BRB No. 91-2108

PETER VAUGHAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAHER TERMINALS, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Cornelius V. Gallagher (Linden & Gallagher), New York, New York, for self-insured employer.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees (90-LHC-0155) of Administrative Law Judge Ralph A. Romano 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant has worked as a longshoreman for various employers since 1954 where he was

exposed to loud noise. On June 1, 1987, claimant worked for this employer for five hours, driving automobiles off a ship, and he testified that he was exposed to loud noise from the lashing release of cars, the screeching of tires, and blowers and horns. Claimant's former co-worker, Michael Adducci, corroborated claimant's testimony that it was noisy on the ship. Employer's Director of Safety and Security, Edward Ponek, deposed that a normal conversation could be held while the cars were being unlashed and while the blowers were on although not if one were close to the blowers, that the horns were blown occasionally, and that the cars did not screech if driven at the right speed. The results of five audiograms were admitted into the record: two administered by the ILA Medical Center on May 28, 1985, showing a 57.19 percent binaural hearing loss and on August 26, 1986, showing a 58.4 percent binaural hearing loss; one administered by Dr. Brownstein on June 2, 1987, showing a 58.4 percent binaural hearing loss, one by Dr. Stingle on August 4, 1989, showing a 57.19 percent binaural hearing loss, and one by Dr. Yaeger on January 24, 1989, showing a 57 percent binaural hearing loss. Drs. Brownstein and Yaeger opined that claimant's hearing loss is work-related. Claimant first received a copy of an audiogram showing he had a hearing loss on June 2, 1987, from Dr. Brownstein. Claimant filed a claim for compensation for a hearing loss in October 1987.

After considering that claimant, Mr. Adducci, and Mr. Ponek addressed noise levels in employer's workplace, and that Drs. Brownstein and Yaeger opined that claimant's hearing loss is due to exposure to injurious noise at work, the administrative found that claimant was exposed to injurious noise on June 1, 1987. The administrative law judge also found that Dr. Brownstein's audiogram was the most acceptable of the 1987 and 1989 test results because it was the most complete and well-documented. Citing *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), for the holding that the responsible employer is the employer during claimant's last exposure to injurious stimuli prior to his receipt of an audiogram and accompanying report, the administrative law judge found that employer was the responsible employer because claimant last worked for employer prior to receiving the results of Dr. Brownstein's audiogram. The administrative law judge awarded claimant permanent partial disability benefits pursuant to Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 58.4 percent binaural impairment based on the audiogram administered by Dr. Brownstein.[1] The administrative law judge also found that employer's claim for Section 8(f) relief is barred by Section 8(f)(3). 33 U.S.C. §908(f)(1),(3) (1988).

On appeal, employer contends that the testimony of claimant and Mr. Adducci regarding noise in the workplace is not credible, and does not establish injurious noise exposure. Employer contends claimant worked for too short of a period of time on June 1, 1987, to have been exposed to injurious noise, and that claimant's exposure to noise during that time was infrequent or even non-existent based in part on the testimony of Mr. Ponek. Employer also contends that tests performed by the Occupational Safety and Health Administration (OSHA) in the 1970's showing the noise level

[1]The administrative law judge also awarded claimant interest and medical expenses pursuant to Section 7, 33 U.S.C. §907. In a Supplemental Decision and Order Awarding Attorney Fees and Disbursements, the administrative law judge awarded an attorney's fee of $9,250 and $2,353.40 in costs.

in its workplace was less than 85 decibels also establish that claimant was not exposed to injurious noise. Further, employer notes that claimant suffered a severe hearing loss prior to his receipt of the June 2, 1987, audiogram and that his hearing loss did not worsen under employer as reflected in the audiograms subsequent to 1985 which show minimal change.[2]

The Director responds, urging affirmance. He contends that claimant need only show exposure to injurious noise for employer to be liable, that claimant need not show a causal relationship between his injury and his noise exposure, and that claimant's testimony is credible. The Director also states that while OSHA standards sometimes may be relevant in occupational disease cases, *see Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich)*, 914 F.2d 1317, 1322, 24 BRBS 36, 42 (CRT)(9th Cir. 1990), because employer presented evidence of noise levels in the workplace from the 1970's, employer did not present sufficient evidence in support of its argument that its alleged compliance with OSHA standards precludes a finding of injurious noise exposure. Claimant has not responded to this appeal.

It is well-established that the employer or carrier responsible for paying benefits in an occupational hearing loss case is the last covered employer or carrier to expose claimant to injurious stimuli prior to the date upon which claimant becomes aware that he is suffering from an occupational disease arising out of his employment. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Subsequent to the issuance of the administrative law judge's decision, the Board overruled *Larson*, 17 BRBS at 205, and adopted the position of the United States Court of Appeals for the Ninth Circuit in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), that the responsible employer or carrier is the one on risk at the time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability. *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). In *Port of Portland*, the court held that receipt of the audiogram and accompanying report has no significance outside the procedural requirements of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913.

Employer's argument that the administrative law judge erred in holding it liable for claimant's benefits is rejected. Although the administrative law judge applied the legal standard set forth in *Larson*, 17 BRBS at 205, his ultimate determination that employer is liable for claimant's hearing loss benefits is consistent with *Port of Portland* and *Good*. Specifically, the administrative law judge credited the June 2, 1987 audiogram administered by Dr. Brownstein as determinative of claimant's disability, and he rationally determined that the testimony of claimant and Mr. Adducci establishes that claimant was exposed to injurious noise on June 1, 1987. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

[2]Dr. Brownstein deposed that his testing revealed that claimant's hearing had worsened, and that claimant could have been exposed to acoustic trauma between 1985 and 1987 despite the slight difference between the 1985 and 1987 audiograms. Cl. Ex. 5, p. 41. Dr. Yaeger deposed that there was no change in claimant's hearing condition between 1986 and 1989 and the differences in the audiograms could be normal variants. Empl. Ex. 10, p. 13, 14.

Thus, claimant's exposure during his employment on June 1, 1987 is the most recent exposure related to his compensable disability. *Good*, 26 BRBS at 163.

Employer's argument that compliance with OSHA standards establishes the noise levels were not injurious is rejected as employer presented no evidence of the noise levels at the time claimant was working for employer. Moreover, to establish employer's liability, it is not necessary for claimant to show that his hearing loss was aggravated while working for employer, *see Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988), and therefore Dr. Yaeger's opinion that the changes in the audiograms were insignificant does not undermine the administrative law judge's findings. Inasmuch as claimant worked for employer at the time of the most recent exposure to injurious stimuli which could have contributed to the hearing loss evidenced on the determinative June 2, 1987 audiogram, the administrative law judge's finding that employer is liable for claimant's occupational hearing loss benefits is affirmed as it is rational, supported by substantial evidence and in accordance with law.[3] *Good*, 26 BRBS at 163.

[3]Although employer filed a notice of appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, it did not address this issue in its petition for review and brief. Therefore, we affirm the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. *See Carnegie v. C & P Telephone Co.*, 19 BRBS 57 (1986).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge