



BRB No. 18-0499

RICHARD KATOWICZ	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	DATE ISSUED: 07/19/2019
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

Conrad M. Cutcliffe (Cutcliffe Archetto & Santilli), Providence, Rhode Island, for self-insured employer.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-LHC-01346) of Administrative Law Judge Jonathan C. Calianos rendered on a claim filed pursuant to 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 rational, supported by substantial evidence, and 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 for employer from 1979 to 1988, and from 2010 through 2014, during which time he was exposed to loud noise.<sup>1</sup> On September 10, 2014, claimant filed a claim against employer for occupational hearing loss. Claimant subsequently worked for another covered employer, Sons of Neptune, between March and August 2015. An audiometric evaluation performed on September 30, 2015, indicated a 16.9 percent left-sided monaural impairment, and an audiometric evaluation on December 7, 2015, indicated a 15 percent left-sided monaural impairment. On October 17, 2016, claimant, now a retiree, filed a claim against Sons of Neptune for occupational hearing loss.

On August 23, 2017, claimant and Sons of Neptune settled his hearing loss claim pursuant to Section 8(i), 33 U.S.C. §908(i), for \$13,000. This agreement was approved by the administrative law judge on August 28, 2017. The claim against employer proceeded to a hearing.

The administrative law judge found that claimant's hearing loss is work-related, that the June 29, 2010, audiogram represented the onset of his work-related disability, that employer did not establish that claimant was exposed to injurious stimuli with Sons of Neptune, and that, consequently, employer is liable for claimant's benefits. The administrative law judge further found that the settlement agreement between claimant and Sons of Neptune did not contain a concession from Sons of Neptune that it was liable for claimant's benefits. The administrative law judge averaged the results of claimant's September and December 2015 audiograms and awarded claimant permanent partial disability benefits for a 15.9 percent monaural impairment payable by employer, with a credit for the \$13,000 claimant received from his settlement with Sons of Neptune.

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<sup>1</sup> During this time claimant underwent multiple hearing evaluations. Relevant to this case, an evaluation performed on June 29, 2010 revealed a 15 percent left-sided monaural impairment, while an exit audiometric evaluation performed in 2014 revealed a 9.4 percent left-sided monaural impairment.

On appeal, employer asserts that Sons of Neptune is the responsible employer solely liable for the totality of the benefits due claimant for his work-related loss of hearing. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's decision, albeit on other grounds. Claimant has filed a reply letter stating he is in agreement with the Director's position.

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, such as this, 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. *See Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997). Employer bears the burden of establishing it is not the responsible employer. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Zeringue*, 32 BRBS at 278. Employer must show either that it did not expose the employee to injurious noise sufficient to have caused his hearing loss or that a subsequent covered employer exposed the employee to injurious noise. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

Employer challenges the administrative law judge's finding that Sons of Neptune did not concede its liability as the responsible employer by agreeing to a Section 8(i) settlement with claimant. Employer asserts that claimant and Sons of Neptune agreed in their settlement that claimant's hearing impairment increased between 2014 and 2015, a period when claimant was not employed by employer.

The administrative law judge addressed this contention and found that the settlement agreement "merely recites the parties' contentions and leaves the ultimate issue of liability unresolved." Decision and Order at 14. Thus, he concluded it would be unreasonable for him "to make any further assumptions stemming from the agreement." *Id.*

Employer's assertion that Sons of Neptune "conceded" and "recognized" its liability by executing a settlement with claimant is unfounded. The reference to claimant's increased hearing loss is not an agreement of the parties but is a statement in Dr. Sells's December 2015 audiometric report. *See* JX 1 at 3 (citing Settlement EXs 4, 5).<sup>2</sup> Thus, while Sons of Neptune agreed to pay claimant \$13,000 to "fully resolve its responsibility

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<sup>2</sup> Ms. Sells was employer's expert witness audiologist. Her July 25, 2017 report discusses the multiple audiometric evaluations performed during claimant's employment with employer, and compares claimant's exit 2014 evaluation with his subsequent "average" left hearing impairment. *See* EX 21 at 2. On deposition, she stated there was only a slight change in claimant's test results from 2010 to 2014, and the change was in the low frequencies, which means that the change "is not specific to noise." *See* EX 9 at 20.

... for any of that portion of [claimant's] hearing loss attributable to [his] work for Sons of Neptune," *id.* at 4, the administrative law judge permissibly found that Sons of Neptune did not concede liability as the responsible employer. *See* Decision and Order Approving Settlement at 1; Decision and Order at 14. As the settlement agreement does not contain a concession of liability by Sons of Neptune, we affirm the administrative law judge's conclusion that it does not satisfy employer's burden of establishing that Sons of Neptune is the employer responsible for the totality of claimant's benefits.<sup>3</sup>

Employer further contends that Sons of Neptune is the responsible employer because claimant's hearing impairment increased after his employment with Sons of Neptune. The administrative law judge found insufficient evidence to conclude claimant was exposed to injurious stimuli while employed by Sons of Neptune. Decision and Order at 14. In making this finding, the administrative law judge relied on claimant's testimony that he was exposed to only very minimal noise and not to any air tools or other loud processes while working for Sons of Neptune. Accordingly, the administrative law judge concluded that employer did not satisfy its burden of establishing that it is not the employer responsible for claimant's benefits under the Act. *Id.*

We reject employer's assertion that, because it is undisputed that Sons of Neptune was claimant's last maritime employer, Sons of Neptune is the employer responsible for claimant's benefits. Proof of claimant's subsequent maritime employment establishes only half of the test for determining the responsible employer. Employer also must show that claimant was exposed to injurious stimuli while working for Sons of Neptune. *See Lins*, 26 BRBS at 64; *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). In this case, the administrative law judge specifically found that "there is insufficient evidence in the record before me to conclude that [claimant's exposure at Sons of Neptune] was injurious." Decision and Order at 14. Employer does not challenge this finding. Therefore, we affirm it. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). As the administrative law judge permissibly found that Sons of Neptune did not expose claimant to injurious stimuli, we affirm his determination that employer is liable for claimant's benefits.<sup>4</sup>

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<sup>3</sup> Similarly, employer's summary assertion that Sons of Neptune's application for relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), indicates its responsibility for the worsening of claimant's hearing loss between 2010 and 2014 is misplaced, as a party may plead alternate defenses in response to a claim.

<sup>4</sup> Thus, we need not address the Director's contention that we should extend to this case the holding of the United States Court of Appeals for the Ninth Circuit in *Stevedoring*

Accordingly, we affirm the administrative law judge's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

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*Services of America v. U.S. Dep't of Labor*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002), *rev'g Benjamin v. Container Stevedoring Co.*, 34 BRBS 189 (2001).