

WILLIE D. CARTER)
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 Claimant-Petitioner)
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 v.)
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 I.T.O. CORPORATION) DATE ISSUED:
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 Self-Insured)
 Employer-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile Alabama, for claimant.

Robert E. Thomas and John M. Sartin, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for self-insured employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1984) of Administrative Law Judge C. Richard Avery 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 as a longshoreman for various stevedoring companies, including employer, from 1967 to 1987. On March 19, 1987, claimant filed a claim under the Act for a 23.1 percent binaural noise-induced impairment against employer,¹ based on the results of a February 6, 1987,² audiometric examination administered at the University of South Alabama Speech and Hearing Center. A subsequent in-house hearing evaluation at Ingalls Shipbuilding, Incorporated, on September 22, 1989, was interpreted by audiologist Marianne Towell as indicative of a zero percent hearing loss. Exs. 20-21. A third audiometric examination performed by Jim D. McDill, Ph.D., on March 22, 1991, indicated a .3 percent binaural hearing loss. Cx. 9.

¹Employer stipulated that it was the last maritime employer. Jx 1.

²The parties stipulated that this February 6, 1987 date was the date of injury. Jx. 1.

In his Decision and Order, the administrative law judge initially noted that in order for claimant to take advantage of the presumption under Section 20(a) of the Act, 33 U.S.C. §920(a), he must establish that he was exposed to injurious stimuli on two occasions in 1984 and 1986 when he worked for employer prior to the February 6, 1987, date of injury. The administrative law judge found that claimant failed to introduce sufficient expert evidence to establish that noisy conditions existed on those dates which could have caused harm to his hearing, and that claimant's testimony alone was not sufficient to establish the level of noise to which he may have been exposed. Therefore, the administrative law judge found the evidence insufficient to invoke the Section 20(a) presumption, and denied the claim.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in failing to accord him the benefit of the Section 20(a) presumption and in requiring that he affirmatively prove causation. Specifically, claimant asserts that the administrative law judge's finding that claimant offered insufficient evidence to establish that conditions existed while he worked for employer in 1984 and 1986 which could have caused harm to his hearing is contrary to the undisputed facts in this case. Claimant further asserts that in finding that claimant was not entitled to the benefit of the Section 20(a) presumption, the administrative law judge erred in focusing solely on the last two occasions he worked rather than considering claimant's exposure to noise throughout the totality of his employment. Finally, claimant avers that inasmuch as he should have been found entitled to the benefit of the Section 20(a) presumption, pursuant to *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), it is employer's burden to establish that it is not the responsible employer, a burden which it failed to meet in this case. Employer responds, urging affirmance.

We agree with claimant that the administrative law judge's analysis of the causation issue in this case is not in accordance with law. In requiring that claimant prove he was exposed to injurious noise on the last two days he worked for employer prior to the date of injury in order to establish a *prima facie* case for application of Section 20(a), the administrative law judge intermixed and confused the concepts of causation and responsible employer. As a result, he erred in placing the burden of proof on claimant.

The question of causation deals with whether claimant's injury is related to his employment as a whole and not to employment with a specific employer. The responsible employer rule comes into play once causation is established and is a judicially-created rule for allocating liability among successive employers in cases where an occupational disease develops after prolonged exposure to injurious conditions. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-45 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). It is well-established that the employer responsible for paying benefits in an occupational disease case such as hearing loss is the last covered employer to expose claimant 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). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially

injurious stimuli is all that is required. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992).

In establishing causation under the Act, claimant is aided by the Section 20(a) presumption. In order to be entitled to the Section 20(a) presumption, claimant bears the burden of establishing that he suffered an injury and that an accident or working conditions existed that could have caused the harm. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Contrary to the administrative law judge's determination in this case, however, claimant is not required to introduce affirmative evidence establishing the existence of injurious working conditions with a particular employer to invoke the presumption. *See, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151-52 (1989). Rather, claimant need only allege the existence of working conditions during the course of his employment which *could* have caused the harm. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Everett*, 23 BRBS at 318. Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption operates to link the harm or pain with claimant's employment. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295-96, 24 BRBS 75, 80 (CRT)(D.C. Cir. 1990).

In the present case, as employer does not dispute that claimant sustained an injury, a hearing loss evidenced on audiograms of record, and claimant testified that he was exposed to loud noise throughout his years of longshore employment,³ we conclude that claimant is entitled to invocation of the Section 20(a) presumption as a matter of law. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Accordingly, we reverse the administrative law judge's finding to the contrary. *See Peterson v. General Dynamics Corp.* 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993).

Once the Section 20(a) presumption is invoked, employer may rebut it by producing evidence to show that claimant's employment did not cause, aggravate, or contribute to his injury. *See Peterson*, 25 BRBS at 78. As the administrative law judge did not evaluate the relevant evidence in terms of rebuttal, we must remand the case to allow him to do so. If, on remand, the administrative law judge finds that employer introduced evidence sufficient to establish that claimant's hearing loss was not caused or aggravated by noise exposure, Section 20(a) is rebutted and the administrative law judge must weigh the relevant evidence as a whole to determine whether claimant's hearing loss is noise-related. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

Furthermore, on remand, if the administrative law judge determines that claimant's hearing loss is related to noise exposure, the last employer to expose claimant to potentially injurious stimuli is liable as the responsible employer; an actual causal relationship between the hearing loss and

³Claimant informed Dr. Daniel E. Sellers of the University of Southern Alabama Speech and Hearing Center that he was exposed to loud noises during his approximately twenty years as a longshore worker. Cx. 8.

work on the last day claimant worked for employer is not necessary. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.3d 593, 22 BRBS 159 (CRT) (9th Cir. 1989). In *Suseoff*, 19 BRBS at 149, the Board addressed the employer's burden of proof with regard to the issues of causation and the determination of the responsible employer. In *Suseoff*, the Board held that once Section 20(a) is invoked, employer can rebut it by showing that exposure to injurious stimuli did not cause the harm alleged, *i.e.*, that claimant's hearing loss is not due to noise exposure in any employment, but is due to other causes. Employer may also escape liability by establishing that it is not the responsible employer; employer bears the burden of demonstrating that it is not the last covered employer to expose claimant to injurious noise. *Id.*, 19 BRBS at 151. *Accord Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In the present case, employer stipulated that it was claimant's last maritime employer; thus, pursuant to *Suseoff*, if claimant's hearing loss is noise-related it can avoid liability as the responsible employer only by showing that it did not expose claimant to injurious noise at its facility. Although the administrative law judge in the present case found that claimant was not exposed to injurious noise levels on the last two days he worked for employer based on his crediting of Dr. Seidman's survey and his assessment of claimant's testimony, in so concluding he erroneously assumed that claimant bore the burden of establishing injurious exposure. Accordingly, on remand, if the claimant's hearing loss is found to be noise-related, the administrative law judge must then consider the responsible employer issue in light of the relevant evidence, placing the burden of proof on the employer consistent with *Avondale Industries* and *Suseoff*. *See Lins*, 26 BRBS at 65.⁴

⁴We note that although Dr. Seidman did opine that as a gouger working in the hold of a ship, claimant would only have received noise exposure of between 74 to 84 decibels, claimant testified that he would sometimes perform other types of work such as carpentry work. In addition, Dr. Seidman recorded noise levels in a variety of jobs on the dock above the 87 decibel level which he considered to be the threshold capable of producing hearing loss.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge