BRB No. 98-1283

JOSEPH WASHINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McDERMOTT, INCORPORATED	)	DATE ISSUED: May 28, 1999
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Dennis R. Stevens (Gibbens, Blackwell & Stevens), New Iberia, Louisiana, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-1963) of Administrative Law Judge Larry W. Price 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 worked for employer in various positions from the early 1960's until he was laid off on August 7, 1986. He underwent audiometric testing on July 3, 1996, which revealed a 75.6 percent binaural impairment, consistent with noise-induced hearing loss. Claimant filed a claim for benefits on July 12, 1996, based on this exam, and employer controverted the claim on July 31, 1996.

The administrative law judge found that the evidence establishes that claimant has a

75.6 percent binaural, noise-induced hearing loss. He found that claimant was first given a report and accompanying audiogram regarding his noise-induced hearing loss on July 3, 1996, and thus his claim was timely filed. The administrative law judge also found that as it is not disputed that claimant spent approximately five percent of his work time performing "load-outs" on barges, an indisputably maritime activity, he is a covered employee under the Act. 33 U.S.C. §902(3). The administrative law judge also invoked the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's hearing loss was caused, at least in part, by noise exposure during the performance of his maritime work, and found that there was insufficient rebuttal evidence. Therefore, the administrative law judge concluded that claimant's hearing loss is work-related. Finally, the administrative law judge awarded claimant interest accruing as of March 8, 1980, as this was the first date employer knew through in-house audiometric testing that claimant had a noise-induced hearing loss.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed, as there is evidence that claimant had previous knowledge of his noise-induced hearing loss. In addition, employer contends that the administrative law judge erred in finding that claimant was a covered employee under the Act as his maritime activities were sporadic and intermittent. Employer further contends that the amount of time claimant spent in the load-out process, as well as the amount of actual noise exposure during the load-out process itself, was insufficient to cause claimant's hearing loss. Employer lastly contends that the administrative law judge erred in awarding interest from March 8, 1980, as the parties stipulated that employer was not notified of the claim until August 27, 1996. Claimant has not responded to this appeal.

Initially, employer contends that claimant had previous knowledge of a noise-induced hearing loss, as well as received reports and audiograms of previous hearing tests. Thus, employer contends that the claim filed in 1996 was not timely. The statue of limitations periods in hearing loss cases do not begin to run until the employee is given a copy of the audiogram and the accompanying report. 33 U.S.C. §908(c)(13)(D); *Vaughn v. Ingalls Shipbuilding, Inc.*, 28 BRBS 129 (1994)(*en banc*).

In the instant case, the administrative law judge reviewed the evidence and found that the claim was timely filed. He noted that while claimant testified that he received two hearing tests while employed by Cabot Corporation, subsequent to his employment with McDermott, Incorporated, and that he was given a "diagram," neither the audiogram nor any accompanying report was offered at the hearing. H. Tr. at 102. Thus, the administrative law judge concluded he could not determine whether the tests met the guidelines, the qualifications of the hearing test administrator, what the "diagram" showed, what the accompanying report, if any, showed, or exactly what claimant received. Decision and Order at 5. Therefore, based on the evidence in the record, the administrative law judge concluded that claimant did not receive an audiogram with the accompanying report prior to

July 3, 1996, and he thereafter filed a timely claim. We affirm the administrative law judge's finding that the instant claim was timely filed. *See Vaughn*, 28 BRBS at 131.

Employer next contends that the administrative law judge erred in finding that claimant is a covered employee under the Act, as his activities loading barges were sporadic, incidental, and intermittent in nature, and thus insufficient to establish status under the Act. 33 U.S.C. §902(3). Generally, an employee satisfies the "status" requirement if he is engaged in work which is integral to the loading, unloading, building, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). To satisfy this requirement, he must "spend at least some of his time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The load-out process is an indisputably longshoring operation, and a claimant's regular participation in load-out operations on an as-needed basis is sufficient to confer status under the Act. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989). Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than episodic, momentary, or incidental to non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.3d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990). The United States Court of Appeals for the First Circuit has held that work, to be considered "episodic," must be "discretionary or extraordinary" as opposed to that which is a "regular portion of the overall tasks to which [claimant] could have been assigned." *Levins v. Benefits Review Board*, 724 F.2d 4, 8, 16 BRBS 24, 33 (CRT)(1st Cir. 1984).

In *Zeringue*, the Board affirmed the administrative law judge's finding that claimant met the status requirement, where the evidence established that the claimant spent approximately 6.84 percent of his time performing load-out operations, even though he did not participate in every load-out and the load-outs occurred infrequently, because claimant's participation in the load-outs was more than episodic, momentary, or incidental to non-maritime work. *See Zeringue*, 32 BRBS at 277. It is undisputed in the instant case that claimant spent 5.1 percent of his time between the years 1974 and 1986 performing load-out functions in the west yard. For the reasons stated in *Zeringue*, we affirm the administrative

law judge's finding that claimant is a covered employee under the Act.[1]

[1]Employer also contends that the situs requirement was not met in the instant case based on *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97 (CRT)(5th Cir. 1989)(*en banc*), wherein the court held that employer's fabrication shop in Amelia, Louisiana, at one of the same yards here, is not a covered situs under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.§1331 *et seq*., an extension of the Act. For the reasons stated in *Zeringue*, we reject this contention. *Zeringue*, 32 BRBS at 276.

Next, employer contends that the administrative law judge erred in finding that claimant's hearing loss was work-related as the amount of time claimant spent in the load-out process, as well as the noise exposure during the load-out process itself, was insufficient to cause claimant's hearing loss. We disagree. Section 20(a) provides claimant with a presumption that his disabling condition is causally related to his employment. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). The administrative law judge credited claimant's testimony that while performing load-outs, he was exposed to noise from side booms, cranes, welding machines and drag lines and it is undisputed that claimant's hearing loss is characteristic of noise-induced hearing loss. In addition, the administrative law judge found that employer offered no evidence of the actual noise level on the barges during load-out functions. Thus, we hold that the administrative law judge properly found that the Section 20(a) presumption was invoked. *See generally Fulks v. Avondale Shipyards, Inc*., 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981);[2] *Meardry v. International Paper Co.*, 30 BRBS 160, 163 (1996).

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused or aggravated by the employment. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). When employer produces such substantial evidence, the presumption drops out of the case, and the administrative law judge must weigh all of the evidence relevant to the causation issue, and render a decision supported by the record. *Universal Maritime Corp. v Moore*, 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987).

The administrative law judge found that employer did not offer evidence of the actual noise level on the barges during load-out functions, and concluded that employer has not

[2]In *Fulks*, the Fifth Circuit held that the fact that a claimant is exposed to injurious stimuli in both covered and uncovered employment cannot defeat the compensability of the entire claim as the relative contribution of each employment is not apportioned. Thus, we reject employer's contention that claimant's arguably greater exposure to noise in uncovered employment limits its liability for claimant's hearing loss to the percentage due to noise exposure in covered employment.

provided substantial evidence to rebut the Section 20(a) presumption. The administrative law judge also found that if the presumption had been rebutted, claimant's testimony regarding exposure to side booms, cranes, welding machines and drag lines during load-outs is credible and entitled to determinative weight. He found that these noises were sufficient to constitute injurious exposure. *See generally Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997). We affirm the administrative law judge's finding that claimant's hearing loss is causally related to his longshore employment as supported by substantial evidence. *See generally John W. McGrath Corp v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Lastly, employer contends that the administrative law judge erred in awarding interest from March 8, 1980, as the parties stipulated that the date of the injury was July 3, 1996. The United States Court of Appeals for the Fifth Circuit has held that pre-judgment interest accrues from the date benefits are due under Section 14, 33 U.S.C. §914, and not from the date of injury. *See Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT)(5th Cir. 1997); *see also Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996)(*en banc*). An employee's compensation becomes due, if the claim is not controverted, fourteen days after employer receives notice of the injury or otherwise has knowledge of it, even absent an award. 33 U.S.C. §914(a), (b); *see also Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998)('knowledge of injury' in Section 14(b) means knowledge of the cumulative compensable hearing loss).

In the instant case, the administrative law judge awarded interest as of March 8, 1980, as employer was aware that claimant had a "major" hearing loss that was noise-induced as of that date, based on in-house audiometric testing. However, since at that time the full extent of claimant's cumulative hearing loss was unknown, and thus, benefits were not yet due under Section 14(b), *see Mowl*, 32 BRBS at 54, interest cannot accrue from March 8, 1980. Moreover, the evidence indicates that the earliest date that employer had notice of the hearing loss claimed was July 31, 1996, the date of its notice of controversion.[3] *Mowl*, 32 BRBS at 54. Thus, we vacate the administrative law judge's award of interest and modify the award to reflect accrual of interest from August 14, 1996, fourteen days after the date of controversion. *Wilkerson*, 125 F.3d at 907, 31 BRBS at 153 (CRT).

[3]Although employer must have known of the injury prior to July 31, 1996, in order to file a notice of controversion on that date, the record is devoid of evidence of the date employer received the actual claim and the parties stipulated that employer was not formally advised of the hearing loss until August 27, 1996.

Accordingly, the administrative law judge's Decision and Order awarding interest from March 8, 1980, is vacated and the decision is modified to reflect the accrual of interest from August 14, 1996. The decision is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge