BRB Nos. 92-1075
and 92-1075A

GEORGE M. BUTLER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

Richard S. Vale (Blue, Williams & Buckley), Metairie, Louisiana, for self-insured employer.

Samuel J. Oshinsky (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits (91-LHC-0048) of Administrative Law Judge James W. Kerr, 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. *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed by this employer as a welder in 1964. Prior to that time, claimant had been sporadically employed by Bender Shipyards (1946-1951), Gulf Shipbuilding Company (1946-1950), and Alabama Dry Dock and Shipbuilding Company (ADDSCO)(1942-1961). Subsequent to 1964, claimant was engaged in employment which is not covered under the Act, until his voluntary retirement in 1984 for reasons unrelated to this claim.

Claimant filed a claim under the Act for a noise-induced hearing loss against ADDSCO in March 1987, within one month of undergoing his first audiometric evaluation on February 28, 1987. Thereafter, in a letter dated April 5, 1990, claimant amended his claim by naming employer as the responsible employer; employer subsequently filed a notice of controversion on May 9, 1990.

In his Decision and Order, the administrative law judge initially determined that claimant suffered a 43 percent binaural hearing impairment,[1] that claimant had established that his hearing loss was work-related, but that claimant had failed to timely file his claim for compensation against employer. Accordingly, the administrative law judge denied claimant's claim for disability benefits; the administrative law judge did, however, award claimant medical benefits payable by employer.

On appeal, claimant challenges the administrative law judge's determination that his claim was not timely filed. Employer cross-appeals, arguing that the administrative law judge erred in finding it liable for claimant's medical benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the decision of the administrative law judge is unreviewable as it lacks the necessary findings of fact to determine the timeliness of the claim. Lastly, all of the parties address the issue of which subsection of the Act, Section 8(c)(13), 33 U.S.C. §908(c)(13), or Section 8(c)(23), 33 U.S.C. §908(c)(23), should be used in calculating claimant's award should the claim be determined to have been timely filed.

I. Timeliness of the Claim.

Claimant initially contends that the administrative law judge erred in concluding that his claim against employer was time-barred pursuant to Section 13 of the Act, 33 U.S.C. §913. In his

[1]The administrative law judge found that claimant suffered a 43 percent binaural hearing impairment based upon his averaging of the four audiograms of record. As that finding is not contested on appeal, it is hereby affirmed.

decision, the administrative law judge implicitly applied Section 13(b)(2) of the Act, 33 U.S.C. §913(b)(2), which contains a two year statute of limitation period for the filing of claims for disability due to an occupational disease which does not immediately result in disability, and determined that claimant's claim against employer was untimely, noting that claimant offered no evidence as to why he did not become aware of employer's potential liability until April 5, 1990.

Initially, we note that, subsequent to the administrative law judge's decision, the United States Supreme Court held that occupational hearing loss is not an occupational disease which does not immediately result in disability. *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993). Therefore, the two-year statute of limitations contained in Section 13(b)(2), which the administrative law judge applied in this case, is not applicable; rather, the claim is subject to the one year limitation period provided in Section 13(a), 33 U.S.C. §913(a). *See Bridier v. Alabama Dry Dock and Shipbuilding Corp.*, 29 BRBS 84 (1995); 33 U.S.C. §908(c)(13)(D).

The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has held that in occupational disease cases where there is a succession of employers and a claim is timely filed against a later employer, the Section 12, 33 U.S.C. §912, and Section 13, 33 U.S.C. §913, time limits do not begin to run against a prior employer until the employee becomes aware, or should have become aware, that liability could be asserted against that particular employer. *See Smith v. Aerojet-General Shipyards*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981). In rendering its decision in *Smith*, the court reasoned that, if the time period for filing a claim begins to run against all potentially liable employers when the employee learns of the work-relatedness of his injury, the employee would have to file against all past employers even though the last employer doctrine precludes liability for any but the last employer. *See Smith*, 647 F.2d at 523-524, 13 BRBS at 395-396. The Board subsequently applied the Fifth Circuit's rationale in *Smith* to a case wherein a prior employer was released from liability and a later employer became potentially liable. *See Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986). In *Osmundsen*, the Board held that it would be unduly harsh to dismiss a claim due to claimant's failure to identify the later employer as the potentially liable employer at an earlier date, especially considering that the later employer was notified of the claim and given thirty days to respond immediately following claimant's awareness that the later employer, and not the prior employer, was potentially liable.

In the instant case, we initially hold that the administrative law judge erred in allocating to claimant the burden of establishing that a timely claim had been filed. Section 20(b), 33 U.S.C. §920(b), provides claimant with a presumption that the claim is timely filed; the burden is thus on employer to prove it was not. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). As the Director asserts in her response brief, in misallocating the burden of proof, the administrative law judge failed to properly apply the holdings in *Smith* and *Osmundsen.* If claimant timely filed against ADDSCO, and ADDSCO is a potential responsible employer, then the claim against employer may be timely under those decisions. Accordingly, the administrative law judge's finding that the instant claim against employer was untimely filed must be vacated, and the case remanded for the administrative law judge to reconsider this issue under Section 20(b) and *Smith* and *Osmundsen*.

In addition, we note that Section 8(c)(13)(D) of the Act provides that, in claims for a loss of hearing, the time period of Section 13 will not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. §908(c)(13)(D)(1988). *See* 20 C.F.R. §702.221(b); *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27, 29 (1992), *aff'd on recon. en banc*, 28 BRBS 129 (1994). Receipt of an audiogram and report by claimant's counsel is not constructive receipt by the employee. *Vaughn*, 26 BRBS at 30. In the instant case, the administrative law judge failed to address claimant's testimony that he never physically received an audiogram or an accompanying report. *See* Tr. at 17-18. Accordingly, on remand, the administrative law judge, when addressing the timeliness of claimant's claim against employer, must also address claimant's testimony regarding this issue.

II. Causation/Responsible Employer.

In its cross-appeal, employer argues that the administrative law judge erred in finding that it was responsible for claimant's medical benefits. Specifically, employer asserts that, as claimant failed to prove that he was exposed to injurious noise levels while working for employer or that the noise levels that he did experience were sufficient to cause his hearing loss, employer cannot be held liable for claimant's medical expenses.

We affirm the administrative law judge's determination that employer is the party responsible for the payment of claimant's benefits. 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. *See 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).

Initially, we reject employer's argument which allocates to claimant the burden of proving injurious exposure with a particular employer, as it is employer's burden to establish it is not the responsible employer. In *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), 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 indicated that once claimant demonstrates *prima facie* entitlement to benefits by showing that "he sustained physical harm and that conditions existed at work which could have caused the harm," there exists a presumption of a compensable claim. Employer can rebut this presumption 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; in this regard, employer bears the burden of demonstrating

that it is not the last employer covered by the Act 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 instant case the administrative law judge set forth in detail the requirements necessary for invocation of the Section 20(a), 33 U.S.C. §920(a), presumption and thereafter rationally concluded, based on the opinions of Dr. Wold and Mr. Holston and claimant's testimony that he was exposed to industrial noise during his employment, that claimant's hearing loss is work-related. *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Accordingly, we affirm the administrative law judge's implicit finding regarding invocation of the Section 20(a) presumption of causation. Moreover, as the record contains no evidence that claimant's employment did not cause, aggravate, or contribute to his injury, *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), we hold that causation is established as a matter of law. *See generally Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984).

As claimant's hearing loss is work-related, the last covered employer to expose him to potentially injurious stimuli is liable as the responsible employer; an actual causal relationship between claimant's hearing loss and that employment is not necessary. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989). As it is uncontroverted that employer was claimant's last maritime employer, pursuant to *Suseoff*, it can avoid liability as the employer responsible for claimant's noise-related hearing loss only by showing that it did not expose claimant to injurious noise at its facility. Contrary to employer's assertion on appeal, the United States Court of Appeals for the Fifth Circuit stated in *Avondale Industries* that employer bears the burden of proof with regard to establishing the responsible employer. *See Avondale Industries*, 977 F.2d at 190-191, 26 BRBS 113-114 (CRT). In the instant case, employer presented no evidence that it did not expose claimant to injurious noise at its facility. Accordingly, as employer has failed to meet its burden of proof on this issue, we affirm the administrative law judge's determination that employer, as claimant's last maritime employer, is the party responsible for the payment of any benefits due claimant under the Act.

III. Section 8(c)(13) v. Section 8(c)(23).

In his decision, the administrative law judge implicitly found that any disability benefits due claimant for his 43 percent binaural hearing impairment should be calculated pursuant to Section 8(c)(23) of the Act, 33 U.S.C. §908(c)(23). *See* Decision and Order at 6. Since the parties filed their briefs in this case, the United States Supreme Court issued its decision in *Bath Iron Works Corp. v. Director, OWCP*, U.S. , 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), wherein the Court held that claims for hearing loss under the Act, whether filed by current employees or retirees, are claims for a scheduled injury and must be compensated pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13).

Thus, on remand, should the administrative law judge determine that claimant's claim against employer is timely, he must calculate claimant's disability award pursuant to Section 8(c)(13) and *Bath Iron Works*.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge