BRB No. 03-0327

JOSEPH L. WRIGHT, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAMBERT POINT DOCKS, INCORPORATED	)	DATE ISSUED: Jan. 21, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order, Order on Post-Hearing Motions, and Decision and Order on Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Ann K. Sullivan (Crenshaw, Ware & Martin, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, Order on Post-Hearing Motions, and Decision and Order on Reconsideration (2001-LHC-01137) of Administrative Law Judge Fletcher E. Campbell, 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 top end loader and transtainer operator for Lambert Point Docks (LPD), and as a hustler driver for other longshore employers from 1965 to May 1, 1997, when he retired. Claimant underwent audiometric testing on August 24 and

September 20, 2000. He was diagnosed with binaural hearing loss due, in part, to noise exposure in the workplace. CX 4 at 1. Claimant sought compensation under the Act from LPD, which was his last longshore employer. EX 5.

Notwithstanding his finding that claimant sustained a noise-induced hearing loss and that LPD is the responsible employer, the administrative law judge denied benefits because there was no expert interpretation of the audiometric evidence as to the extent of claimant's hearing loss under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). In his Order on Post-Hearing Motions, the administrative law judge discussed a conference call with opposing counsel in which he ordered the reopening of the record for the purpose of submitting expert testimony addressing the extent of claimant's hearing loss and, on this basis, he granted claimant's motion for reconsideration. The administrative law judge rejected employer's contention that under Section 702.336(b) and Section 702.338, 20 C.F.R. §§702.336(b), 702.338, he lacked authority to reopen the record after issuing his initial decision. On reconsideration, the administrative law judge credited the testimony of Dr. Coleman that, based on claimant's September 20, 2000, audiogram, claimant has a 25 percent binaural hearing loss under the AMA *Guides*. The administrative law judge rejected employer's contention that the audiogram failed to conform to the technical guidelines enumerated by the AMA *Guides*. The administrative law judge again found that claimant was exposed to injurious noise during the course of his employment with LPD, and he awarded claimant benefits under the Act for a 25 percent hearing loss.

On appeal, employer challenges the administrative law judge's finding that claimant's hearing loss is related to his employment, that LPD last exposed claimant to injurious noise, that claimant has a 25 percent hearing impairment, and that claimant is entitled to compensation at the maximum applicable rate of $835.74 per week. Employer also challenges the administrative law judge's reopening of the record to admit evidence addressing the extent of claimant's hearing loss under the AMA *Guides*, and his exclusion of testimony regarding dosimetry readings for equipment used at employer's facility. Claimant responds, urging affirmance.

We address first employer=s contention that the administrative law judge erred in finding claimant entitled to the presumption at Section 20(a) of the Act, 33 U.S.C. '920(a). In order to be entitled to the Section 20(a) presumption linking claimant=s hearing loss to his employment, claimant must establish a *prima facie* case by showing that he suffered a harm and that an accident occurred or working conditions existed which could have caused the injury or harm. *Bolden v. G.A.T.X. Terminals Corp*., 30 BRBS 71 (1996); *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In his decision on reconsideration, the administrative law judge specifically credited claimant's testimony that he was exposed to loud noise while

operating a top loader and a transtainer, that he was exposed in general to loud noise on the docks, and that he did not wear hearing protection. *See* Tr. at 16-20.

It is uncontested that claimant suffered a harm, *i.e.*, a hearing impairment. Employer argues that claimant's vague and general descriptions of loud machinery and noise exposure are not sufficient to establish the existence of working conditions sufficient to invoke the Section 20(a) presumption.[1] Dr. Coleman testified that claimant's hearing loss is related, in part, to his longshore employment, JX 2 at 18-21, there is no medical evidence of record that claimant=s hearing loss is not attributable to noise exposure, *see Damiano v. Global Terminal & Container Service*, 32 BRBS 261 (1998); *see also Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998), and the administrative law judge rationally credited claimant=s testimony about the noise level to which he was exposed. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Consequently, the administrative law judge=s finding that claimant was exposed to loud noise during the course of his employment is affirmed as it is supported by substantial evidence.[2] *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *Davidson v. Bender Shipbuilding & Repair Co.*, 30 BRBS 45 (1996). Thus, claimant is entitled to invocation of the Section 20(a) presumption. *See generally Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT)(5th Cir. 2000).

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[1] In its appellate brief, employer partially relies on claimant's deposition testimony. In his decision, the administrative law judge stated that he would not consider claimant's deposition because it was not offered into evidence before the hearing. Decision and Order at 6. The Board may only consider on appeal the evidence admitted into the record before the administrative law judge. *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985). Accordingly, employer's references in its brief to claimant's deposition testimony will not be addressed.

[2] Employer also alleges error in the administrative law judge's finding that claimant worked 40 hours a week for LPD prior to his retirement. Decision and Order at 3. Claimant testified that, whereas LPD was his regular employer for 24 years, he worked approximately 16 hours per week for it in 1997. Tr. at 29-30, 37. Claimant's W-2 Forms for 1997 and employer's work history for claimant in 1997 support his testimony that he worked approximately 16 hours per week for employer during 1997. EXs 4, 5. We hold that any error by the administrative law judge is harmless as, regardless of the number of hours claimant worked for LPD in 1997, the administrative law judge credited substantial evidence of claimant's noise exposure during the course of his longshore employment to invoke the Section 20(a) presumption, as a matter of law. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

Employer next argues that it rebutted the Section 20(a) presumption. Employer relies on claimant's testimony of noise exposure during the course of his employment with Cooper/T. Smith Stevedoring (Cooper), with whom claimant was primarily employed in 1996 and 1997. Tr. at 18-19, 36. Employer also argues that, since claimant worked for it approximately 16 hours per week in 1997, and this work was in the enclosed, insulated and air conditioned cabs of its top loaders and transtainers, Tr. at 25-27, it established that claimant was not last exposed to injurious noise during the course of his employment with LPD prior to his retirement on May 1, 1997. 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 last employment with employer.[3] However, the question of causation concerns whether claimant's hearing loss is related to his exposure to loud noise in the workplace or to some other cause. Once, as here, 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. As employer attempts to escape liability on appeal by asserting that claimant was last exposed to injurious noise at Cooper, employer's argument challenges the administrative law judge's finding that LPD is the responsible employer. *See generally Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

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 in 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. LPD 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*

[3] In its post-hearing brief, LPD similarly challenged claimant's contention that it is the responsible employer in terms of it rebutting the Section 20(a) presumption of a work-related injury at its facility. Post-Hearing Brief at 9-10. Employer's burden to rebut the Section 20(a) presumption is to produce substantial evidence that claimant's hearing loss was not caused or aggravated by his employment. *See generally Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). In this case, employer did not produce any medical evidence contradicting the testimony of Dr. Coleman that claimant's hearing loss is due, in part, to noise exposure at work. Thus, employer did not rebut the Section 20(a) presumption that claimant's hearing loss is related to his employment. We, therefore, affirm the administrative law judge's conclusion that claimant established a work-related hearing loss.

[Barnes], 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Zeringue*, 32 BRBS 275. In order to establish that it is not the responsible employer, LPD 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.[4] *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS at 71(CRT)(4th Cir. 2000), *cert. denied*, 121 S.Ct. 885 (2001); *Todd Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990); *Lustig v. United States Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In his decision, the administrative law judge credited claimant's testimony that he was exposed to loud noise while working for employer. Decision and Order at 6. On reconsideration, the administrative law judge rejected the testimony of Ronald Taylor, General Superintendent for LPD, and Kenneth Roach, Jr., Assistant Superintendent for LPD. Decision on Recon. at 4-5. The administrative law judge found that the testimony of Mr. Roach and Mr. Taylor does not specifically contradict claimant's testimony that his job duties with employer exposed him to loud noise and that he did not wear hearing protection while working for employer. The administrative law judge credited the testimony of Mr. Roach that top loaders can be loud, not all were air-conditioned, and the windows often were left open. Tr. at 50-54. The administrative law judge credited Mr. Taylor's testimony that noise level testing had not been done at its facility. CX 12 at 12-14. The administrative law judge further found vague and unpersuasive Mr. Roach's testimony that the equipment used at employer's facility was "low noise or quiet." *Id*. at 5. Additionally, the administrative law judge found that Mr. Roach did not testify as to the impact of all the noises to which claimant was exposed over a significant period of time at LPD.

Based on these findings by the administrative law judge, we hold that LPD failed to establish that it did not expose claimant to injurious noise prior to his retirement on May 1, 1997. The extent of claimant's prior noise exposure as a hustler driver with Cooper is irrelevant under *Cardillo*. *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). The administrative law judge acted within his discretion in crediting claimant's testimony of loud noise exposure with employer rather than the testimony of Mr. Roach and Mr. Taylor. *See Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). Moreover, the administrative law judge rationally credited the testimony of Mr. Roach that top loader

[4] There is no allegation in this case that claimant had subsequent covered employment. Moreover, the record establishes that claimant last worked for LPD prior to his retirement on May 1, 1997. JX 1; EX 5.

operators left the windows open on occasion, which is contrary to employer's contention that claimant was not exposed to loud noise because claimant worked in enclosed, insulated, and air conditioned cabs. Claimant also testified that he left the windows open. Tr. at 17. Accordingly, substantial evidence supports the finding that claimant was last exposed to injurious noise while working with LPD, and we hold the administrative law judge properly found LPD is the responsible employer for claimant's work-related hearing loss. *See Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *see also Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

Employer next challenges the administrative law judge's exclusion of Mr. Roach's testimony addressing the level of noise produced by employer's machinery. At the hearing, claimant objected to Mr. Roach's testifying because he was not listed as a potential witness in employer's pre-hearing statement. Tr. at 10. In his decision, the administrative law judge denied claimant's objection based on employer's counsel's assurance that Mr. Roach was listed as a witness in its interrogatory responses. Decision and Order at 5-6; *see also* CX 13 at 2-3. Mr. Roach testified, *inter alia*, that he read in advertising brochures for the equipment at employer's facility that one machine had a rating of 75 decibels, and that other machines were described as being quiet or low noise. Tr. at 48-50, 56. Claimant objected to this testimony on the basis that employer averred in its answers to claimant's interrogatories that no noise level testing had been performed at employer's facility. Tr. at 49; *see* CX 13 at 5-6. On reconsideration, the administrative law judge sustained claimant's objection, but he allowed the remainder of Mr. Roach's testimony. Decision on Recon. at 4 n.4. On appeal, employer argues that the administrative law judge erred by excluding Mr. Roach's testimony concerning the noise produced by the equipment because he did not testify to actual readings at employer's facility but instead offered testimony based on his review of manufacturers' brochures describing the noise ratings and level of noise emitted by the equipment claimant operated.

An administrative law judge has great discretion concerning the admission of evidence, and any decisions regarding the admission or exclusion of evidence are reversible only if arbitrary, capricious, or an abuse of discretion. *See, e.g., Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). In this case, we hold that the administrative law judge acted within his discretion to initially address on reconsideration claimant's specific objection to Mr. Roach's testimony regarding noise levels omitted by its equipment, and to sustain this objection based on employer's failure to disclose this evidence in response to claimant's interrogatories requesting information on noise testing at its facility. Employer's mere assertion of error fails to show that the exclusion of this evidence was arbitrary, capricious, or an abuse of discretion.

Employer next challenges the administrative law judge's reopening of the record to admit expert interpretation of the audiometric evidence of record. Employer asserts that, pursuant to Sections 702.366(b) and 702.338, the administrative law judge may not consider a new issue or reopen the record for the receipt of new evidence once he has filed his initial compensation order.

In his decision, the administrative law judge found that Section 8(c)(13)(C), 33 U.S.C. §908(c)(13)(C), and Section 702.441, 20 C.F.R. §702.441, require that an expert interpret the results of the audiogram to establish the extent of claimant's hearing loss, and that the record lacked such an interpretation. Decision and Order at 6. In his Order on Post-Hearing Motions, the administrative law judge granted claimant's motion for reconsideration, and he reopened the record for an expert interpretation of the audiogram. The administrative law judge rejected employer's contention that he lacked authority under Section 702.336(b) to do so, finding that the extent of claimant's hearing loss was an issue that was previously raised. The administrative law judge further rejected employer's contention that he lacked authority to reopen the record under Section 702.338. The administrative law judge found that this section does not specifically prohibit the receipt of new evidence pursuant to a motion for reconsideration and that reopening the record in this case was necessary to provide for a fair hearing.

We affirm the administrative law judge's reopening the record upon claimant's motion for reconsideration. The administrative law judge properly found that Section 702.336(b) does not preclude him from reopening the record as the extent of claimant's hearing loss was at issue prior to the issuance of his initial decision.[5] Tr. at 5-7. Section 702.338 of the regulations provides in pertinent part:

> [T]he administrative law judge shall fully inquire into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or, at any time prior to the filing of the compensation order, reopen the hearing for

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[5] Section 702.336(b) of the regulations provides in pertinent part:

> At any time prior to the filing of the compensation order in the case, the administrative law judge may in his discretion, upon the application of a party or upon his own motion, give notice that he will consider any new issue.

20 C.F.R. §702.336(b).

receipt of such evidence.

20 C.F.R. §702.338. Section 702.338 provides the administrative law judge with considerable discretion in determinations relating to the admission of evidence. *See generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). Thus, an administrative law judge does not abuse his discretion when, in his initial decision, he orders a party to submit additional evidence after determining that the record evidence is insufficient to decide an issue in dispute. *Wayland v. Moore Dry Dock*, 21 BRBS 177 (1988). Moreover, where, as in this case, a party seeks to submit new evidence pursuant to a motion for reconsideration, an administrative law judge has the discretion to admit such evidence. *Williams v. Nicole Enterprises, Inc.*, 19 BRBS 68 (1986). Accordingly, while Section 702.338 does not expressly provide for the admission of new evidence pursuant to a motion for reconsideration, we hold that the administrative law judge properly acted in accordance with his duty to fully inquire into the matters at issue by granting claimant's motion for reconsideration and reopening the record for evidence interpreting the audiometric evidence of record pursuant to the AMA *Guides.*

Employer next challenges the administrative law judge's crediting of the September 20, 2000, audiogram, which Dr. Coleman testified showed a 25 percent binaural hearing loss. Employer asserts that Dr. Coleman's accompanying letter written on September 20, 2000, does not meet the requirements of Section 8(c)(13)(C) and Section 702.441 for being presumptive evidence of a 25 percent hearing loss because neither Dr. Coleman nor the audiologist who administered the test interpreted or certified its results, nor did the accompanying report set forth the testing standards and the method used for evaluating claimant's hearing loss.[6] Moreover, employer contends that neither

[6] Section 8(c)(13)(C) of the Act states:

> An audiogram shall be presumptive evidence of the amount of hearing loss sustained as of the date thereof, only if (i) such audiogram was administered by a licensed or certified audiologist or a physician who is certified in otolaryngology, (ii) such audiogram, with the report thereon, was provided to the employee at the time it was administered, and (iii) no contrary audiogram made at that time is produced.

33 U.S.C. §908(c)(13)(C).

Section 702.441(b)(1) of the regulations provides as follows:

> (b) An audiogram shall be presumptive evidence of the amount of hearing loss on the date administered if the

the audiogram nor the letter states the extent of claimant's hearing loss pursuant to the AMA *Guides*, as required by Section 8(c)(13)(E), 33 U.S.C. §908(c)(13)(E). Employer further argues that claimant did not establish the testing standards used, the reliability of the test results, and compliance with the 1996 American National Standards Institute (ANSI) specifications for audiometers, as required by Section 702.441 and the AMA *Guides*. In this regard, employer also relies on the notation on the September 20, 2000, audiogram that the audiometer was calibrated on April 2001, after the date of the audiogram. Finally, employer argues that the administrative law judge erred by placing the burden on employer to establish the audiogram was non-conforming.

On reconsideration, the administrative law judge credited Dr. Coleman's testimony that the September 20, 2000, audiogram established a 25 percent hearing loss under the AMA *Guides*. Decision on Recon. at 2-3. The administrative law judge rejected employer's contentions that the audiogram is non-conforming. The administrative law judge credited Dr. Coleman's testimony that the audiometer was calibrated prior to claimant's evaluation, as it is calibrated annually. The administrative law judge also credited his testimony that the audiogram complied with the 1996 ANSI specifications for audiometers notwithstanding the statement on the audiogram form that the hearing levels tested comply with the 1969 ANSI specifications. The administrative law judge also reasoned that employer failed to produce any testimony contrary to Dr.

> following requirements are met:
>
> > (1) The audiogram was administered by a licensed or certified audiologist, by a physician certified by the American Board of Otolaryngology, or by a technician, under an audiologist's or physician's supervision, certified by the Council of Accreditation on Occupational Hearing Conservation, or by any other person considered qualified by a hearing conservation program authorized pursuant to 29 C.F.R. §1910.95(g)(3) promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. §667). Thus, either a professional or trained technician may conduct audiometric testing. However, to be acceptable under this subsection, a licensed or certified audiologist or otolaryngologist, as defined, must ultimately interpret and certify the results of the audiogram. The accompanying report must set forth the testing standards used and describe the method of evaluating the hearing loss as well as providing an evaluation of the reliability of the test results.

20 C.F.R. §702.441(b)(1).

Coleman's statements addressing the technical validity of the September 20, 2000, audiogram.

Initially, we note that employer's contentions challenge the validity of the September 20, 2000, audiogram as presumptive evidence of the extent of claimant's hearing loss under Section 8(c)(13)(C). In adjudicating a claim, however, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses and to determine the weight to be accorded to the evidence of record. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Accordingly, while an audiogram that fails to conform to the requirements enumerated in Section 8(c)(13)(C) and Section 702.441(b)(1) is not *presumptive* evidence of the amount of hearing loss sustained as of the date thereof, the audiogram may be considered *probative* evidence by the administrative law judge in his determination of the extent of clamant=s hearing loss, which he may consider and evaluate in light of the other evidence of record. *See generally Norwood v. Ingalls Shipbuilding, Inc.*, 26 BRBS 66 (1992)(Stage, C.J., dissenting on other grounds); *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). In this case, employer has presented no audiometric evidence or testimony challenging Dr. Coleman's opinion that claimant sustained a 25 percent work-related hearing loss. Moreover, in his decision on reconsideration, the administrative law judge explicitly found that claimant met his burden of proof; therefore, we reject employer's contention that the administrative law judge improperly placed on it the burden of proof. *See* Decision on Recon. at 3-4. Finally, Dr. Coleman's testimony specifically addresses whether the September 20, 2000, audiogram conforms to the requirements of Sections 8(c)(13) and 702.441, JX 2 at 9-15, 24-25, and thus rectifies any deficiencies in his initial report. *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); *Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990) (Brown, J., dissenting on other grounds). Accordingly, we affirm the administrative law judge's crediting of Dr. Coleman's interpretation of the September 20, 2000 audiogram in awarding claimant benefits for a 25 percent binaural impairment.

Employer lastly challenges the award of compensation at the applicable maximum compensation rate of $835.74 per week. *See* 33 U.S.C. §906(b). Employer argues that claimant's W-2 forms for 1996 and 1997 are insufficient evidence to calculate claimant's average weekly wage under Section 10(a), 33 U.S.C. §910(a), and that under Section 10(c), 33 U.S.C §910(c), claimant's compensation rate should derive from the applicable National Average Weekly Wage of $400.53.

On reconsideration, the administrative law judge awarded claimant compensation at a rate of $835.74 per week. Decision on Recon. at 5. In his Post-Hearing Brief, claimant argued that he has an average weekly wage of $2002.75, and that he is therefore

entitled to compensation at the maximum compensation rate in effect on May 1, 1997, of $835.74 per week. In support of his contention, claimant submitted his W-2 forms from 1996 and 1997, which claimant asserted show wages of $104,143.18 in 1996 and $49,898.13 during the first four months of 1997.[7] Claimant's Post-Hearing Brief at 19-21; CX 1. Employer responded that claimant's compensation rate is the National Average Weekly Wage in effect on May 1, 1997, of $400.53 per week. Employer's Brief at 14-15.

We reject employer's contention that claimant's average weekly wage should be the National Average Weekly Wage in effect on claimant's date of retirement. The statutory provisions requiring the use of the National Average Weekly Wage in latent occupational diseases cases do not apply to hearing loss claims, as hearing loss is not a latent disease. 33 U.S.C. §910(d)(2), (i); *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Rather, claimant's average weekly wage should be calculated as of the date of claimant's last exposure to injurious stimuli prior to the administration of the determinative audiogram. *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT). Although the administrative law judge provided no calculation of claimant's average weekly wage, it is clear on this record that claimant's average weekly wage prior to his retirement on May 1, 1997, exceeds that which would yield the maximum compensation rate. *See generally Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1996); CX 1. As employer raises no other contentions with regard to the awarded compensation rate, it is affirmed.

[7] A review of claimant's W-2 forms shows taxable income, including container royalty, vacation/holiday and Guaranteed Annual Income payments, of $115,388.22 in 1996 and $51,466.39 in 1997. CX 1; *see generally Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998); *McMennamy v. Young & Co.*, 21 BRBS 351 (1988).

Accordingly, the administrative law judge's Decision and Order, Order on Post-Hearing Motions, and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge