BRB Nos. 96-1001
and 96-1180

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

Appeals of the Decision and Order - Awarding Benefits, and the Decision and Order Denying Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorneys' Fees and Costs of Alfred Lindeman, Administrative Law Judge, United States Department of Labor, and the Compensation Order Approval of Attorney Fee Application of Karen P. Staats, District Director, United States Department of Labor.

Peter W. Preston (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

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

John Dudrey (Williams, Frederickson & Stark, P.C.), Portland, Oregon, for Cargill, Incorporated.

William M. Tomlinson (Linsay, Hart, Neil & Weigler, LLP), Portland Oregon, for Jones Oregon Stevedoring, Stevedoring Services of America and Homeport Insurance Company.

Roger W. Atwood (Williams, Zografos, Peck & Atwood), Portland, Oregon, for Portland Lines Bureau and SAIF Corporation.

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

PER CURIAM:

Columbia Grain appeals the Decision and Order - Awarding Benefits, the Decision and Order Denying Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorneys' Fees and Costs (95-LHC-1119) of Administrative Law Judge Alfred Lindeman, and the Compensation Order Approval of Attorney Fee Application (Case No. 14-116727) of District Director Karen P. Staats, 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).[1] 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 award 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).

Claimant has worked since 1965 as a longshoreman and linesman for various longshore employers, where he is 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. A formal hearing was held on October 27, 1995, to determine, *inter alia*, the extent of claimant's compensable hearing loss under the Act, *see* 33 U.S.C. §908(c)(13)(B), and the responsible employer for paying benefits under the Act. Claimant's longshore employers from March 2, 1994, to June 6, 1994, were represented at the formal hearing.

In his 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. §§912, 913. Next, the administrative law judge found that the April 25, 1995, audiogram 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. 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 hearing impairment.

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[1]We hereby consolidate for purposes of decision employer's appeal of the administrative law judge's Decision and Order - Awarding Benefits, Decision and Order Denying Motion for Reconsideration and Supplemental Decision and Order Awarding Attorneys' Fees and Costs, BRB No. 96-1001, and its appeal of the district director's Compensation Order Approval of Attorney Fee Application, BRB No. 96-1180. 20 C.F.R. §802.104(a).

Columbia Grain's motion for reconsideration was subsequently denied by the administrative law judge. Lastly, the administrative law judge awarded claimant's attorney a fee of $10,500, and costs of $662.50, payable by employer. Subsequently, the district director awarded counsel a fee of $1,618.75, and costs of $345, for work performed at that level, also payable by employer.

On appeal, Columbia Grain challenges the administrative law judge's finding that it is responsible for the payment of claimant's benefits and his determination of the extent of claimant's compensable hearing loss. Columbia Grain also challenges the fee awards rendered by the administrative law judge and the district director. Claimant, Portland Lines Bureau, Jones Oregon Stevedoring, Stevedoring Services of America, and Cargill, Inc., respond, urging affirmance of the administrative law judge's responsible employer determination. Claimant also responds that he is entitled to compensation for a 20 percent work-related hearing loss.[2]

We first address Columbia Grain's appeal of the administrative law judge's finding that claimant is entitled to compensation for a 15 percent hearing loss. Columbia Grain contends that claimant is not entitled to compensation for conductive hearing loss in claimant's right ear attributable to claimant's January 26, 1994, mastoidectomy. Specifically, employer argues that the surgery is an intervening cause of injury which relieves it of liability under the Act for the resulting hearing loss caused by the surgery.

We reject employer's contention on appeal. Under the aggravation rule, claimant is entitled to compensation for his entire hearing loss when work-related acoustic trauma aggravates or combines with a prior hearing impairment. *See, e.g., Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991). In the instant case, substantial evidence supports the administrative law judge's finding that claimant sustained work-related hearing loss after his January 26, 1994, mastoidectomy. Tr. at 77, 85-86, 91, 105, 116-117. Accordingly, claimant's mastoidectomy is not an intervening cause of injury, and we affirm the administrative law judge's finding that claimant is entitled to compensation for his entire 15 percent hearing loss.

Employer next challenges the administrative law judge's finding that it is the party responsible for paying claimant's compensation under the Act. 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

[2]We decline to address this contention, which should have been raised in a cross-appeal. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314, 318 (1988).

aware he was suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *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 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,* 932 F.2d at 836, 24 BRBS at 137 (CRT), 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 the responsible employer or carrier is the one on the risk at 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. [3] *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT); *see Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). Accordingly, a distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; rather exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

In the instant case, the administrative law judge relied upon the April 22, 1994, audiogram when addressing the responsible employer issue. However, the administrative law judge unequivocally found the April 25, 1995, audiogram to be determinative of the extent of claimant's compensable hearing loss. This finding is not challenged on appeal. Accordingly, pursuant to *Port of Portland*, the last employer to expose claimant to potentially injurious noise prior to April 25, 1995, is the party responsible in this case for

[3]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.

paying claimant's benefits under the Act. In this regard, we note that in finding that claimant was not exposed to injurious noise at work during the period between the audiograms of April 22, 1994, and June 7, 1994, the administrative law judge relied on the fact that these audiograms demonstrated the same degree of loss, reasoning that this fact established that there was no injurious exposure between the two dates. This reasoning is erroneous as a matter of law, in that whether a claimant incurs actual injury as a result of noise is not determinative of employer's liability under the Act; all that is required is that claimant be exposed to levels of noise exposure which are potentially injurious during his work for an employer for that employer to be held liable. *See Good*, 26 BRBS at 163-164 n.2. Thus, 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. Accordingly, we vacate the administrative law judge's decision holding employer liable for the payment of claimant's benefits, and we remand the case to the administrative law judge to reconsider the responsible employer issue pursuant to applicable law.

Lastly, employer asserts that the administrative law judge erred in holding it liable for claimant's counsel's fee. Pursuant to our decision to vacate the administrative law judge's determination regarding the party responsible for the payment of claimant's compensation benefits, we additionally vacate the administrative law judge's finding that employer is liable for claimant's counsel's fee for work performed at that level. On remand, the administrative law judge must reconsider this issue in light of his determination of the party liable for claimant's compensation benefits.

Finally, employer requests that the district director's fee award be stayed pending the conclusion of the appellate process. BRB No. 96-1180. It is well-established that a fact-finder may render an attorney's fee determination when he issues his decision, in order to further the goal of administrative efficiency. *See Williams v. Halter Marine Service, Inc.,* 19 BRBS 248, 253 (1987). Any such award of an attorney's fee does not become effective and is thus not enforceable until all appeals are exhausted. *Id.* We therefore deny the relief requested by employer. We note, however, that the employer ultimately held to be responsible for claimant's permanent partial disability compensation will also be liable for this award.

Accordingly, the administrative law judge's finding that Columbia Grain is the party responsible for the payment of claimant's compensation benefits and counsel's fee for work performed before the administrative law judge is vacated, and the case is remanded for reconsideration of the responsible employer issue consistent with this opinion. In all other respects, the administrative law judge's the Decision and Order - Awarding Benefits, and the Decision and Order Denying Motion for Reconsideration and Supplemental

Decision and Order Awarding Attorneys' Fees and Costs are affirmed. The district director's Compensation Order Approval of Attorney Fee Application is modified to provide that liability for that fee is to be assessed against the responsible employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge