BRB No. 98-0285

WILLIAM BERRY	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
	)	
v.	)	
	)	
UNIVERSAL MARITIME SERVICE CORPORATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James Guill, Administrative Law Judge, United States Department of Labor.

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

Christopher J. Field (Weber Goldstein Greenberg & Gallagher), Jersey City, New Jersey, for self-insured employer.

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

PER CURIAM:

Universal Maritime (employer) appeals the Decision and Order (93-LHC-1834) of Administrative Law Judge James Guill 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 laborer, worked for various employers until his retirement in 1988. From approximately 1965 until 1981, claimant worked for Universal Maritime. From 1981 or 1982 until his retirement in 1988, he was on the Guaranteed Annual Income Program and worked primarily during July, August and December of each year for various employers. Claimant's last day of employment prior to his retirement was December 30, 1988, and he worked for Universal Maritime on that day. Claimant worked for Maher Terminals immediately preceding his last day of employment. Claimant sought benefits under the Act for a work-related hearing loss.

In his Decision and Order, the administrative law judge found that claimant is entitled to invocation of the presumption of Section 20(a) of the Act, 33 U.S.C. §920(a), based on claimant's demonstrated hearing loss and his testimony that his work exposed him to loud noise. The administrative law judge further found that employer produced insufficient evidence to establish rebuttal of the Section 20(a) presumption. The administrative law judge found that claimant is entitled to benefits for a 25.43 percent binaural hearing loss under 33 U.S.C. §908(c)(13). The administrative law judge denied employer relief from continuing compensation liability under 33 U.S.C. §908(f).

On appeal, employer contends that the administrative law judge erred in finding it to be the responsible employer because claimant failed to establish that he was exposed to injurious stimuli on his last day of employment. Claimant responds, urging affirmance. In addition, claimant's counsel requests an attorney's fee for work performed before the Board.

If claimant establishes his *prima facie* case, by establishing the existence of a bodily harm and an accident or working conditions that could have caused the harm, Section 20(a) of the Act provides claimant with a presumption that his condition is causally related to his employment. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1990). Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused, contributed to or aggravated by his employment. *See Bridier v. Alabama Dry Dock & Shipbuilding* Co., 29 BRBS 84 (1995). The responsible employer is the last employer during whose employment claimant was exposed to injurious stimuli prior to claimant's awareness that he was suffering from an occupational disease. *Travelers Insurance Co. v. Cardillo,* 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Employer bears the burden of proof on this issue; if claimant establishes injurious exposure with a covered employer, it is not also claimant's responsibility to prove that no other employer is liable. Thus, employer can escape liability by rebutting the Section 20(a) presumption with substantial evidence that the

occupational exposure did not cause the harm, *i.e.,* that claimant's injury is not work-related; in addition, consistent with *Cardillo*, employer can establish it is not the liable employer by proving that claimant was not exposed to injurious stimuli in its employ in sufficient quantities to have the potential to cause his hearing loss or that claimant was last exposed to injurious stimuli while working for a subsequent covered employer. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178 (CRT) (9th Cir. 1997); *Avondale Industries, Inc. v. Director, OWCP,* 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992).

In the instant case, the administrative law judge accepted the parties' stipulation that Universal Maritime is claimant's last maritime employer. Employer contends, however, that it is not the responsible employer under *Cardillo*. We reject employer's contention that, in order for claimant to establish his *prima facie* case and establish that employer is the responsible employer, it is claimant's burden to prove that employer exposed claimant to injurious stimuli during his last day of employment with Universal Maritime. *See Ramey v. Stevedoring Services of America,* 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Here, the administrative law judge properly found that claimant established the "working conditions" element of his *prima facie* case, *i.e.,* he credited claimant's testimony regarding the noisy conditions under which he worked during the course of his employment. *See Ramey*, 134 F.3d at 959-960, 31 BRBS at 210 (CRT); *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178 (CRT) (9th Cir. 1997). Thus, the administrative law judge properly shifted the burden to employer to rebut the presumption by introducing substantial evidence that claimant's hearing loss is not work-related. *See generally Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976).

We reject employer's contention that the administrative law judge erred in failing to find rebuttal established.[1] The administrative law judge rationally found that employer's proffer of a noise survey demonstrating compliance at its Port Newark facility with OSHA noise exposure standards is not determinative of the presence or absence of injurious stimuli at claimant's workplace, noting, *inter alia*, that the OSHA standards are intended to protect the health and safety of workers and do not purport to establish the point at which hearing loss can occur in a given individual. Decision and Order at 30-32. The administrative law judge also found the noise studies problematic in that claimant retired in 1988 and the study was not performed

[1]Employer raises this contention in its closing argument which employer incorporated by reference into its Petition for Review.

until 1992 and given that most of claimant's employment with employer occurred in Brooklyn, not at Port Newark. Furthermore, as noted by the administrative law judge, there is no medical evidence that claimant's hearing loss is not work-related. Accordingly, we affirm his finding that employer did not produce substantial evidence rebutting the Section 20(a) presumption. *Bridier*, 29 BRBS at 89-90. Thus, employer cannot escape by liability by establishing the absence of a work-related injury. *Susoeff*, 19 BRBS at 151-152. Moreover, the record does not contain evidence of the absence of potentially injurious stimuli on December 30, 1988. Although claimant was unable to recall the degree of the noise levels on that day, it is employer's burden to affirmatively establish that it did not expose claimant to potentially injurious stimuli, and it has failed to do so on the present record. *Ramey*, 134 F.3d at 959-960, 31 BRBS at 210 (CRT)*; Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). We therefore affirm the administrative law judge's award of benefits to claimant payable by Universal Maritime as the responsible employer.[2]

Claimant's counsel has filed a fee petition for work performed before the Board in connection with this appeal. He requests a fee for 11 hours of services at $150 per hour.[3] Employer has not objected to the fee. We find that the requested fee is reasonably commensurate with the necessary work performed in successfully defending against employer's appeal. 33 U.S.C. §928; 20 C.F.R. §802.203. We therefore award claimant's counsel a fee of $1,650, payable directly to counsel by

[2]The administrative law judge's basis for finding Universal Maritime to be the responsible employer is that, after 1976, claimant's hearing loss, as demonstrated on the audiometric examination, did not deteriorate, and claimant last worked for Universal Maritime prior to the administration of the 1976 audiogram. This finding is problematic in that the administrative law judge did not rely solely on the 1976 audiogram in awarding claimant benefits, *see generally Ramey*, 134 F.3d at 960-961, 31 BRBS at 211 (CRT) (discussing "determinative" audiogram), and as an actual deterioration in claimant's hearing is not required for an employer to be held liable. *Jones Stevedoring*, 131 F.3d at 693, 31 BRBS at 186(CRT). All that is required is that claimant be exposed to injurious stimuli that has the potential to cause or aggravate claimant's hearing loss. *Id.* However, employer bears the burden of proving the absence of potentially injurious stimuli, which it has failed to do on this record. *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991). Moreover, we note that employer did not attempt to add claimant's other employers to the proceedings in an attempt to shift liability.

[3]We note that counsel has itemized 11 hours of services, which, when multiplied by $150 equals $1,650. Counsel's request for a fee of $1,550 is based on his erroneous addition of the number of hours as equaling 10.33 hours.

employer. *See Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed. Claimant's counsel is awarded attorney fee's of $1,650 for work performed before the Board.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge