BRB No. 92-1242

W. L. ADAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COOPER/T. SMITH STEVEDORING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

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

Douglas L. Brown (Armbrecht, Jackson, DeMouy, Crowe, Holmes & Reeves), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (90-LHC-2312) of Administrative Law Judge Richard D. Mills denying benefits 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 longshoreman since 1958, filed a claim against employer on January 27, 1987, for occupational hearing loss benefits based on the results of a November 14, 1986, audiometric examination administered by Dr. Sellers which revealed a 10.9 percent bilateral sensori-neural hearing loss consistent with noise exposure. Claimant's Exhibit 8. Subsequent hearing evaluations

performed by Dr. McDill on August 20, 1990, and by Judith B. Hoffman on October 8, 1990, revealed a moderate high frequency sensori-neural hearing loss and a mild sensori-neural hearing loss respectively, but no measurable impairment. Claimant's Exhibits 9 and 10. Claimant, who usually worked as a tow (fork-lift) operator, testified that on the last day he worked for employer, February 25, 1986, he worked in the hold of a ship until he suffered a broken leg. Claimant further testified that while working for employer that day he was exposed to loud noises from an overhead winch, power saws, and hammers. Tr. at 8-28.

In his Decision and Order, the administrative law judge initially noted that in order to be entitled to the Section 20(a), 33 U.S.C. §920(a), presumption,[1] claimant must allege an injury which arose out of, and in the course of, his employment. Without resolving the causation issue, the administrative law judge then noted that pursuant to *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955), the last employer to expose claimant to harmful stimuli is liable for the full amount of the award. He then determined that although claimant testified that he was exposed to very loud noise while working in the hold of the ship, claimant had offered "no convincing evidence" that the noise from the winch and saws was in fact, injurious, and that the noise surveys in evidence did not prove that this type of noise exposure was over 85 dba. The administrative law judge further concluded that although claimant proved that as a fork lift driver he was exposed to "injurious noise," employer was not the last employer to expose him to such noise inasmuch as claimant had testified that the last employer to expose him to fork lift noise was Strachan Shipping on February 24, 1986. Tr. at 19. The administrative law judge then determined that inasmuch as the evidence failed to establish that employer was the last maritime employer to expose claimant to harmful noise, the claim must fail and denied benefits accordingly. Decision and Order at 4.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in failing to accord him the benefit of the Section 20(a) presumption, in requiring that he affirmatively establish causation, and in finding that he was not exposed to injurious noise levels on the date he last worked for employer. Employer responds, urging affirmance of the administrative law judge's determination that it is not the last maritime employer to expose claimant to harmful noise, contending that claimant failed to introduce evidence sufficient to establish the existence of working conditions with employer which could have caused his injury. In the alternative, employer contends that assuming, *arguendo*, that the administrative law judge erred in failing to invoke the Section 20(a) presumption, this error is harmless because the administrative law judge considered all of the relevant evidence and his finding that claimant did not receive injurious noise exposure while working for employer on February 25, 1986, is rational and supported by substantial evidence.

We are unable to affirm the administrative law judge's denial of benefits in this case because he intermixed and confused the concepts of causation and responsible employer and as a result, erred in placing the burden of proof on claimant to affirmatively establish that employer was the last employer to expose him to injurious noise. The question of causation deals solely with whether claimant's injury is related to his employment as a whole and not to employment with a specific

[1]The parties stipulated that employer was claimant's last maritime employer before November 14, 1986, the stipulated date of injury. Joint Exhibit 1; Decision and Order at 2.

employer. The responsible employer rule, which comes into play once causation is established, is a judicially-created rule for allocating liability among employers in cases where an occupational disease develops after prolonged exposure to injurious conditions. *Cardillo*, 225 F.2d at 144-145. 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 Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984). A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to potentially injurious stimuli is all that is required. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992).

In establishing causation under the Act, claimant is aided by the Section 20(a) presumption. In order to be entitled to the Section 20(a) presumption, claimant bears the burden of establishing that he suffered an injury and that an accident or working conditions existed that could have caused the harm. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989). Contrary to the administrative law judge's analysis in this case, however, claimant is not required to introduce affirmative evidence establishing the existence of injurious working conditions with a particular employer to invoke the presumption. *See, e.g., Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 151-52 (1989). Rather, claimant need only establish the existence of working conditions during the course of his employment which could have caused the harm. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1990); *Everett*, 23 BRBS at 318. Once claimant establishes the two elements of his *prima facie* case, the Section 20(a) presumption operates to link the harm or pain with claimant's employment. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 295-96, 24 BRBS 75, 80 (CRT)(D.C. Cir. 1990).

In the present case, inasmuch as the three audiograms of record demonstrate that claimant suffers from a hearing loss,[2] and claimant established exposure to noise during the course of his employment, he has established both the injury and the working conditions element of his *prima facie* case. Consequently, we conclude that claimant is entitled to invocation of the 20(a) presumption as a matter of law. *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the Section 20(a) presumption is invoked, employer may be rebut it by producing evidence to show that claimant's employment did not cause, aggravate, or contribute to his injury. *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). In the present case, however, there is no evidence in the record sufficient to establish rebuttal; the only medical opinion which addresses the cause of claimant's hearing loss, that of Dr.

[2]Employer argues in its brief that claimant sustained no compensable injury, relying on the fact that two of the three record audiograms found no rateable hearing loss. Both audiograms, however, state that claimant has some degree of hearing loss, although the degree is not measurable. They are thus sufficient to establish an injury for purposes of Section 20(a) invocation. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993).

Sellers, specifically relates claimant's hearing loss to noise exposure. Claimant's Exhibit 8. Accordingly, on the facts presented, causation is established as a matter of law.

Inasmuch as claimant's hearing loss is noise-related, the last employer to expose him to potentially injurious noise levels is liable as the responsible employer; an actual causal relationship between the hearing loss and work on the last day claimant worked for employer is not necessary. *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, 596, 22 BRBS 159, 162 (CRT)(9th Cir. 1989). In *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed the parties' respective burdens of proof with regard to the issues of causation and determining the responsible employer. The Board stated that once claimant has demonstrated *prima facie* entitlement to benefits by showing that "he sustained physical harm and that conditions existed at work which could have caused the harm," there exists a presumption of a compensable claim. *Suseoff*, 19 BRBS at 151. Employer can rebut this presumption by showing that exposure to injurious stimuli did not cause the harm alleged. Employer may also escape liability by proving it is not the last employer to exposed claimant to injurious stimuli. The United States Courts of Appeals which have addressed this issue have agreed that this allocation of the burden of proof is proper. *See Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991); *see also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). Thus, employer in this case must prove it was not the last employer to expose claimant to injurious stimuli in order to avoid liability.

In the present case, inasmuch as employer stipulated that it was the last maritime employer before November 14, 1986, the stipulated date of claimant's injury, employer can only avoid liability by proving it was not the responsible employer under *Suseoff, i.e.,* by showing that it did not expose claimant to injurious noise at its facility. In determining that employer was not the responsible employer, the administrative law judge considered claimant's failure to offer convincing evidence that the noise from the winch and the saws was injurious and the noise surveys of record, which did not establish that the noise exposure claimant received was above 85 dba, the standard recognized by the Occupational Safety and Health Administration as injurious. Decision and Order at 4. In so concluding, however, the administrative law judge erred in placing the burden of establishing injurious exposure on claimant when, in fact, it is employer who bears the burden of proving that it did not expose claimant to injurious noise. Accordingly, we vacate the administrative law judge's responsible employer determination in this case and remand for him to reconsider this issue in light of the relevant evidence, placing the burden of proof properly on the employer consistent with *Avondale Industries* and *Suseoff*. *See Lins*, 26 BRBS at 65.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge