

THOMAS MCCANTS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BENDER SHIPBUILDING & REPAIR)	DATE ISSUED: _____
COMPANY, INCORPORATED)	
)	
and)	
)	
ALABAMA INSURANCE GUARANTY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

Michael Gillion (Gillion, Brooks & Hamby), 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 - Denying Benefits (90-LHC-2918) of Administrative Law Judge James W. Kerr, Jr., 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 worked as a welder for employer from January 13 through April 3, 1981.¹ Prior to

¹The administrative law judge found the testimony of employer's safety director, Harry Bodin, Jr., that claimant only worked for employer for two and one-half months, more persuasive than claimant's testimony that he worked for employer for one to one and one-half years. *See* Tr. at 18,

this time, claimant testified that he worked for other maritime employers. Tr. at 19. On September 29, 1988, claimant filed a claim under the Act against employer for a 23 percent noise-induced binaural hearing loss based on the results of an April 2, 1988, audiometric examination administered at the University of South Alabama Speech and Hearing Center. CX 7. Employer filed its Notice of Controversion on November 30, 1988. The case was referred to the Office of Administrative Law Judges for a formal hearing on August 9, 1990. A second audiometric examination, administered by Jim D. McDill, Ph.D., on June 21, 1991, revealed a 12.8 percent binaural impairment. EX 1.

In his Decision and Order, the administrative law judge found that claimant was entitled to the Section 20(a), 33 U.S.C. §920(a), presumption based on the aforementioned audiograms and claimant's testimony regarding exposure to industrial noise. He then noted that employer had offered the testimony of Mr. Bodin in support of rebuttal. Without specifically stating whether employer successfully established rebuttal of the presumption with regard to causation, the administrative law judge, after reviewing the evidence, credited Mr. Bodin's testimony and concluded that claimant was not exposed to industrial noise during the brief period he worked for employer. In addition, the administrative law judge noted that if claimant had worked in noisy areas, he would have been issued earplugs and earmuffs. The administrative law judge therefore concluded that claimant did not receive an injury under the Act while working for employer and denied the claim. Decision and Order at 4.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in concluding that the testimony of Mr. Bodin was sufficient to overcome the Section 20(a) presumption.² Employer responds, urging affirmance.

We are unable to affirm the denial of benefits in this case, as the administrative law judge's decision is not supported by substantial evidence or applicable law. Initially, the administrative law judge intermixed and confused the legal concepts relating to determining causation and the responsible employer. The question of causation deals solely with whether claimant's hearing loss is related to noise exposure in his employment as a whole, rather than to employment with a specific employer. The responsible employer rule comes into play once causation is established and is a judicially-created rule for allocating liability among successive employers in cases where an occupational disease develops after prolonged exposure to injurious conditions. *See 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

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²Although claimant also asserts that the administrative law judge erred in failing to resolve all factual doubt in his favor, the United States Supreme Court recently determined that the "true doubt rule" is invalid because it conflicts with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). *Director, OWCP v. Greenwich Collieries*, ___ U.S. ___, 114 S.Ct. 2251, 28 BRBS 43 (CRT) (1994).

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 *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board addressed the employer's burden of proof with regard to the issues of causation and the determination of the responsible employer. In *Suseoff*, the Board indicated that once claimant demonstrates *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. Employer can rebut this presumption by showing that exposure to injurious stimuli did not cause the harm alleged, *i.e.*, that claimant's hearing loss is not due to noise exposure in any employment, but is due to other causes. Employer may also escape liability by establishing that it is not the responsible employer; employer bears the burden of demonstrating that it is not the last employer covered by the Act to expose claimant to injurious noise. *Id.*, 19 BRBS at 151. *Accord Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In the present case, the administrative law judge properly found that claimant was entitled to invocation of the Section 20(a) presumption, as the two audiograms of record indicate that he suffers a hearing loss and claimant testified that he was exposed to loud noise while performing longshoring activities with various companies, including employer.³ *See Konno v. Young Brothers, Ltd.*, 28 BRBS 57 (1994); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Accordingly, we affirm the administrative law judge's finding regarding invocation of the Section 20(a) presumption of causation.

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). In the present case, the administrative law judge never evaluated the record evidence to determine whether it was sufficient to establish the lack of a causal nexus. Rather, he evaluated the record evidence only in terms of whether claimant was exposed to injurious noise levels during the brief period he worked for employer. Although the administrative law judge failed

³Claimant testified that while working for employer he was exposed to injurious noise from chipping guns and grinders. Tr. at 18. Claimant also testified that employer did not provide him with hearing protection. Tr. at 32. Finally, claimant testified that he was exposed to noise while working for previous longshore employers, but that he was provided with hearing protection during this work. Tr. at 19.

to consider rebuttal under Section 20(a), we need not remand for him to do so on the facts presented as neither Mr. Bodin's testimony, which relates solely to the conditions of employment at employer's facility, nor any other evidence in the record is sufficient to establish that noise exposure during the course of claimant's employment did not cause, aggravate, or contribute to his hearing loss. Accordingly, on these facts, we hold that causation is established as a matter of law. *See generally Bell Helicopter International, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13 (CRT)(8th Cir. 1984)

As claimant's hearing loss is work-related, the last employer to expose him to potentially injurious stimuli is liable as the responsible employer; an actual causal relationship between claimant's hearing loss and that employment is not necessary. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in 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). If the administrative law judge's determination that employer did not expose claimant to injurious noise is supported by substantial evidence, the result reached in this case can be affirmed as employer could not be held liable as the responsible employer. The administrative law judge's conclusion that claimant was not exposed to injurious noise while working for employer and that if he had worked in noisy areas he would have been issued earplugs and earmuffs, was based solely on Mr. Bodin's testimony. Upon reviewing Mr. Bodin's testimony, however, we agree with claimant that this testimony is insufficient to meet employer's burden of establishing that it did not expose claimant to injurious stimuli. Although Mr. Bodin contradicted claimant's testimony that he was exposed to noise from chipping guns, Tr. at 18, 20, testifying that these guns were not used during the time claimant worked for employer, Tr. at 35, Mr. Bodin conceded that claimant may have worked around grinders, needle guns, arch gouging, blowers, and sledge hammers. Tr. at 38-40. Moreover, while Mr. Bodin testified that in 1981 or 1982 employer began a hearing protection program which required that certain people, including those doing the work claimant alleged he performed, wear ear protection, Tr. at 36, 40-41, he also testified that prior to that time employer provided ear protection, but had no organized hearing conservation program. Tr. at 40-41. Inasmuch as claimant worked for employer between January and April 1981, Mr. Bodin's testimony cannot establish that employer's conservation program was in place at that time, as he consistently stated it was initiated either in 1981 or 1982. Thus, employer failed to definitively establish that its hearing protection program was in effect during claimant's tenure with employer through Mr. Bodin's testimony. Accordingly, the administrative law judge's finding that claimant was not exposed to injurious noise while working for employer must be reversed. The case is remanded for the administrative law judge to consider all remaining issues necessary to the resolution of the claim.

Accordingly, the administrative law judge's determination that claimant was not exposed to injurious noise while working for employer is reversed. His 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