

BRB No. 91-897

DONNIS DUNNAM)	
)	
Claimant-Respondent)	
)	
v.)	
)	
INGALLS SHIPBUILDING,)	DATE ISSUED: _____
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

John F. Dillon (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Paul M. Franke, Jr. (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (89-LHC-2555) 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked for employer from 1965 to 1972; thereafter, claimant worked for two additional maritime employers. On July 29, 1987, claimant underwent an audiometric examination which revealed a 6.5 percent binaural hearing loss. CX 2. Based upon this audiogram, on September 8, 1987, claimant notified employer of his injury and filed a claim against employer for compensation for a hearing loss on the same day. Thereafter, on October 29, 1987, claimant underwent a second audiometric examination which revealed a 15.9 percent binaural hearing impairment. CX 17. Previously, on May 11, and 14, 1987, Assistant District Director¹ Robert H.

¹The title "district director" has been substituted for the title "deputy commissioner" issued in the statute. 20 C.F.R. §702.105.

Bergeron advised employer's attorney that due to the unprecedented number of hearing loss claims filed in his office against employer, employer was excused from filing notices, responses, or controversions, and making payments in regard to these claims as required by Section 14(e) of the Act, 33 U.S.C. §914(e), until 28 days following service of the claim by the district director's office. Employer subsequently filed a Notice of Controversion on January 14, 1988.

A hearing was held on July 17, 1990, wherein the parties disputed causation, the nature and extent of disability, average weekly wage, penalties, employer's liability for medical benefits, and attorney's fees. Employer additionally attempted to escape liability by arguing that it was not the responsible employer. In his Decision and Order, the administrative law judge discussed claimant's testimony regarding his exposure to noise during his employment with employers subsequent to 1972, and his utilization of ear protection on those jobs. The administrative law judge found that employer was the last employer to expose claimant to harmful noise; therefore, the administrative law judge, after determining that claimant has an 11.2 percent binaural impairment based upon the average of the two audiometric evaluations, found that employer is responsible for disability benefits pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge further found that employer is liable for medical benefits in connection with claimant's hearing loss, and interest on all sums in arrearage pursuant to 28 U.S.C. §1961. Lastly, the administrative law judge found that the "excuse" granted by the district director was invalid; thus, the administrative law judge determined that employer was liable for a Section 14(e) penalty, 33 U.S.C. §914(e), the exact amount to be determined by the district director.

On appeal, employer challenges the administrative law judge's finding that it is the responsible employer. Employer additionally contends that the administrative law judge erred in holding it liable for a Section 14(e) assessment. Specifically, employer asserts that the administrative law judge erred in finding that the "excuse" granted by the district director is invalid. Employer further contends that the instant case is distinguishable from *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (5th Cir. 1990), *aff'g in part, part Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989) (*en banc*), because the excuse was granted four months before claimant filed his claim, rather than retroactively. Additionally, employer contends that even if it had not been excused, the concept of "replacement income" is not applicable in this case, so the Section 14(e) penalty should not apply. Claimant responds, urging affirmance of the administrative law judge's Section 14(e) assessment and decision that employer is the responsible employer.²

Employer initially challenges the administrative law judge's finding that it is the employer responsible for the payment of benefits to claimant. In the instant case, the administrative law judge implicitly invoked the Section 20(a), 33 U.S.C. §920(a), presumption. To rebut the presumption, employer must present facts to show that exposure to injurious noise did not cause claimant's hearing loss. Employer also may escape liability by showing that claimant was exposed to injurious stimuli while employed for a subsequent, covered employer. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *see also Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied* 429 U.S. 820 (1976). Herein, employer attempted to establish that

²We deny claimant's motion to strike portions of employer's arguments concerning Section 14(e); claimant's arguments in the motion will be considered as part of his response to employer's appeal.

claimant was exposed to injurious noise levels while working for two maritime employers subsequent to the termination of his employment with employer in 1972.

The responsible employer rule is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the employer responsible for a claimant's disability benefits is the last covered employer to expose the claimant to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Id.*, at 137; *Susoeff*, 19 BRBS at 149. In the instant case, the responsible employer is the last maritime employer to expose claimant to injurious noise stimuli prior to his date of awareness, the earliest possible date of which is the date of the first audiogram, July 29, 1987. Employer asserts that it is not the responsible employer because it is undisputed that claimant's subsequent work was maritime employment, and that claimant testified as to the level of noise exposure experienced while working for those subsequent employers.

During his deposition, claimant testified that he was exposed to noise while working for employers subsequent to 1972. Claimant's Deposition at 21-24. Claimant further testified, however, that he wore ear protection at all times while working for these subsequent employers. *Id.* at 22, 41-42. After setting forth claimant's testimony, the administrative law judge concluded that claimant was last exposed to harmful noise while working for employer and that his hearing loss thus arose in the course and scope of his employment. Decision and Order at 4. It is well established that all adjudicative and factfinding functions reside in the administrative law judge. *See Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380 (1990). Thus, an administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). The administrative law judge's finding, based upon claimant's testimony, that claimant was last exposed to harmful noise while employed by employer is rational and supported by substantial evidence. Employer here did not meet its burden of proving that claimant was exposed to injurious levels of noise in subsequent maritime employment. *See Avondale Shipyards*, 977 F.2d 191-92, 26 BRBS at 114-15 (CRT). Accordingly, the administrative law judge's finding that employer is the responsible employer is affirmed.

Additionally, employer, citing *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), argues that claimant must make his claim for disability benefits against potentially liable employers in the reverse order of his employment beginning with the most recent employer and proceeding backwards. In *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992), the Board specifically rejected this identical argument, noting, *inter alia*, that there is no precedent requiring that claimant file against potential responsible employers in a specific order. Thus, for the reasons set forth in *Lins*, we reject employer's argument and we affirm the administrative law judge's finding that employer is the responsible employer and is liable for claimant's 11.2 percent binaural hearing impairment.

Lastly, the precise arguments raised by employer regarding the excuse granted by the district director, the inapplicability of *Fairley*, *supra*, and the concept of "replacement income" have been

rejected by both the Board and the United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the present case arises. *See Ingalls Shipbuilding, Inc. v. Director, OWCP*, 976 F.2d 934 (5th Cir. 1992), *aff'g Benn v. Ingalls Shipbuilding, Inc.*, 25 BRBS 37 (1991); *see also Ingalls Shipbuilding, Inc.*, 898 F.2d at 1095, 23 BRBS at 67 (CRT). We therefore reject these specific allegations of error raised by employer, and we affirm the administrative law judge's finding that employer is liable for a Section 14(e) assessment.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge