BRB No. 99-1308

JAMES PALMER, Jr.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COLUMBIA GRAIN	)	DATE ISSUED:
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
PORTLAND LINES BUREAU	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	
	)	
JONES OREGON STEVEDORING	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
Employer/Carrier-	)	

Respondents	)	
	)	
CARGILL, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand, the Order Denying Columbia Grain's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees on Remand of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Peter W. Preston and Meagan A. Flynn (Preston Bunnell & Stone, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for Columbia Grain and Eagle Pacific Insurance Company.

Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for Jones Oregon Stevedoring Company.

Ronald W. Atwood (Ronald W. Atwood, P.C.), Portland, Oregon, for Portland Lines Bureau and SAIF Corporation.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

HALL, Chief Administrative Appeals Judge:

Columbia Grain appeals the Decision and Order on Remand, the Order Denying Columbia Grain's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees on Remand (95-LHC-1119) of Administrative Law Judge Alfred Lindeman 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). The amount of an attorney's fee determination is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

This case is before the Board for a second time. To recapitulate, claimant has worked since 1965 as a longshoreman and linesman for various longshore employers, where he was exposed to loud noise. Claimant, who has a medical history of ear infections, underwent a right ear mastoidectomy on January 26, 1994. On November 9, 1993, April 22, 1994, June 7, 1994, August 1, 1994, and April 25, 1995, claimant underwent audiometric evaluations which revealed bilateral hearing loss. Claimant sought benefits under the Act for a work-related noise-induced hearing loss.

In his initial Decision and Order, the administrative law judge found that claimant's receipt of the June 7, 1994, audiogram apprised him of his work-related hearing loss. *See* 33 U.S.C. §§908(c)(13), (D), 912, 913. Next, the administrative law judge found that the April 25, 1995, audiogram, demonstrating a 15 percent binaural impairment, was determinative of the extent of claimant's compensable hearing loss. The administrative law judge further found the April 22, 1994, audiogram determinative of the responsible employer issue, as two doctors opined that the June 1994 audiogram reflected the same clinical hearing loss as the April 1994 audiogram. The administrative law judge therefore found that claimant's exposure to noise after the April 1994 audiogram was not injurious. Based on this finding, and his finding that claimant's employment as a linesman did not expose him to injurious noise while claimant's employment as a millwright for Columbia Grain did involve exposure to loud noise, the administrative law judge concluded that Columbia Grain is the party responsible for paying claimant's permanent partial disability benefits for a 15 percent binaural impairment, as the last employer to expose claimant to injurious noise prior to April 22, 1994.

Columbia Grain appealed this decision to the Board. On appeal, the Board affirmed the administrative law judge's finding that claimant sustained work-related hearing loss after

his January 26, 1994, mastoidectomy, and thus is entitled to compensation for the entire 15 percent hearing loss reflected on the April 1995 audiogram. However, the Board vacated the administrative law judge's finding that Columbia Grain is the responsible employer and held that as the administrative law judge found that the April 25, 1995, audiogram is determinative of the extent of claimant's compensable hearing loss, the administrative law judge must review the evidence regarding claimant's exposure to noise and determine which employer was the last employer to expose him to potentially injurious noise prior to April 25, 1995.[1] *Palmer v. Columbia Grain*, BRB Nos. 96-1001, 96-1180 (May 2, 1997) (unpub.).

On remand, the administrative law judge held that the Board's instruction required the identification of the last employer, prior to the date of the determinative audiogram, that exposed claimant to actual or potentially injurious stimuli that could have caused claimant's compensable condition, which, the administrative law judge found, in this case did not worsen after April 1994.[2] Decision and Order on Remand at 3-4. The administrative law judge found that no part of claimant's binaural hearing loss was based on any exposure after June 7, 1994, which is the date of the audiogram that formed the basis of claimant's claim. Moreover, relying on medical evidence that claimant's hearing loss after April 1994 did not worsen, and in fact improved,[3] the administrative law judge again found that Columbia

[1]In addition, the Board instructed the administrative law judge on remand to reconsider which employer is liable for claimant's attorney's fee.

[2]On remand, Jones Oregon stipulated it was the last employer prior to the April 25, 1995, audiogram. The administrative law judge framed the issue as whether Columbia Grain, the last employer to expose claimant to noise prior to the April 1994 audiogram, or Jones Oregon, the last employer to expose claimant to noise prior to the April 1995 audiogram, is liable.

[3]The administrative law judge found that the April and June 1994 audiograms demonstrated a 20 percent binaural impairment and that the April 1995 audiogram

Grain is the responsible employer for claimant's 15 percent binaural hearing loss, as the last employer to expose claimant to injurious stimuli prior to the April 1994 audiogram. The administrative law judge found this conclusion supported by the Board's decision in *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997).

In denying Columbia Grain's motion for reconsideration, the administrative law judge stated that as there was no worsening of claimant's hearing loss after the first valid audiogram establishing the onset of claimant's disability (the April 1994 audiogram), there can be no "rational connection" between any later exposure to noise and claimant's compensable hearing loss. Order Denying Motion for Recon. at 2, *citing Cordero v. Triple A Machine Shop,* 580 U.S. 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). In a Supplemental Decision and Order Awarding Attorney's Fees on Remand, the administrative law judge, noting that Columbia Grain did not object to specific itemized entries or to the hourly rate, rejected its contention that claimant's attorney did not have to participate in the proceedings on remand, and thus is not entitled to an attorney's fee. The administrative law judge awarded claimant's counsel a supplemental fee in the amount of $3,262.50, representing 13 hours of legal services on remand at the hourly rate of $225, and 2.5 hours of services at the rate of $135.

On appeal, Columbia Grain contends that the administrative law judge exceeded the scope of the Board's remand and did not follow the Board's directive. Thus, Columbia Grain contends that the administrative law judge erroneously found it to be the employer responsible for claimant's 15 percent binaural hearing loss. Jones Oregon responds, urging affirmance, as does Portland Lines Company. In addition, Columbia Grain contends that the administrative law judge erred in finding that claimant's counsel is entitled to an attorney's fee for work performed on remand, as claimant did not gain additional compensation. Employer also contests the hourly rate awarded by the administrative law judge.

As discussed in the Board's previous decision in this case, the long-standing rule for allocating liability in an occupational disease case is that the responsible employer or carrier is the employer or carrier during the last employment where claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been aware he was suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). In *Cardillo*, the court specifically stated that

> the employer during the last employment in which claimant was exposed to

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demonstrated a 15 percent impairment.

> injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Cardillo, 225 F.2d at 145. Thereafter, in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), accepting the standard established by *Cardillo*, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction the instant case arises, further stated that the "onset of disability is a key factor in assessing liability under the last injurious-exposure rule." In *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit reviewed the issue of the responsible employer under *Cardillo* and *Cordero* in a hearing loss case, and held that the responsible employer or carrier is the one on the risk at the time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability for which claimant is being compensated. The court also relied on the statement in *Cordero* that there must be a "rational connection" between the onset of the claimant's disability and his exposure; thus, the court held liable the last employer who, by injurious exposure, could have contributed causally to the claimant's disability evidenced on the determinative audiogram.[4] *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143(CRT); *see Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

[4]The court explained that, while it agreed that a demonstrated medical causal relationship was not necessary for an employer to be held liable based on exposure in its employ, liability could not be imposed on an employer who could not, even theoretically, have contributed to the disability. *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT). The court held that the Board erred in holding liable an employer who exposed claimant after the administration of the determinative audiogram as no part of that exposure could have been related to the results demonstrated on that audiogram. *Id*.

In *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178 (CRT)(9th Cir. 1997), the Ninth Circuit reviewed a case in which the named employer contended that it could not be liable inasmuch as the claimant's hearing did not worsen after the determinative audiogram, despite continued exposure to the noises typical in his kind of work at its facility. The employer thus argued that it is impossible that claimant's employment at its facility prior to the audiogram, which lasted only 1 ½ hours, exposed the claimant to noise that could have caused his hearing damage. The court held that under the responsible employer rule, liability falls on the employer covering the risk at the time of the most recent injurious exposure, even if there is not a demonstrated medical causal relationship between a claimant's exposure and his occupational disease. The court noted that the evidence in the case did not establish "the absence of proof" that exposure to noise while working for employer had the potential to injure claimant.[5] *Taylor*, 133 F.3d at 693, 31 BRBS at 186(CRT); *see also Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990).

Subsequent to the issuance of the Board's previous decision in the instant case, the Ninth Circuit issued an unpublished decision in *Maersk Stevedoring Co. v. Container Stevedoring Co.*, No. 98-70852, 2000 WL 27883, 210 F.3d 384 (table)(9th Cir. Jan. 11, 2000), *rev'g Echamendi v. Container Stevedoring Co.*, BRB No. 97-1409 (June 23, 1998)(unpub.)(McGranery, J., dissenting). In *Echamendi*, the administrative law judge held that the first of four audiograms in evidence established the onset of the claimant's disability and was "determinative" for purposes of assigning liability under the "last injurious exposure" rule. The administrative law judge further held that the second audiogram was the most accurate and was "determinative" for purposes of calculating the extent of the claimant's permanent partial disability. A majority of the Board panel reversed the administrative law judge's responsible employer finding, holding that the "determinative audiogram" is the one that is "used for purposes of calculating benefits." *Echamendi*, slip op. at 5. The Board held that because Maersk was the last employer to expose claimant to potentially injurious noise prior to the second audiogram, it was liable under the "last injurious exposure rule" even though the second audiogram showed no actual worsening of claimant's hearing loss. *Echamendi*, slip op. at 8.

[5]In a case in which claimant had a work-related hearing loss involving two potentially responsible employers, the Ninth Circuit held that claimant's testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. 33 U.S.C. §920(a). Thus, as the last employer failed to present rebuttal evidence, the presumption controls and the last employer is liable for claimant's work-related hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

In an unpublished decision, the Ninth Circuit reversed the Board's decision, holding that the medical opinions of record agree that all of claimant's audiograms measured "essentially the same" hearing loss and that placing liability on Maersk would violate the "rational connection" rule articulated in *Cordero*, that at least a potential causal connection must exist between the employment and the claimed work injury. Specifically, the court stated,

> The ALJ did find that Echamendi was exposed to potentially injurious noise while employed at Maersk. It was, then, "theoretically possible" that this exposure "had the potential" to contribute to Echamendi's hearing loss. Such a reading of our cases, however, is overly formalistic. We read our case law on this matter to stand for the limited proposition that *in the absence of proof to the contrary*, a theoretical possibility of injurious exposure which has the potential to contribute to a hearing loss is sufficient to establish liability. Here, we are presented with evidence ... that eliminates any theoretical possibility that Echamendi's hearing deteriorated due to exposure while working at Maersk. Yes, Echamendi was exposed to potentially injurious noise at Maersk. The audiograms, however, demonstrate that this exposure was not actually injurious.

Maersk, 2000 WL 27883 at *3 (emphasis added). The court further stated, in a footnote, that its decision is consistent with *Port of Portland*, in that while a demonstrated causal relationship may not be required to establish an employer's liability, the "proven absence" of medical causation "surely precludes a finding of liability." *Id.* at n.3. Thus, the court, in essence, held that there is no "rational connection" between claimant's exposure to noise and his compensable disability where the medical evidence establishes that the claimant's hearing loss did not actually worsen during his employment with a potentially liable employer.

Likewise, the Board reviewed a hearing loss case in which the administrative law judge averaged the results of two audiograms in awarding benefits, *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997). The Board held that in averaging the administrative law judge in effect found both audiograms are "determinative" of claimant's disability. The Board held that the carrier on the risk prior to the onset of disability, that is prior to the first audiogram, is the liable party, as the results of this audiogram were higher than the results of the later one, and thus, the later exposure could not have contributed causally, even theoretically, to the compensable hearing loss. *Roberts*, 30 BRBS at 232.

In the instant case, the Board remanded for the administrative law judge to review the evidence regarding claimant's exposure to noise and determine which employer was the last employer to expose him to potentially injurious noise prior to the April 25, 1995 audiogram determinative of claimant's disability. The Board stated that a claimant need not incur actual

injury as a result of the subsequent exposure in order for the later employer to be held liable. The administrative law judge declined to adhere to this approach, finding it inconsistent with case law. The administrative law judge found it persuasive that the audiogram determinative of disability was lower than the prior audiograms, and he credited Dr. Hodgson's opinion that the improvement in claimant's hearing loss represented the full healing process following ear surgery. The administrative law judge therefore found that any noise exposure following the April 22, 1994, audiogram was not actually or potentially injurious, and thus that Columbia Grain was the last employer to expose claimant to injurious stimuli prior to the onset of his compensable disability in April 1994. Decision and Order on Remand at 3-4, *citing Roberts*, 30 BRBS at 232.

On appeal, Columbia Grain contends the administrative law judge erred in failing to adhere to the Board's instruction that he determine the responsible employer with reference to the April 1995 audiogram. Moreover, Columbia Grain asserts that the administrative law judge's analysis does not comport with law, as an actual causal relationship between the last exposure and the disability need not be established in order for the last employer to be held liable.

We affirm the administrative law judge's decision on remand, recognizing that he did not determine the responsible employer with reference to the April 1995 audiogram found to be determinative of claimant's disability as instructed.[6] Nonetheless, we find his decision to be consistent with the Board's decision in *Roberts,* and with the most recent discussion of this issue by the Ninth Circuit in *Maersk.*[7] The administrative law judge's finding that claimant's hearing loss did not worsen after April 1994 is supported by substantial evidence of record. Drs. Hodgson and Lipman stated that claimant's hearing loss did not increase between the audiograms administered in April and June 1994. CX 23, 24. Dr. Hodgson further stated that the improvement in claimant's hearing, as evidenced on the April 1995 audiogram, was due to claimant's full recovery from ear surgery performed in January 1994. CX 24.

In view of these facts, the administrative law judge's imposition of liability on Columbia Grain as the last employer to expose claimant to injurious stimuli prior to the April

[6]The "law of the case" doctrine is not an absolute bar to a judicial body's re-addressing a previously resolved issue. *See Ortiz v. Todd Shipyards Corp.*, 25 BRBS 228 (1991).

[7]We acknowledge the Ninth Circuit's rule concerning the lack of precedential value of its unpublished decisions, *see* U.S. Ct. App. 9th Cir. Rule 36-3, but the court's most recent discourse on this subject is a relevant consideration.

1994 audiogram is consistent with law. Inasmuch as claimant's hearing improved after June 1994, any subsequent exposure could not have even potentially contributed to the compensable disability, as was the situation in the *Roberts* and *Echamendi* cases. *Maersk*, 2000 WL 27883 at *2-3; *Roberts*, 30 BRBS at 232. Moreover, given the improvement in claimant's hearing, the April 1994 audiogram established the onset of claimant's disability, and the "rational connection" between claimant's disability and injurious exposure was properly determined with reference to this audiogram. *Id.; Port of Portland*, 932 F.2d at 840, 24 BRBS 143(CRT); *Cordero*, 580 F.2d at 1331, 8 BRBS at 744. Thus, we affirm the administrative law judge's decision on remand.

Columbia Grain also contends that the administrative law judge erred in finding it liable for claimant's attorney's fee. As we affirm the administrative law judge's finding that Columbia Grain is the responsible employer, we also affirm the administrative law judge's finding that it is liable for claimant's attorney's fee. Columbia Grain asserts that the administrative law judge erred in awarding claimant's counsel an additional fee for work performed on remand, as claimant did not gain any additional compensation because the only issue concerned the liable employer. The administrative law judge found that it was necessary and appropriate for claimant's attorney to continue to participate in the proceedings on remand, in order to protect his client's entitlement to compensation in view of the fact that the award is not yet final. Columbia Grain has failed to demonstrate legal error or an abuse of discretion in the administrative law judge's determination, and we therefore affirm the administrative law judge's award of an attorney's fee to claimant's counsel for work performed on remand. We reject employer's contention that the hourly rate awarded by the administrative law judge is not reasonable. Employer did not raise this objection below, and may not assert it for the first time on appeal. *See Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

Accordingly, the Decision and Order on Remand, the Order Denying Columbia Grain's Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney's Fees on Remand of the administrative law judge are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that Columbia Grain is the responsible employer in this case. I would hold that the responsible employer must be determined with reference to the employer at the time of the last exposure to noise prior to the audiogram determinative of disability, regardless of any actual causal relationship between this exposure and the disability, as I believe this is consistent with the principles of *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

Following *Cardillo*, the Board has consistently held that the responsible employer in an occupational disease case is the last employer to expose claimant to injurious stimuli. The "last exposure" rule has prevailed in the face of contentions and medical opinions that the exposure was of too short a duration to potentially cause the claimant's disability. In *Proffitt v. E.J. Bartells Co.*, 10 BRBS 435 (1979), the Board affirmed a finding that Bartells was the responsible employer based on the claimant's two days of asbestos exposure in its employ, rejecting the contention that a distinct aggravation of claimant's condition was necessary for a finding of employer's liability. Similarly, in *Whitlock v. Lockheed Shipbuilding & Constr. Co.*, 12 BRBS 91 (1980), the Board held in a hearing loss case that the only necessary inquiry is whether the claimant was exposed to injurious stimuli, *i.e.*, harmful noise levels, with the last employer. The Board reiterated that it is not necessary that the exposure actually aggravate the hearing loss. *See also Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986) (no need to demonstrate "actual medical causal relationship" between asbestos exposure and occupational disease).

The Ninth Circuit also has adopted this reasoning. In *Lustig v. United States Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989), *aff'g in pert. part Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), the last carrier contended that because there is a ten-year latency period for the development of asbestos-related cancer, the exposure decedent had while it was on the risk could not have had any effect on the disability. In affirming the Board's holding that this last carrier was liable and that an actual causal relationship between the exposure and disability need not be established, the Ninth Circuit stated that the carrier's argument "suggests an unwarranted change" from the *Cardillo* rule. The court stated that as the carrier was on the risk for the last eight years of employment during which decedent was exposed to asbestos, it is liable as the last carrier.[8] *Lustig*, 881 F.2d at 596, 22 BRBS at

[8]In *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24

162(CRT).

In *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), *rev'g in pert. part Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), the Ninth Circuit reviewed the issue of the responsible employer in a hearing loss case. The Board had held liable the last employer to expose claimant to injurious stimuli, even though this exposure occurred after the audiogram had been performed. The Ninth Circuit first relied on the statement in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), that there must be a "rational connection" between the onset of the claimant's disability and his exposure. The court held this rational connection missing in the case before it where no part of the exposure with the last employer could have contributed to the loss demonstrated on the audiogram. The court stated,

> We agree with the Board that *Cordero* does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease. But *Cordero* does require that liability rest on the employer covering the risk at the time of the most recent injurious exposure *related* to that disability. . . We reject any reading of *Cardillo* that would impose liability on an employer who *could not*, even theoretically, have contributed to the causation of the disability.

932 F.2d at 840, 24 BRBS at 143(CRT) (emphasis in original). The court lastly referred to the "determinative audiogram" as the benchmark for the inquiry into the last injurious exposure, but it left this term undefined. The Board subsequently held that the "determinative" audiogram is the one relied upon in determining the extent of the claimant's hearing loss, *see Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991)*; Good v.*

BRBS 36(CRT) (9th Cir. 1990), *rev'g Picinich v. Lockheed Shipbuilding Co.*, 22 BRBS 289 (1989), the United States Court of Appeals for the Ninth Circuit stated that minimal exposure to offensive stimuli at a place of employment is not sufficient to place responsibility on a covered employer in the absence of proof that exposure in such quantities had the potential to cause the claimant's disease. As the claimant was exposed to minimal levels of asbestos at Todd Shipyards, the court held that he was not exposed in sufficient quantities to have the potential to cause the lung disease, and thus Lockheed is liable. Subsequently, in a hearing loss case, the Ninth Circuit affirmed the administrative law judge's finding that the last employer, who exposed the claimant to noise for only one and one-half hours, was liable, holding that the employer did not demonstrate the "absence of proof" that this exposure had "the potential to injure" the claimant. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997). In these cases, the focus was on the degree of exposure rather than the physical impact on claimant.

Ingalls Shipbuilding, Inc., 26 BRBS 159 (1992), and the Ninth Circuit adopted this position in *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998), agreeing with the Board that average weekly wage should be calculated as of the date of last exposure prior to the administration of the audiogram determinative of the extent of the claimant's hearing loss. The court, in *Ramey*, stated that the use of the date of the last exposure prior to the audiogram determinative of disability provides a "bright line" that "aided the goal of avoiding unnecessary 'administrative difficulties and delays' that might accompany a less definitive rule." *Ramey*, 134 F.3d at 962, 31 BRBS at 212(CRT), *quoting Port of Portland*, 932 F.2d at 841, 24 BRBS at 144(CRT).

The published decisions of the Ninth Circuit in *Ramey, Jones Oregon* and *Port of Portland* support holding the last employer to expose claimant to injurious noise prior to the date of the audiogram determinative of disability liable for claimant's hearing loss. Unlike my colleagues, I do not find the Ninth Circuit's decision in *Maersk Stevedoring Co. v. Container Stevedoring Co.*, No. 98-70852, 2000 WL 27883, 210 F.3d 384 (table)(9th Cir. Jan. 11, 2000), to be dispositive in the instant case. The Ninth Circuit's rules provide that any disposition that is not published shall not be regarded as precedent. U.S. Ct. App. 9th Cir. Rule 36-3. Thus, the decision is not controlling. Comparing audiometric results as was done in *Maersk*, and the Board's decision in *Roberts*, injects "causation" into the analysis of the responsible employer despite longstanding law to the contrary.[9] *See Lustig*, 881 F.2d at 596, 22 BRBS at 162 (CRT). Under *Maersk*, the focus shifts from the date of last exposure to determining whether claimant's hearing loss was aggravated, *i.e.*, whether the percentage of loss measured by audiogram increases after a specific date. Under this approach, the *Port of Portland* rule becomes one where liability is imposed on the last employer to expose claimant prior to the date of the audiogram determinative of disability, unless an earlier audiogram shows a greater or equal loss, in which case the last employer at that time may be liable. This approach, by looking at whether disability increases or decreases, necessarily injects causation into the rule. This constitutes an unwarranted alteration of *Cardillo*, replacing the last exposure rule with one varying based on audiometric readings.

[9]The Board's decision in *Roberts* is factually distinguishable from *Maersk* and from the instant case, in that the administrative law judge therein averaged the results of two audiograms in determining the extent of claimant's disability, thereby establishing the onset of disability as of the time of the first audiogram.

Moreover, it defeats the purpose of the "bright line" rule of using the last employer to expose claimant to injurious stimuli prior to the audiogram determinative of disability, *see Ramey*,134 F.3d at 962, 31 BRBS at 212(CRT), and makes the responsible employer rule essentially different in hearing loss cases than it is in other occupational disease cases. *See Lustig*, 881 F.2d at 593, 22 BRBS at 159 (CRT); *Fulks v. Avondale Shipyards, Inc*., 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981)(rejecting a *de minimis* test for injurious exposure). The responsible employer rule is a rule of liability allocation, *Fulks*, 637 F.2d at 1011, 12 BRBS at 978, with its rationale being that each employer will be the last a proportionate number of times. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Cardillo*, 225 F.2d at 145. The inquiry into "injurious exposure" involves only an assessment of the type and duration of exposure, *see generally Picinich*, 914 F.3d at 1317, 24 BRBS at 36 (CRT), and should not depend on the often subtle differences in the results of audiometric testing. The exposure rule of *Cardillo* has governed for 45 years, a period which saw major amendments to the Act in 1972 and 1984. Congress did not see fit to alter the rule, and replacing a definitive determination based on exposure with one dependent on audiometric values undermines the goal of sharing the risk among employers in a way which is easily determined. It can only lead to more litigation as employers seek to shift liability to their fellows based on particular facts.

As my colleagues' decision undermines *Cardillo*, I must dissent. Therefore, I would remand the case to the administrative law judge to determine the responsible employer with reference to the audiogram determinative of disability as instructed in the Board's prior decision.

ROY P. SMITH
Administrative Appeals Judge