BRB No. 91-1111

CHARLES LEE LADNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING, INCORPORATED	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax), Pascagoula, Mississippi, for the claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (89-LHC-3253) of Administrative Law Judge Richard D. Mills rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Worker's 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 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 as a sheetmetal worker from 1969 until 1974, during which time he was exposed to loud industrial noise. After leaving employer, claimant worked in the toolroom at Bayou Steel, another maritime employer who was engaged in the work of building steel barges. Thereafter, claimant was employed in non-maritime home

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

construction. On June 6, 1987, claimant underwent an audiometric evaluation which revealed a 10.2

percent bilateral sensori-neural hearing loss. On September 2, 1987, claimant filed a claim under the Act for occupational hearing loss based on the results of this audiogram and provided employer with notice of his injury that same day. Cx. 5. Subsequently, on October 28, 1987, claimant underwent a second audiometric evaluation which revealed a 3.44 percent binaural hearing impairment. Ex. 3. Previously, on May 11, and 14, 1987, Assistant District Director[1] Robert H. Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, or controversions, and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of claim by the district director's office. On December 30, 1987, employer commenced voluntary payment of permanent partial disability compensation to claimant based upon a 3.44 percent binaural hearing impairment pursuant to 33 U.S.C. §908(c)(13)(B).

A hearing was held on September 12, 1990, wherein the parties disputed causation, extent of disability, employer's liability for medical benefits, and the Section 14(e) penalty. Employer additionally attempted to escape liability by arguing that it was not the responsible employer because claimant received subsequent noise exposure while employed by Bayou Steel in maritime employment prior to the date of injury.

In his Decision and Order, the administrative law judge, after discussing claimant's testimony regarding his exposure to noise at Bayou Steel, determined that employer was liable as the responsible employer because it was the last maritime employer to expose claimant to injurious noise levels. Accordingly, the administrative law judge concluded that employer was liable for claimant's 6.82 percent binaural hearing loss based on the average of the two audiograms of record pursuant to 33 U.S.C. §908(c)(13)(B). The administrative law judge further found that employer was liable for medical benefits in connection with claimant's hearing loss, and for payment of a Section 14(e) assessment, the exact amount of which was to be determined by the district director.

On appeal, employer challenges the administrative law judge's finding that it is the responsible employer and in addition contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Claimant responds, urging affirmance of the administrative law judge's finding that employer is the responsible employer as well as his award of a Section 14(e) assessment.

In the instant case, the administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption. To rebut the presumption, employer must present facts to show that exposure to injurious noise did not cause claimant's hearing loss. Employer also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *see also Susoeff v. San*

[1] The title "district director" has been substituted for the title "deputy commissioner" used in the statute. 20 C.F.R. §702.105.

Francisco Stevedoring Co., 19 BRBS 149 (1986); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied* 429 U.S. 820 (1976).[2] Herein, employer attempted to avoid liability by establishing that claimant was exposed to injurious noise levels while working at Bayou Steel subsequent to the termination of his employment with employer in 1974.

The rule for determining the responsible employer in an occupational hearing loss case is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last covered employer to expose the claimant to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Id.*, 225 F.2d at 137; *Lins*, 26 BRBS at 62; *Susoeff*, 19 BRBS at 149. Employer asserts that it is not the responsible employer because it is undisputed that claimant's work for Bayou Steel was maritime employment, and claimant testified that he was exposed to some degree of noise while working there on a daily basis.

At his deposition, claimant underwent extensive questioning by employer's counsel regarding his exposure to noise while working at Bayou Steel. Claimant testified that he did not receive any noise exposure while he was employed in Bayou's toolroom, which was located five to six hundred feet from the nearest production area. Claimant admitted, however, that approximately once per day he would have to walk within about one hundred feet of the production area where the grinders and welders were working. By contrast, claimant testified that while working for employer he was exposed to noise from chipping guns, scaling guns, and grinders at least five to six hours a day, five days or more per week. *See* Claimant's deposition at 26.

After setting forth claimant's testimony, the administrative law judge concluded that claimant was last exposed to high levels of industrial noise while working for employer and that his hearing loss thus arose in the course and scope of that employment. Decision and Order at 6. It is well-established that all adjudicative and fact-finding functions reside in the administrative law judge. *See Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990). Thus, an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The administrative law judge's finding, based upon claimant's testimony, that claimant was last exposed to high levels of industrial noise while employed by employer is rational and supported by substantial evidence. Employer here did not meet its burden of proving that claimant was exposed to injurious levels of noise in his subsequent maritime employment at Bayou. *See Avondale*

[2]Although employer asserts that it should be afforded the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption against a subsequent maritime employer, the Section 20(a) presumption operates in favor of the claimant to establish that the claim comes within the provisions of the Act. Thus, in order to avoid liability as responsible employer once the Section 20(a) presumption is invoked, employer must establish not only that claimant was employed in subsequent maritime employment, but that he was exposed to injurious stimuli while so employed.

Shipyards, 977 F.2d at 191-192, 26 BRBS at 114-115 (CRT).[3] Accordingly, the administrative law judge's finding that employer is the responsible employer is affirmed.

Turning to employer's appeal of the administrative law judge's determination that it is liable for a Section 14(e) assessment, employer specifically asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Employer further contends that the instant case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), *aff'g in pert. part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*), because the excuse was granted prior to the date claimant notified employer of his injury rather than retroactively. Additionally, employer contends that even if it had not been excused, the concept of "replacement income" is not applicable in this case, so the Section 14(e) penalty should not apply. Lastly, employer contends that its Form LS-202, First Report of Injury, filed on September 23, 1987, is the functional equivalent of a notice of controversion sufficient to absolve it from liability for an assessment pursuant to Section 14(e) of the Act.

The precise arguments raised by employer regarding the excuse granted by the district director, the inapplicability of *Fairley*, *supra*, and the concept of "replacement income" have been rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934 (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). We therefore reject these specific allegations of error raised by employer.

Employer's assertion that its Form LS-202 First Report of Injury, filed September 23, 1987, constituted a "controversion" sufficient to relieve it of liability for a Section 14(e) assessment similarly must fail. Employer's argument is identical to that addressed by the Board in *Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting). In *Snowden*, the Board held that an employer's Form LS-202, which was filled out in a manner identical to the Form LS-202 filed by employer in the instant case, was not the functional equivalent of a notice of controversion since it was inadequate to meet the statutory requirements of Section 14(d) of the Act. For the reasons set forth in *Snowden*, we hold that the Form LS-202 First Report of Injury filed by employer in this case does not constitute a notice of controversion for purposes of Section 14(e). We, therefore, affirm the administrative law judge's finding that employer is liable for a Section 14(e) assessment.

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

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[3]Employer cites *Smith v. Aerojet General Shipyards Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), *rev'g* 9 BRBS 225 (1978), for the proposition that the purpose of the "last maritime employer rule" is to require that claimants proceed against potentially liable employers in reverse chronological order. *Smith*, however, indicates only that the Section 12 and 13, 33 U.S.C. §§912, 913, statute of limitations do not begin to run against a previous employer where the employee files a claim against a later employer until the employee is aware that liability could be assessed against that particular employer under the last employer doctrine.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge