BRB No. 98-0488

CAMILLE J. MARROY	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
BUCK KREIHS COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
HIGHLAND INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation Benefits and Order Denying Employer/Carrier's Motion for Reconsideration of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Fleming & Gibbons, P.C.), Mobile, Alabama, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the the Decision and Order Awarding Compensation Benefits and Order Denying Employer/Carrier's Motion for Reconsideration (96-LHC-1750) of Administrative Law Judge Richard D. Mills 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 various maritime employers between 1964 and 1987. It is undisputed that claimant performed his last covered employment while working twelve hours for employer on August 4, 1987, and August 5, 1987. In 1984, three years prior to working for employer, an audiogram was performed which revealed a 17.5 percent binaural hearing loss. A November 27, 1989, audiogram revealed a 15.5 percent binaural hearing loss. On July 7, 1993, claimant filed a claim under the Act against employer for an occupational noise-induced hearing loss.[1]

In his Decision and Order, after initially determining that claimant's hearing loss is work-related, the administrative law judge awarded him compensation under Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), for a 15.9 percent binaural hearing impairment based on the results of the November 27, 1989, audiogram. In so doing, he noted that claimant had made a well-reasoned argument that this audiogram should be determinative of the compensable disability as it had been performed closest in time to when he last worked for employer, was valid under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), and the percentage of loss reflected therein was reasonable in comparison with the other record audiograms. Moreover, he noted that employer made no argument regarding the percentage of loss to be assigned, but instead argued that claimant did not sustain a hearing loss from employment activities. Although employer asserted that it did not expose claimant to an injurious level of noise during the time that claimant worked for it in 1987, the administrative law judge credited claimant's testimony to the contrary and found that employer is liable for claimant's hearing loss benefits.

---

[1]In the 1960s, claimant sustained a slag injury to his left ear while working for Boland Marine and Manufacturing Company which resulted in his having chronic infections and ultimately required four surgical procedures.

Employer sought reconsideration, arguing that inasmuch as the 15.9 percent hearing loss reflected on claimant's November 1989 audiogram is less than the 17.5 percent loss reflected on the 1984 audiogram taken prior to his working for employer, the administrative law judge erred in holding it liable as the responsible employer as claimant sustained no loss of hearing due to noise exposure while in its employ.[2] Crediting Dr. Gonsoulin's opinion that the variance between the 1984 and 1989 audiograms could be attributed to subjectivity, and finding it inconceivable that claimant's hearing loss actually improved while he continued being exposed to injurious noise, in an Order Denying Employer/Carrier's Motion for Reconsideration, the administrative law judge reaffirmed his initial Decision and Order.[3]

On appeal, employer asserts that as the 1989 audiogram taken after claimant

---

[2]Employer correctly asserts that the administrative law judge mischaracterized its argument on reconsideration as asserting that the 1984 audiogram should be determinative. Any error he may have made in this regard is harmless, however, inasmuch as he ultimately concluded that the 1989 audiogram was determinative for valid reasons, this finding is not challenged by employer on appeal, and in any event, an actual causal relationship between the last exposure and the disability need not be established to hold employer liable as the responsible employer. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT) (9th Cir. 1997)

[3]In finding the 1989 audiogram determinative, the administrative law judge also noted that as the 1984 audiogram failed to test the 3000 Hz frequency, it did not comply with the AMA *Guides*. Decision and Order at 8; Order Denying Employer/Carrier's Motion For Reconsideration at 1.

worked for employer reflects a lower percentage of hearing loss than that reflected on the 1984 audiogram, the administrative law judge erred in determining that it is liable as the responsible employer because claimant sustained no loss of hearing while working for employer in 1987. Claimant responds, urging affirmance.

The administrative law judge's finding that employer is the responsible employer liable for claimant's hearing loss benefits is affirmed. The last covered employer to expose claimant to potentially injurious stimuli prior to the determinative audiogram is liable as the responsible employer. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). The "determinative audiogram" is the one that is "used for purposes of calculating benefits." *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 962, 31 BRBS 206, 212(CRT) (9th Cir. 1998) (adopting this rule for purposes of determining the "time of injury" for calculating average weekly wage and referring to this rule as creating a bright line aiding the administrative process); *see also Mauk v. Northwest Marine Iron Works,* 25 BRBS 118 (1991). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer under *Cardillo*, *Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989), and there need not be a demonstrated medical causal relationship between a claimant's exposure and his hearing loss. *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *see generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992). Rather, a claimant's exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT) (9th Cir. 1997).

It is employer's burden of proof to establish that it is not the responsible employer. *See Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *see also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Where, as here, it is undisputed that claimant's hearing loss is noise-related, and that employer is claimant's last maritime employer, employer can escape liability as the responsible employer only by establishing that it did not expose claimant to potentially injurious noise levels at its facility. *Id.; Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (decision on recon.). Although employer in this case attempted to show that claimant was not exposed to injurious noise levels during its employ based on the testimony and noise surveys of Dr. Seidman,[4] the administrative law judge rationally found to the contrary based on

[4]Dr. Seidman indicated that claimant had worked as a welder during his last

his crediting of claimant's testimony. Claimant testified that on his last days of covered employment with employer, he worked as a welder and shipfitter within 20 feet of other crew members and stevedores using an electrical welding machine, a torch, a hammer, maul, chipping gun, and grinder. Tr. at 22-32. Moreover, claimant testified that although these activities took place aboard a vessel, the levels of noise were high and akin to the normal levels at a shipyard. Tr. at 25-26.

The administrative law judge is free to accept or reject all or any part of any testimony according to his judgment. *Todd Shipyards Corp. v. Donovan*, 300 F.2d. 741 (5th Cir. 1962). Thus, his crediting of claimant's testimony over that of Dr. Seidman was a proper exercise of his discretionary authority. In this case, claimant's testimony provides substantial evidence to support the administrative law judge's finding that employer was the last covered employer to expose him to potentially injurious stimuli which could have theoretically contributed to the hearing loss evidenced on the 1989 audiogram found determinative of the disability. As employer has failed to raise any reversible error by the administrative law judge in evaluating the conflicting evidence and making credibility determinations, his finding that employer is liable as the responsible employer is affirmed. *See Ramey*, 134 F.3d at 962, 31 BRBS at 211-212 (CRT)*; see generally Meardry v. Int'l Paper Co.*, 30 BRBS 160, 163 (1996).

---

job with employer and inferred from the results of prior studies he had performed involving similar work at other facilities that the levels of noise to which claimant was exposed was not sufficient to cause hearing damage.

Accordingly, the administrative law judge's Decision and Order and Order Denying Employer/Carrier's Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge