case, it is uncontested that claimant suffered a "harm," *i.e.*, a hearing impairment. In his decision, the administrative law judge rationally credited claimant's testimony that the noise from the machinery around which he worked was so loud that it often required the employees to raise their voices to be heard, over the contrary testimony of Mr. Nargi, employer's assistant terminal manager, since claimant's greatest exposure to injurious noise levels occurred prior to the

time that Mr. Nargi began working for employer in 1987, and as there is medical evidence of record that claimant's hearing loss is attributable to noise exposure. *See Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT)(9th Cir. 1998); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997). Consequently, the administrative law judge's determination that claimant established working conditions which could have caused his hearing impairment, and thus has established his *prima facie* case, is affirmed. *See Quinones v. H. B. Zachery, Inc.*, 32 BRBS 6 (1998).

Employer next argues that the administrative law judge erred in determining that it did not rebut the Section 20(a) presumption. Employer asserts that the administrative law judge's rejection of its noise surveys is contrary to his finding that noise exposure analyses documenting the absence of noise at or in excess of that proscribed by the Occupational Health and Safety Act of 1970 (OSHA) are relevant evidence. Employer therefore maintains that as the administrative law judge found its rebuttal evidence, *i.e.* the noise surveys and testimony of Mr. Bragg, relevant and probative, this evidence must be sufficient to establish rebuttal of the Section 20(a) presumption. Employer further argues that the administrative law judge prematurely weighed the entirety of the relevant evidence regarding causation without first determining whether employer's evidence is, in and of itself, sufficient to establish rebuttal of the Section 20(a) presumption.

It is employer's burden to rebut the Section 20(a) presumption that claimant's hearing loss is work-related with substantial countervailing evidence sufficient to establish that there is no causal connection between the hearing loss and his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Employer must present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *see generally Holmes v. Universal Maritime Service Corp.,* 29 BRBS 18 (1995) (Decision on Recon.).

Contrary to employer's contentions, the administrative law judge independently analyzed employer's evidence under the appropriate rebuttal standard. Consequently, the administrative law judge did not weigh the entirety of the medical evidence regarding causation, but rather determined that the evidence relied upon by employer was, on its face, insufficient to establish rebuttal of the

Section 20(a) presumption.[1] In his decision, the administrative law judge thoroughly considered the relevant evidence in the context of employer's contention that the noise surveys alone are sufficient to rebut the Section 20(a) presumption. The administrative law judge concluded that compliance with OSHA noise exposure standards constitutes relevant, but not determinative, evidence of the presence or absence of injurious stimuli in workplaces which fall under the Act. In so finding, the administrative law judge initially noted that the pertinent OSHA regulation, 29 C.F.R. §1910.95, counsels against regarding the eight-hour time-weighted average (TWA) exposure to 90 dBA (air-weighted decibels) criterion as determinative of factual inquiries which fall outside of the OSHA context. In particular, the administrative law judge found that while the regulation notes that 90 dBA is permissible exposure for an eight-hour day, it nonetheless requires employers to adopt an effective hearing conservation program whenever it appears that any employee may be exposed to an eight-hour TWA of 85 dBA or more. 20 C.F.R. §1910.95(c). Thus, from this evidence the administrative law judge inferred that the 90 dBA is an outer limit, and as such, lower exposures are also cause for concern.[2]

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[1]Employer misinterprets the administrative law judge's decision in that although he found that the noise surveys are to some extent relevant and persuasive, they nevertheless do not rise to the level of being the substantial countervailing evidence which employer needs in order to establish rebuttal. Decision and Order at 18.

[2]The administrative law judge found further support for this inference in the medical opinions of Drs. West and Matthews. *See* n. 4, *infra.*

Additionally, the administrative law judge found that Section 1910.95 does not define ||injurious stimuli= or specify a particular noise exposure level that might constitute ||injurious stimuli= and thus employer's noise surveys cannot demonstrate the absence of a work-related injury.[3] Moreover, the administrative law judge found this evidence is insufficient to establish that claimant was not exposed to loud noise at any time during his employment; all it establishes is that during the time reflected in the studies, the levels of noise in the various places claimant worked did not exceed that allowed by OSHA. As these findings are rational, they are affirmed.

[3]The administrative law judge also found that a finding that the OSHA standards are dispositive on the issue of causation of hearing loss would not be reconcilable with the purposes of the Longshore Act, since such a conclusion would preclude any compensation for occupational hearing loss so long as the standards are met, even in cases where claimant has overwhelming medical evidence in his favor.

The administrative law judge also found that Dr. Katz's opinion insufficient to rebut the Section 20(a) presumption because it was based in part on the Bragg noise surveys,[4] and because there is no underlying evidence in the record to support Dr. Katz's opinion that either claimant's heart surgery and/or his age adversely affected his hearing levels. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989). Lastly, Mr. Nargi's testimony is insufficient to establish rebuttal as the administrative law judge rejected his testimony regarding the working conditions in the warehouse and in the yard which prevailed throughout the majority of the time that claimant worked for employer as speculative since, as previously noted, Mr. Nargi did not begin working for employer until 1987. Consequently, the administrative law judge's determination that employer did not establish rebuttal of the Section 20(a) presumption and his consequent conclusion that claimant's hearing impairment is work-related are affirmed as rational, supported by substantial evidence, and in accordance with law. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990); *Bridier*, 29 BRBS at 90.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

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[4]Specifically, the administrative law judge found that Dr. Katz's opinion that if claimant did not have an eight-hour TWA exposure of greater than 90 dBA during the period he worked for employer his hearing loss cannot be attributed to occupational noise exposure is, at best, speculative, in that the noise surveys cannot definitively establish that claimant was not exposed to greater than 90 dBA throughout the entirety of his employment. As such, the administrative law judge found that Dr. Katz's statement on causation lacks a proper foundation. Moreover, the administrative law judge accorded greater weight to the opinions of Drs. West and Matthews, that 90 dBA or less is not necessarily the minimum exposure level below which noise-induced hearing loss cannot occur, and thus, in turn discredited the contrary opinion of Dr. Katz on this issue.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge