BRB No. 96-0651

CLIFFORD R. SELLERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ANCO INSULATION COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Anthony N. Fox (Clark & Scott, P.C.), Birmingham, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (93-LHC-3417) of Administrative Law Judge C. Richard Avery 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 retired journeyman sheet metal worker, worked for various companies, including employer, during his forty year career. Claimant filed a claim under the Act for a 13.13 percent binaural noise-induced hearing loss against employer, based on the results of a March 5, 1988, audiometric examination and claimant's recollections that his work with employer was one of his last maritime jobs.[1]

In his Decision and Order, the administrative law judge found that claimant is entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, but that employer demonstrated that claimant performed no maritime employment while working with employer and, thus, is not the responsible employer in this case. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant argues that the evidence in this case establishes that claimant has a work-related hearing loss, that employer employed claimant to work on ships at the Gulf Shipyards in Chickasaw, Alabama, in 1978 during which time he was exposed to injurious levels of noise, that employer was claimant's last maritime employer under the Act, and that, therefore, employer is liable for claimant's hearing loss injury.

In the instant case, the administrative law judge properly found that claimant is entitled to invocation of the Section 20(a) presumption, as two audiograms of record indicate that he suffers a hearing loss and claimant testified that he was exposed to loud noise during his employment around shipyards.[2] *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, employer may rebut it by producing facts to show that claimant's employment did not cause, aggravate, or contribute to his injury. *See Peterson v. General Dynamics Corp.* 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993). Referring to the Board's unpublished decision in *Carter v. I.T.O. Corp.*, BRB No. 92-1555 (April 25, 1995)(unpub.),[3] the administrative law judge recited the proper standard for establishing rebuttal of

[1]Claimant specifically testified that he worked for employer on three occasions during 1978, 1979, and 1980, and that he retired in 1980. The record indicates that claimant previously pursued his claim against Alabama Dry Dock & Shipbuilding Company and then Mobile Refrigeration Company, Incorporated, only to subsequently agree with each party's request before the district director to be dismissed without prejudice on the grounds that the actions against each employer are premature pending further developments with regard to the claim. Claimant's Exhibit 1.

[2]The administrative law judge found that claimant's testimony was bolstered by noise surveys in the same shipyards that reveal levels higher than 85 dba, a level which Drs. Sellers and McDill opine could cause hearing loss.

[3]As Judge Avery acknowledged, in *Carter v. I.T.O. Corp.*, BRB No. 92-1555 (April 25, 1995)(unpub.), the Board admonished him for confusing the concepts of causation and responsible

the Section 20(a) presumption and added that employer also can escape liability by showing it is not the last employer to expose claimant to noise. The administrative law judge then found that "whether deemed rebuttal of the Section 20 presumption or a defense to the last employer rule," Decision and Order at 4, employer in this instance has demonstrated that it was not claimant's last maritime employer.

Discounting claimant's testimony because of his very poor memory,[4] the administrative law judge specifically determined through the testimony of employer's risk manager, Gerald J. Caillouet, that while claimant did work for the company in 1978, 1979 and 1980, employer performed no work at the Gulf Shipyards during that period of time.[5] Rather, Mr. Caillouet stated that employer performed insulation work on power plants over that time span.

The question of causation deals with whether claimant's injury is related to his employment as a whole and not to employment with a specific employer. The responsible employer rule, once causation is established, is a judicially-created rule for allocating liability among successive employers in cases where an occupational disease develops after prolonged exposure to injurious conditions. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-45 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). It is well-established that the employer responsible for paying benefits in an occupational disease case such as hearing loss is the last covered employer to expose claimant to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See id; Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

In resolving the instant claim, the administrative law judge moved directly to the responsible employer issue without first ascertaining whether employer rebutted the Section 20(a) presumption that claimant's hearing loss is noise-related, and thus, whether causation has been established. However, as the only evidence of record establishes that claimant's hearing loss is compatible with

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employer on facts similar to those in the instant case.

[4]The administrative law judge found that claimant's statements establish that he is really uncertain for whom he worked at Gulf Shipyards. In fact, claimant conceded that he worked for so many employers he was unsure who he was working for at the Gulf Shipyard, and acknowledged that he could not remember the type of or specific locations for work he performed for employer during his employment in 1979 and 1980. Hearing Transcript (HT) at 33-36. In addition, upon questioning by the administrative law judge, claimant disclosed that he could only remember working at the shipyard during his employment with employer in 1978, and that other employers caused him to work around ships. HT at 43-44.

[5]Mr. Caillouet stated that employer's policy is to retain employment records for seven years and, thus, the company no longer had any records regarding the specific job sites where claimant worked in 1978-1980. Mr. Caillouet's testimony regarding employer's absence from the Gulf Shipyard is based upon his inquiry of Bill Yost, the owner of the Gulf Shipyard from 1977 to 1982.

exposure to loud noise, we hold that causation is established as a matter of law in light of the existing record in this case.[6] *See Bridier v. Alabama Dry Dock & Shipyard Corp.*, 29 BRBS 84 (1995)

Nonetheless, inasmuch as the administrative law judge rationally credited the testimony of employer's risk manager, Mr. Caillouet, over claimant's uncertain testimony pertaining to the nature and location of the work that claimant performed with employer, we affirm the administrative law judge's finding that employer met its burden of establishing that it is not claimant's last maritime employer and, thus, not the responsible employer in this case, as those determinations are rational and based on substantial evidence. *See generally Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Accordingly, we affirm the administrative law judge's conclusion that employer, ANCO Insulation, is not liable for benefits under the Act. *See Black*, 717 F.2d at 1280, 16 BRBS at 13 (CRT); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

We, however, remand this case to the district director to provide claimant with an opportunity to proceed against other employers in his hearing loss claim, as other employers were identified initially as being potentially liable. *See* n. 1, *supra*; 33 U.S.C. §921(b)(4); *see generally Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). On remand, each employer must, if desired, be given the opportunity to develop evidence on the issue of the work-relatedness of claimant's hearing loss in addition to its liability as the responsible employer.

[6]Only the opinions of certified audiologist J. Timothy Holston, M.S., and otolaryngologist Dr. Donald Muller address the causation issue, and each opines that the hearing loss is compatible with noise exposure. Employer has not produced any evidence to the contrary. In fact, employer has urged, both in its post-hearing brief before the administrative law judge and its response to claimant's appeal, that the issue in this case is whether claimant's work with employer was in a maritime capacity.

Accordingly, the administrative law judge's finding that employer is not liable as the responsible employer in the instant case is affirmed. The case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge