

ROMULUS E. BASS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL	)	DATE ISSUED: <u>May 10, 2002</u>
TERMINALS	)	
	)	
and	)	
	)	
ABERCROMBIE, SIMMONS, &	)	
GILLETTE OF VIRGINIA	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Errata Order, and Order on Motion for Reconsideration and Section 8(f) Application of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Breit Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Brian L. Sykes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order, Errata Order, and Order on Motion for Reconsideration and Section 8(f) Application (2000-LHC-2226) of Administrative Law Judge Fletcher E. Campbell, 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 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, a crane operator, alleged that he suffered from a work-related binaural hearing loss, diagnosed on December 16, 1999. The administrative law judge concluded that claimant's binaural hearing loss is work-related, finding that claimant established invocation of the presumption pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a), and that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded claimant continuing permanent partial disability benefits for his binaural hearing loss. In an Errata Order, the administrative law judge limited the award to 56.2 weeks at the maximum compensation rate based upon a 28.1 percent binaural hearing loss as indicated on a 1999 audiogram. Initially, the administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). On reconsideration, the administrative law judge granted employer Section 8(f) relief based upon the agreement of the Director, Office of Workers' Compensation Programs (the Director), that the Special Fund is liable under Section 8(f).

Employer appeals the administrative law judge's finding that claimant's hearing loss is work-related. Employer further contends that the administrative law judge erred determining the extent of claimant's hearing loss, and in shifting liability to the Special Fund after employer pays benefits for 104 weeks. Claimant responds only to the Section 20(a) issues urging affirmance. The Director has not participated in this appeal.

Employer initially argues that the administrative law judge erred in finding that claimant established invocation, and that it did not establish rebuttal, of the Section 20(a) presumption. The Section 20(a) presumption is invoked if claimant establishes his *prima facie* case - - the existence of a harm and of working conditions which could have caused the harm. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT)(4<sup>th</sup> Cir. 1997); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Claimant's testimony,

if credible, may establish that working conditions existed which could have caused the harm. See *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption by presenting substantial evidence sufficient to sever the causal connection between the injury and the employment. See *Moore*, 126 F.3d 256, 31 BRBS 119(CRT).

In finding that claimant established invocation of the Section 20(a) presumption, the administrative law judge relied on claimant's 1999 audiogram to establish a harm, a hearing loss. Additionally, the administrative law judge relied on claimant's uncontradicted testimony that he was exposed to loud noise on the job and Dr. Strasnick's opinion that a possible cause of claimant's hearing loss was noise exposure to establish that claimant was subjected to working conditions which could have caused the harm. Moreover, the administrative law judge found that Dr. Strasnick's opinion is insufficient to establish rebuttal of the Section 20(a) presumption because he did not state that claimant's exposure to noise at work did not aggravate his pre-existing hearing problems. Dr. Strasnick stated that the greatest likelihood of the cause of claimant's hearing problem is either a genetically-based hearing loss versus age-related changes within the auditory system, or noise-induced trauma, but that any determination regarding the contribution of noise-induced trauma would be conjectural. Cl. Exs. 5-8, 5-9; Emp. Exs. 4.1, 4.2. Dr. Strasnick also stated that a differential diagnosis for the left ear loss is a noise-induced loss. Cl. Ex. 5-8; Emp. Ex. 4.1. Dr. Strasnick's opinion therefore is insufficient to rebut the Section 20(a) presumption as he does not state with a reasonable degree of certainty that claimant's hearing loss was not caused or aggravated by noise exposure. As the administrative law judge's findings that claimant established invocation of the Section 20(a) presumption and that employer did not establish rebuttal are supported by substantial evidence, we affirm them. See *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT)(9<sup>th</sup> Cir. 1998); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 31 BRBS 19(CRT)(1<sup>st</sup> Cir. 1997); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995); Decision and Order at 6; Cl. Exs. 5-6, 5-8, 5-9; Emp. Exs. 4.1, 4.2, 4.4, 7.1; Jt. Ex. 1 n. 8; Tr. at 17-21. Thus, we affirm the administrative law judge's finding that claimant's hearing loss is work-related.

Employer next contends that the administrative law judge erred in finding that the extent of claimant's hearing loss is 28.1 percent, and asserts that the administrative law judge should have awarded benefits for a 26.3 percent binaural loss based on the 1999 audiogram. Employer states that the administrative law judge's error is based upon incorrect assertions by claimant's counsel in his statement of contested issues that claimant suffers from a 28.1 percent binaural

loss. Claimant's counsel also asserted that claimant suffered from a 28.1 percent binaural hearing loss in his post-hearing and post-Decision and Order briefs to the administrative law judge. See Correspondence to ALJ Campbell dated March 22 and 28, 2001, at 1; Clt. Br. dated February 20, 2001, at 1; Emp. Ex. 7.1.

Employer's contention has merit. The summary of the 1999 audiogram states that claimant has a 26.3 percent binaural hearing loss. See Emp. Ex. 7.1. Additionally, the 26.3 percent binaural loss demonstrated on the 1999 audiogram is ascertainable from Table 2, p. 226, from the American Medical Association *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1995). See EX 4.4; 33 U.S.C. §908(c)(13)(B), (E); *Craig, et al. v. Avondale Industries, Inc.*, 35 BRBS 164, 168 (2001). Thus, we vacate the administrative law judge's award for a 28.1 percent binaural hearing loss and modify it to reflect an award for a 26.3 percent binaural hearing loss. Claimant's award of permanent partial disability benefits for his 26.3 percent binaural hearing loss is \$901.28 (the maximum compensation rate) per week from December 16, 1999, for 52.6 (26.3 percent of 200) weeks pursuant to Section 8(c)(13)(B). See *generally Fucci v. General Dynamics Corp.*, 23 BRBS 161 (1990)(*en banc*)(Brown, J., dissenting on other grounds).

Employer lastly contends that the administrative law judge erred in awarding it Section 8(f) relief after it pays permanent partial disability benefits for 104 weeks because the administrative law judge improperly applied Section 8(f). In hearing loss cases in which Section 8(f) is applicable, the Act limits employer's liability to the lesser of 104 weeks or the extent of hearing loss attributable to the subsequent injury. See *Machado v. General Dynamics Corp.*, 22 BRBS 176 (1989) (*en banc*) (Brown, J., concurring); 33 U.S.C. §908(f)(1).

We agree with employer's contention, and we modify the administrative law judge's award of Section 8(f) relief. In this case, claimant's compensable hearing loss is measured by the December 1999 audiogram. Employer is liable for the difference between the loss demonstrated on this audiogram and that demonstrated on the next most recent audiogram, administered on August 18, 1997. *Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989). The 1997 audiogram reveals a 39.4 percent monaural hearing loss, which converts to a 6.6 percent binaural loss. Ex. 7.1. It is appropriate to convert the monaural loss to a binaural loss for Section 8(f) purposes, so that the respective liabilities of employer and the Special Fund are calculated on the same basis. See *generally McShane v. General Dynamics Corp.*, 22 BRBS 427 (1989).<sup>1</sup> Thus, employer is liable for benefits for claimant's binaural

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<sup>1</sup>In so doing, we are not departing from the holdings of the United States Court of Appeals for the Second, Fourth, and Fifth Circuits, that where claimant has a measurable hearing loss in only one ear, his compensation should be calculated on a monaural basis. See

impairment for 39.4 weeks ( $26.3\% \times 200 = 52.6$  weeks;  $52.6 - (6.6\% \times 200) = 39.4$  weeks), and the Special Fund is liable for benefits for 13.2 weeks. 33 U.S.C. §908(f)(1).

Accordingly, the administrative law judge's Decision and Order, Errata Order, and Order on Motion for Reconsideration and Section 8(f) Application are modified in part to reflect that claimant is entitled to compensation for a 26.3 percent binaural hearing loss. Of the total award of 52.6 weeks, employer is liable for 39.4 weeks and the Special Fund is liable for 13.2 weeks. In all other respects, the decisions are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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*Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27(CRT)(4<sup>th</sup> Cir. 1994); *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17(CRT)(2<sup>d</sup> Cir. 1993); *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113(CRT)(5<sup>th</sup> Cir. 1993), *rev'g* 26 BRBS 43 (1992)(*en banc*)(Dolder and Smith, JJ., dissenting); 33 U.S.C. §908(c)(13)(A). In these cases, the courts were addressing the extent of a claimant's hearing loss in determining his entitlement to benefits and were not ascertaining employer's liability for Section 8(f) relief in a case where claimant is being compensated for a binaural hearing loss, as here.