BRB No. 13-0449

GARY J. AUBERT, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN SUGAR REFINING, INCORPORATED	)	DATE ISSUED: June 16, 2014
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Arthur J. Brewster and Jeffrey P. Briscoe, Metairie, Louisiana, for claimant.

John J. Rabalais and Janice B. Unland (Rabalais Unland), Covington, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2010-LHC-1395) of Administrative Law Judge Lee J. Romero, 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This hearing loss case is before the Board for the second time. To reiterate, claimant worked as a longshoreman for various employers for twenty-two years. Following a June 29, 2009, hearing evaluation, claimant filed a claim against employer for a work-related noise-induced hearing loss. Claimant's last day of longshore work prior to June 29, 2009, was June 27, 2009, on which date claimant was employed by employer. Claimant worked for Ports of America from June 22 through June 26, 2009. In his initial decision, the administrative law judge found that: working conditions existed at employer's facility that could have caused the hearing loss, such that claimant is entitled to the Section 20(a), 33 U.S.C. §920(a), presumption relating his hearing loss to his employment; employer did not rebut the presumption with evidence that claimant's hearing loss was not caused by exposure to injurious stimuli; and employer was the last covered employer to expose claimant to injurious stimuli prior to the June 2009 audiogram. Thus, the administrative law judge held employer liable for claimant's 7.95 percent binaural hearing loss.[1] 33 U.S.C. §908(c)(13).

Employer appealed, and the Board vacated the award of benefits. *Aubert v. American Sugar Refining, Inc.*, BRB No. 11-0828 (Aug. 14, 2012) (unpub.). The Board held the administrative law judge had not addressed evidence tending to show that claimant was not exposed to injurious noise at employer's facility. Accordingly, the Board remanded the case for the administrative law judge to reconsider all evidence relevant to invocation of the Section 20(a) presumption and to a determination of employer's liability for claimant's benefits.[2] In this latter regard, the Board noted that although the administrative law judge did not utilize the 2003 audiogram for purposes of

[1] The administrative law judge averaged the results of claimant's June 29, 2009 audiogram (11.7 percent) and June 15, 2010 audiogram (4.2 percent).

[2] Specifically, the Board remanded the case for the administrative law judge to address the following evidence: 1) Mr. Nicholas's testimony that claimant did not have to raise his voice to communicate with other workers in the hold of the barge; 2) claimant's testimony that he wore hearing protection 100 percent of the time while working for employer in the barge; 3) Mr. Nicholas's testimony that he never saw claimant without hearing protection in the barge and that the ear plugs provide at least 13 decibels of protection, thereby reducing the noise exposure; 4) Dr. Gianoli's testimony that whether noise is injurious depends on the duration of exposure to noise and the intensity of the noise; and 5) Dr. Gianoli's testimony that if claimant properly inserted earplugs while working for employer, the noise levels would have been reduced to non-injurious intensities. *Aubert v. American Sugar Refining, Inc.*, BRB No. 11-0828 (Aug. 14, 2012) (unpub.). The Board noted that this evidence should be considered in assessing whether claimant established his prima facie case and whether employer rebutted the Section 20(a) presumption.

determining the timeliness of claimant's claim or extent of claimant's disability, he should, if necessary on remand, address employer's assertion that claimant's hearing loss did not progress after the 2003 audiogram. *Id.*, slip op. at 7 n. 7.

In his decision on remand, the administrative law judge generally addressed the evidence in accordance with the Board's instructions.[3] The administrative law judge again invoked the Section 20(a) presumption and found that employer did not rebut it. Finding that employer was the last covered employer to expose claimant to injurious noise prior to the 2009 audiogram, the administrative law judge again held employer liable for benefits for claimant's 7.95 percent binaural hearing loss. Employer appeals the decision, and claimant responds, urging affirmance.

Employer first contends that claimant is not entitled to the benefit of the Section 20(a) presumption because he did not demonstrate exposure to "injurious" noise at its facility. In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a prima facie case. To establish his prima facie case, the claimant must show that he sustained a harm and that conditions existed, or an accident occurred, at work which could have caused the harm. *See Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). The claimant is not required to affirmatively prove that his work in fact caused the harm; rather, the claimant need establish only that the working conditions could have caused the harm. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6(CRT) (5th Cir. 1986); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a prima facie case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury is not related to the employment. *Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). If the Section 20(a) presumption is rebutted, it falls from the case, and the claimant bears the burden of establishing by a preponderance of the evidence the work-relatedness of his harm. *See, e.g., Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997).

[3] On remand, employer renewed its motion to join Ports of America as a potentially responsible employer to this case; the administrative law judge denied the motion, noting that if claimant was not exposed to injurious stimuli at employer's facility, employer would avoid liability, and claimant would bear the burden of pursuing benefits from additional employers. Employer has not appealed the denial of its motion. *See Aubert*, slip op. at 5 n. 6 (record is not clear regarding claims against other employers).

The administrative law judge found that claimant has a 7.95 percent binaural hearing loss due to noise exposure, thus establishing the "harm" prong of claimant's prima facie case.[4] With regard to the "working conditions" prong, employer contends that claimant was required to prove exposure at its facility on June 27, 2009, to noise levels at or above 90 decibels over an eight-hour time-weighted average (TWA) because this is the level at which OSHA requires employees to wear hearing protection.[5] Employer thus contends the administrative law judge erred in using an 85 decibel exposure level and in concluding that claimant was exposed to potentially injurious noise on June 27.

We reject this contention. The administrative law judge rationally found that claimant demonstrated working conditions on June 27, 2009, that could have caused his hearing loss based on record evidence establishing that noise in excess of 85 decibels can constitute "injurious" noise. CXs 14 at 57-58; 16 at 63. Contrary to employer's contention, claimant is not required to establish noise exposure in excess of OSHA limits in order to establish he was exposed to noise that could have contributed to his hearing loss. *See generally Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999). Moreover, the administrative law judge rationally credited the testimony of Mr. Bode and Dr. Gianoli that noise levels most likely exceeded 85 decibels if employees had to shout to be heard; in addition, the administrative law judge specifically credited claimant's testimony that he had to shout to be heard while working inside the hold of the barge.[6] Tr. at 65, 70, 97; CX 14 at 23; *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Damiano v. Global Terminal &*

[4] Employer does not challenge this finding. In addition, it is uncontested that claimant's hearing loss is noise-induced.

[5] Employer cites 29 C.F.R. §1910.95 for this proposition.

[6] The administrative law judge weighed claimant's testimony against Mr. Nicholas's testimony that claimant could talk to others inside the barge without raising his voice. Tr. at 59. The administrative law judge rationally determined that claimant's testimony was more persuasive because Mr. Nicholas also testified that it was his understanding that noise generated in the hold of the barge is above 85 decibels. Decision on Remand at 8; Tr. at 65. Employer erroneously asserts that a claimant's testimony must be uncontradicted in order to establish the elements of a prima facie case. It is well-established that the administrative law judge may determine the weight to be accorded to conflicting evidence of record. *See, e.g., Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Container Service, 32 BRBS 261 (1998). The administrative law judge also found that employer's 2008 and 2009 sound level surveys, indicating longshoremen were exposed to 86.3 and 89.5 decibels of noise, corroborated claimant's exposure to injurious noise. CXs 8, 9. In addition, the administrative law judge relied on claimant's improper use of earplugs, inferring there likely was no discernible reduction in noise exposure because none of the experts could state with certainty the level of reduction provided by improperly inserted earplugs.[7] Decision and Order on Remand at 9-10; CXs 8, 9; EX 7. The administrative law judge addressed all the conflicting evidence and his finding that claimant was exposed to noise levels that could have contributed to his hearing loss is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's finding that the Section 20(a) presumption applies in this case. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part and rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

Employer next contends the administrative law judge erred in finding it did not produce substantial evidence to rebut the Section 20(a) presumption and in holding it liable for claimant's benefits. To the extent employer relies on the same assertions, i.e., OSHA noise guidelines and claimant's use of hearing protection, we reject its contentions of error. As discussed above, the administrative law judge made rational credibility determinations and his weighing of the evidence on these issues is within his discretion as the trier-of-fact. *Mijangos*, 948 F.2d 941, 25 BRBS 78(CRT).

However, employer also contends that Dr. Gianoli's opinion rebuts the Section 20(a) presumption and establishes that employer is not the responsible employer. In addition, employer contends that claimant had the same or a greater level of hearing loss in 2003 as in June 2009, as demonstrated by the audiogram dated March 7, 2003. CXs 14

[7] In addressing whether claimant's use of hearing protection reduced the intensity of claimant's noise exposure, the administrative law judge specifically considered: claimant's testimony that he wore hearing protection 100 percent of the time; Mr. Nicholas's testimony that he never saw claimant without hearing protection and the hearing protection provided at least 13 decibels of protection; and Dr. Gianoli's testimony that if claimant properly inserted his earplugs, the noise levels would have been reduced to non-injurious intensities. Decision and Order on Remand at 9. Given Mr. Nicholas's testimony that earplugs would fall out if they were not inserted properly, and claimant's testimony that his earplugs would "back out" of his ears while working in the hold of the barge, *see* Tr. at 98, the administrative law judge rationally inferred that claimant's earplugs were not always inserted properly. *See generally Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 32 BRBS 91(CRT) (5th Cir. 1998) (administrative law judge entitled to select from among competing inferences).

at 16; 15 at 77. Thus, employer argues that it established that any noise exposure on June 27, 2009, did not contribute to claimant's hearing loss, such that employer cannot be held liable for benefits.

The administrative law judge did not specifically address on remand employer's contention concerning the comparison between the 2003 and later audiograms. The administrative law judge also used an incorrect standard in addressing the sufficiency of Dr. Gianoli's opinion for purposes of determining employer's liability. Thus, we must again remand this case.

In the context of this case in which employer avers it has produced substantial evidence of the lack of injurious exposure at its facility, it is important to note the nature of occupational hearing loss injuries. The Supreme Court has stated that occupational hearing loss injuries occur simultaneously with noise exposure. Once the exposure ends, the injury is complete. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993). Noting the difference between hearing loss and occupational diseases such as asbestosis, the Fifth Circuit stated in *Plaisance*:

> although the last employer rule is common to occupational disease and hearing loss claims under the LHWCA, there is no reason why the substantial evidence required for an employer's rebuttal of the Section 20(a) presumption should differ in hearing loss cases from the injuries at issue in *Ortco* [*Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir. 2003)] (heart attack) or *Conoco* (shoulder injuries), as questions of multiple causation can arise in such instances. *See Avondale Indust.*, [*Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992)] . . . (hearing loss case where last employer rule, but not employment-related causation, was disputed). Occupational diseases, on the other hand, are governed by a separate prong of the LHWCA's definition of' "injury" that does not include hearing loss; they are notable for their much closer and sometimes unique connection with the workplace. That the employer might have to adduce more evidence to rebut a plaintiff's prima facie case of occupational disease would not be surprising . . .

Plaisance, 683 F.3d at 231-232, 46 BRBS at 29(CRT). Thus, in a hearing loss case, as in one involving a traumatic injury, an employer can demonstrate it is not liable because the claimant's injury was not actually caused or aggravated by his employment. Therefore, the administrative law judge erred in finding that employer did not rebut the Section 20(a) presumption and in holding employer liable on the ground that "it is irrelevant that Claimant may not have actually sustained a distinct aggravation of his work injury working for Employer on June 27, 2009." Decision and Order on Remand at 13. The

correct inquiry, on the facts of this case, is whether employer has produced substantial evidence that claimant's hearing loss was not actually caused or contributed to by his employment on June 27, 2009.[8] *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT); *see Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also Albina Engine & Machine v. Director, OWCP [McAllister]*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010) (in occupational disease case with multiple employers, Section 20(a) analysis applies to each).

We turn now to employer's specific contentions that it has produced such substantial evidence. Claimant's 2003 audiogram was not specifically interpreted by Mr. Bode and Dr. Gianoli due to the poor quality of the copy presented to them. Mr. Bode testified on deposition that a comparison of the 2003 and 2009 audiograms demonstrates that claimant was exposed to more noise in the interim and that there was a "permanent threshold shift" increasing claimant's hearing loss. CX 16 at 86-88. In his September 14, 2010 report, Dr. Gianoli stated that the "pure tone testing" on the 2003 audiogram is not "significantly different" than that obtained on the 2010 audiogram. CX 4 at 3. Dr. Gianoli testified on deposition that the 2003 and 2009 audiograms are "virtually identical" and "substantially similar;" that there is "no significant difference" between the 2003 and 2009 audiograms; and that "it's hard to say there is any difference [among] any of these [three] audiograms." CXs 14 at 15-17; 15 at 77. The administrative law judge found the 2009 audiogram "determinative" as to the timeliness of claimant's claim, as claimant was not provided with a report of the 2003 audiogram. Although the 2003 audiogram could not be used to commence the statute of limitations,[9] or to determine the extent of claimant's hearing impairment,[10] there must be a "rational connection" between

[8] That is, although claimant was exposed to potentially injurious noise on June 27, 2009, employer cannot be held liable if the administrative law judge finds that the exposure was not, in fact, injurious. *See Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990).

[9] The administrative law judge properly found that the 2003 audiogram did not begin the running of the statute of limitations under Section 8(c)(13)(D) because it was not accompanied by an interpretative report and claimant was not provided a copy. 33 U.S.C. §908(c)(13)(D); *see Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991).

[10] The audiogram is not interpreted pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment.* 33 U.S.C. §909(c)(13)(E); *see Green-Brown v. Sealand Services, Inc.*, 586 F.3d 299, 43 BRBS 57(CRT) (4th Cir. 2009).

the claimant's hearing impairment and his exposure to injurious noise. *Port of Portland v. Director, OWCP [Ronne]*, 932 F.2d 836, 840, 24 BRBS 137, 143(CRT) (9th Cir. 1991) ("liability must rest on the employer covering the risk at the time of the most recent injurious exposure related to the disability"); *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997). On remand, the administrative law judge must address whether the evidence concerning the 2003 audiogram constitutes substantial evidence that claimant's noise exposure on June 27, 2009, did not contribute to his compensable hearing loss. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT)*; see also G. K. [Kunihiro] v. Matson Terminals, Inc.*, 42 BRBS 15 (2008), *aff'd mem. sub nom. Director, OWCP v. Matson Terminals, Inc.*, 442 F.App'x 304 (9th Cir. 2011) (for purposes of Section 8(f), administrative law judge can find two audiograms demonstrate the same hearing loss based on test/retest variability).

In addition, the administrative law judge must reconsider the sufficiency of Dr. Gianoli's opinion to rebut the Section 20(a) presumption. *Plaisance*, 683 F.3d 225, 46 BRBS 25(CRT). Dr. Gianoli testified on deposition that claimant's exposure to noise at employer's facility on June 27, 2009, did not contribute to claimant's noise-induced hearing loss, even assuming claimant was exposed to 85-89 decibels of noise and did not use hearing protection at all or use it properly. CXs 14 at 26; 15 at 86-87. This testimony accounts for the administrative law judge's finding that claimant's hearing protection was not properly inserted. Thus, the administrative law judge should address whether employer has produced substantial evidence that "throws factual doubt on [claimant's] prima facie case such that the Section 20(a) presumption is rebutted. *Plaisance*, 683 F.3d at 231, 46 BRBS at 29(CRT). If the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the relevant evidence as a whole to determine whether claimant established his hearing impairment is related to his employment with employer on June 27, 2009, *see id.*, such that employer can be held liable for payment of benefits. *Ronne*, 932 F.2d at 840, 24 BRBS at 143(CRT).

Finally, we address employer's remaining contention that the administrative law judge erred in finding it was the last employer to employ claimant prior to the 2009 audiogram; employer asserts the time records indicate claimant worked for both Ports America and employer on June 29, 2009. Contrary to employer's assertion, however, substantial evidence supports the administrative law judge's finding that claimant's last day of work prior to the June 29, 2009 audiogram was for employer on June 27, 2009, and that employer misinterpreted the week-ending total for the week ending on June 29, 2009, as work actually performed on June 29, 2009. Tr. at 96; CX 1 at 2; EX 5 at 3. Consequently, we reject this assertion of error. *Ronne*, 932 F.2d at 840, 24 BRBS at 143(CRT).

Accordingly, we affirm the administrative law judge's findings that the Section 20(a) presumption is invoked and that employer was the last employer for which claimant worked prior to the June 29, 2009, audiogram. The administrative law judge's finding that employer is liable for benefits is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge