BRB No. 11-0828

GARY J. AUBERT Claimant-Respondent v. AMERICAN SUGAR REFINING, INCORPORATED and ACE AMERICAN INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 08/14/2012 DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Edward S. Rapier, Jr., Metairie, Louisiana, for claimant.

Richard C. Stanley, William M. Ross, and Michelle M. West (Stanley, Reuter, Ross, Thornton & Alford, L.L.C.), New Orleans, Louisiana, and John J. Rabalais and Janice B. Unland (Rabalais, Unland & Lorio), Covington, Louisiana, for employer/carrier.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-LHC-1395) of Administrative Law Judge Lee J. Romero, Jr., 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).

Claimant worked as a longshoreman for various employers for twenty-two years. On March 7, 2003, June 29, 2009, and June 15, 2010, claimant underwent audiometric evaluations which revealed binaural sensorineural hearing loss. Following the 2009 evaluation, claimant filed a claim against employer for benefits under the Act for a work-related noise-induced hearing loss. The administrative law judge found that claimant's June 29, 2009, and June 15, 2010, audiograms comply with the Act and regulations,[1] *see* 33 U.S.C. §908(c)(13)(D); 20 C.F.R. §702.441(d), and averaged their results to find that claimant suffers a 7.95 percent binaural hearing loss. The administrative law judge also found that employer was the last covered employer to expose claimant to injurious stimuli prior to the June 29, 2009, audiogram,[2] that working conditions existed at employer's facility that could have caused the loss, thereby invoking the Section 20(a), 33 U.S.C. §920(a), presumption, and that employer did not rebut the presumption by showing that claimant's hearing loss was not caused by exposure to injurious stimuli. Decision and Order at 21-22. Accordingly, the administrative law judge held employer liable for benefits. Employer appeals the administrative law judge's decision on the following grounds: (1) the last employer rule is inapplicable to hearing loss cases because hearing loss is not an occupational disease; (2) the last employer rule violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d); (3) the administrative law judge erred in finding the June 29, 2009, audiogram determinative of claimant's impairment; (4) the administrative law judge erred in invoking the Section 20(a), 33 U.S.C. §920(a), presumption against employer; and, (5) the administrative law judge

[1]The administrative law judge did not consider the March 7, 2003, audiogram performed at Ochsner Clinic because it was "not accompanied by an interpretive audiological report." Decision and Order at 24; CX 6; EX 3 at Exhibit B p. 98.

[2]Claimant's last day of longshore work prior to the June 29, 2009, audiogram was June 27, 2009, on which date claimant was employed by employer. Claimant worked for Ports of America from June 22 through June 26, 2009.

erred in finding employer failed to rebut the Section 20(a) presumption. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's first two assertions. Claimant responds, urging affirmance of the award of benefits.

We first address employer's contention that the administrative law judge erred in invoking the Section 20(a) presumption. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish his prima facie case, the claimant must show that he sustained a harm and that conditions existed or an accident occurred at work which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.,* 30 BRBS 71 (1996). Once the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment.[3] *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

In this case, the administrative law judge found that claimant's audiograms establish that he suffers from a mild-to-moderate high frequency sensorineural hearing loss, which Mr. Bode and Dr. Gianoli opined was noise-induced. Further, based on the results of the August 19, 2008, and August 24, 2009, sound level surveys performed at employer's site, indicating a time-weighted average for longshoremen of 86.3 and 89.5 decibels of noise, respectively, and the testimony of Mr. Bode and Dr. Gianoli that exposure to noise above 85 decibels can be injurious, the administrative law judge found that conditions existed at employer's facility that could have caused claimant's hearing loss. Decision and Order at 21-22; CX 8, 9, 14 at 57-58, 16 at 63. In so finding, the administrative law judge also credited the testimony of Mr. Nicholas, claimant's supervisor, that employees were required to wear ear protection in the hold of the barge

[3]In the proceeding before the administrative law judge, there was only one employer claimed against, and it asserts it did not expose claimant to injurious noise because claimant wore ear plugs while working in areas where noise levels exceeded 85 decibels. Thus, the issue concerning claimant's exposure to noise is one of causation under Section 20(a). *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). If claimant's hearing loss is related to noise exposure at work, employer contends that it was not the last employer to expose claimant to injurious stimuli. *See, e.g., Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *see* discussion, *infra*.

because the noise levels were injurious, claimant's testimony that he had to shout to be heard while working inside the hold of the barge, and Dr. Gianoli's testimony that noise levels most likely exceeded 85 decibels if employees had to shout to be heard. Tr. at 65, 70, 97; CX 14 at 23.

As employer states, however, the administrative law judge did not address evidence which could establish that claimant was not exposed to *injurious* noise levels at employer's facility. Specifically, employer asserts that the administrative law judge did not address the following evidence: 1) Mr. Nicholas's testimony that claimant did not have to raise his voice to communicate with other workers in the hold of the barge; 2) claimant's testimony that he wore hearing protection 100 percent of the time while working for employer in the barge; 3) Mr. Nicholas's testimony that he never saw claimant without hearing protection in the barge and that the ear plugs provide at least 13 decibels of protection, thereby reducing the noise level; 4) Dr. Gianoli's testimony that whether noise is injurious depends on the duration of exposure to noise and the intensity of the noise;[4] 5) Dr. Gianoli's testimony that if claimant properly inserted earplugs while working for employer, the noise levels would have been reduced to non-injurious intensities. Tr. at 59, 78-84, 164-66; CX 10 at 50; EX 6 at 26, 7 at 83. As this evidence goes to whether claimant was exposed to conditions at work that could have caused his hearing loss, we vacate the administrative law judge's finding that claimant's hearing loss is compensable.

On remand, the administrative law judge must address all the relevant evidence and determine whether claimant was exposed to noise at employer's facility that could have caused his hearing loss. *See Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010); *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998) (claimant must establish exposure to injurious noise). This evidence is to be considered by the administrative law judge in addressing whether claimant established his prima facie case for entitlement to the Section 20(a) presumption and in addressing whether employer produced substantial evidence to rebut the Section

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[4] *But see Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981) (regardless of its brevity, the concern is whether an exposure is injurious and has the potential to cause the disease).

20(a) presumption. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT);[5] *see Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 22 BRBS 340 (1989) (decision on remand); *Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

If claimant's hearing loss is found to be related to noise exposure at work, employer argues that it is not the responsible employer because it was not the last covered employer to expose claimant to injurious stimuli. *See Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Susoeff*, 19 BRBS 149. However, no other employers currently are parties to this case.[6] In the event the administrative law judge determines this case should

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[5]We note that the administrative law judge rejected Dr. Gianoli's statement that it was "highly unlikely" that exposure to noise at employer's facility caused claimant's hearing loss, CX 14-15, stating that it did not rebut the Section 20(a) presumption because it did not establish that claimant's hearing loss was not caused by exposure to injurious noise and did not meet the standard set forth in *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). However, in *Plaisance*, the Fifth Circuit very recently held that it is erroneous to rely on its characterization in *Ibos*, 317 F.3d at 485, 36 BRBS at 96(CRT), of an employer's burden on rebuttal to produce "proof" that "exposure to injurious stimuli did not cause the employee's occupational disease," because the issue in *Ibos* was the responsible employer and not whether the disease was work-related. The court explicitly referred to the standard enunciated in *Ibos* as "dicta" with respect to the issue of causation. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). The court explained that ". . . all it [employer] must do is advance evidence to throw factual doubt on the prima facie case. Having produced substantial evidence, the employer then casts the duty on the ALJ to weigh all the record evidence." *Id.*

[6]The administrative law judge denied employer's motion to join claimant's other employers to this case. That order has not been appealed. However, employer may renew its motion on remand. Moreover, claimant initially filed a claim against Ports of America. Employer asserts that claimant "voluntarily withdrew" the claim after Ports of America controverted it. As it is unclear whether there was an order disposing of that claim, it still may be open. *Intercounty Constr. Co. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975) (a timely claim which is not closed by an order awarding or denying the claim remains open and pending until it is resolved).

be addressed as a responsible employer case, we reject employer's contention that the last employer rule does not apply to hearing loss cases because hearing loss is not an "occupational disease." It is well established that the last employer rule applies to hearing loss cases. *See Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997). Indeed, the seminal case in determining the responsible employer, *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), was a hearing loss case. Moreover, we reject employer's contention that by shifting the burden of establishing non-exposure to an employer, the last employer rule violates Section 7 of the APA, 5 U.S.C. §556(d). The last employer rule is one of allocation of liability, not compensability. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *see also Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005). The rule applies only after there is "a legitimate statutory shifting of the burden of proof, such as that which occurs under [Section] 20(a). . . ." *McAllister,* 627 F.3d at 1299 n.2, 44 BRBS at 91 n.2(CRT); *see also Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT) (once the Section 20(a) presumption is invoked, employer can then rebut it with evidence that exposure to injurious stimuli did not cause the harm or that the claimant was exposed to injurious stimuli while performing covered work for a subsequent employer); *Susoeff,* 19 BRBS 149.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.[7]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[7]In light of our conclusion, we need not address employer's remaining contention regarding which audiogram is determinative of the extent of claimant's hearing impairment. However, this case is similar to *Roberts*, 30 BRBS 229, in that the last audiogram revealed a lesser hearing loss than the one before it. In *Roberts*, the Board held that any noise exposure between the two audiograms could not have contributed causally to the compensable hearing loss, making the earlier carrier liable. *See generally Ceres Marine Terminals, Inc. v. Green*, 656 F.3d 235, 45 BRBS 45(CRT) (4th Cir. 2011). Moreover, although the administrative law judge did not factor in the 2003 audiogram because he found it did not comply with the regulations for purposes of being "determinative," he should, if necessary on remand, address employer's assertion that the 2003 audiogram demonstrated a hearing loss and is probative to the issues in the case. *See generally R.H. [Harris] v. Bath Iron Works Corp.*, 42 BRBS 6 (2008); *see also Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009).