BRB No. 95-1816

COSMO CANESTRI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
SEA-LAND SERVICE, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order, Decision and Order on Motion for Reconsideration, and Supplemental Decision and Order - Attorney Fee of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order, the Decision and Order on Motion for Reconsideration, and the Supplemental Decision and Order - Attorney Fee (92-LHC-498) of Administrative Law Judge Reno E. Bonfanti 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.[1] *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

[1]Employer's motion for oral argument is denied, as oral argument is not necessary for disposition of this case.

Claimant filed a claim under the Act for a work-related hearing loss. In his Decision and Order, the administrative law judge summarily concluded that employer was the party responsible for payment to claimant of compensation due as a result of claimant's occupational loss of hearing. The administrative law judge denied employer's subsequent motion for reconsideration.

Thereafter, claimant's counsel filed a fee petition with the administrative law judge seeking an attorney's fee of $4,800, representing 16 hours of services at a hourly rate of $300. In a Supplemental Decision and Order, the administrative law judge awarded the fee requested by counsel.

On appeal, employer argues that the administrative law judge erred in finding that it is the party responsible for claimant's compensation. Specifically, employer asserts that claimant failed to prove that he was exposed to injurious noise levels while working for employer, and that the administrative law judge's findings regarding this issue are inconsistent. Employer additionally appeals the award of an attorney's fee, averring that it was never served with claimant's fee petition and, therefore, never had an opportunity to respond to counsel's fee request. Claimant responds, urging affirmance of the administrative law judge's finding that employer is the responsible employer in this case.

In determining that employer is the party responsible for the payment of claimant's compensation benefits, the administrative law judge in the instant case did not discuss the evidence of record or state which evidence he credited or rejected in rendering his decision. Rather, the administrative law judge stated only that "careful consideration of the evidence in this record" had been undertaken. Decision and Order at 2. We hold that this statement does not satisfy the requirements of the Administrative Procedure Act, 5 U.S.C. §554 (APA). Hearings of claims arising under the Act are subject to the APA, *see* 33 U.S.C. §919(d), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. §557(c)(3)(A). An administrative law judge thus must adequately detail the rationale behind his decision and specify the evidence upon which he relied. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981). Failure to do so will violate the APA's requirement for a reasoned analysis. *Ballesteros*, 20 BRBS at 187; *see Williams v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 61 (1985).

In the instant case, the administrative law judge's failure to adequately detail the rationale behind his decision and specify the evidence upon which he relied in designating employer as the responsible employer makes it impossible for the Board to apply its standard of review. *See Ballesteros*, 20 BRBS at 187. Moreover, we agree with employer that the administrative law judge's decision contains inconsistent findings. Once it is determined that a 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 work on the last

day he worked for employer is not necessary.[2] *See, e.g., 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). In the instant case, the administrative law judge, although stating that claimant had not been exposed to injurious noise during his last employment with employer, nevertheless concluded that employer is the responsible employer. Accordingly, we vacate the administrative law judge's finding that employer is the party responsible for the payment of claimant's compensation, and we remand the case for the administrative law judge to resolve the inconsistencies contained in his decision, to consider and discuss all of the evidence relevant to this issue, to make appropriate findings based on the relevant law and evidence, and to give a written explanation of the reasons and basis for the determination.

Lastly, employer asserts that it was never served with a copy of claimant's counsel's fee petition for work performed before the administrative law judge; thus, employer seeks remand of the administrative law judge's fee award so that it may have an opportunity to respond to counsel's fee petition. Section 702.132 of the regulations, 20 C.F.R. §702.132, requires that the other parties be served with a request for an attorney's fee. Moreover, due process requires that a fee request be served on employer and that employer be given a reasonable time to respond. *See Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 5 BRBS 23 (9th Cir. 1976). Based upon the record before us, we are unable to determine whether employer was served with a copy of claimant's counsel's fee petition; in his response brief, claimant's counsel does not address this issue. We therefore vacate the administrative law judge's award of an attorney's fee. On remand, the administrative law judge must determine whether employer was served, and if employer was not served with counsel's fee petition, allow employer a reasonable opportunity to file a response to claimant's fee petition.

[2]Contrary to employer's assertion on appeal, which allocates to claimant the burden of proving injurious exposure with a particular employer, it is employer's burden to establish it is not the responsible employer. *See Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

Accordingly, the administrative law judge's Decision and Order, Decision and Order on Motion for Reconsideration, and Supplemental Decision and Order - Attorney Fee are vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge