BRB No. 97-1409

CECIL ECHAMENDI	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
MAERSK STEVEDORING COMPANY	)	
	)	
and	)	
	)	
SIGNAL MUTUAL ADMINISTRATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Frank B. Hugg, San Francisco, California, for Container Stevedoring Company.

B. James Finnegan (Finnegan, Marks & Hampton), San Francisco, California, for Maersk Stevedoring Company and Signal Mutual Administration.

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

HALL, Chief Administrative Appeals Judge:

Container Stevedoring Company (Container) appeals the Decision and Order Awarding Benefits (96-LHC-2364) of Administrative Law Judge Henry B. Lasky 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, a retiree, worked for 27 years as a longshoreman for various employers. On May 27, 1993, claimant was working for Container. Because of problems with his hearing, claimant consulted Dr. Johnson on that day. As a result of an audiogram, Dr. Johnson recommended that claimant purchase hearing aids, which claimant did on July 1, 1993, at a cost of $1,550. Claimant continued to work for various employers and last worked on January 28, 1994, for Maersk Stevedoring Company (Maersk) as a "top man" aboard ship loading and unloading containers. Claimant testified that on his last day he was exposed to a great deal of noise due to the presence of blowers and reefers aboard the ship. On September 25, 1995, February 25, 1997, and March 26, 1997, claimant underwent additional audiometric evaluations which revealed a binaural hearing loss.

In his Decision and Order, the administrative law judge initially determined that claimant's hearing loss is work-related and thus that claimant is entitled to benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13). The administrative law judge then found the May 27, 1993, audiogram determinative of the responsible employer issue as he determined this represented the onset of claimant's disability, and as he found that claimant's hearing loss was not aggravated by his subsequent noise exposure. As claimant worked for Container prior to the administration of this audiogram, it was found to be the responsible employer. The administrative law judge then calculated the extent of claimant's hearing loss by averaging the results of the three most recent audiograms, finding that the 1993 audiogram is invalid for purposes of determining the extent of claimant's hearing loss.[1] Based on these

[1]The administrative law judge found the 1993 audiogram invalid under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, as claimant's hearing was not tested at the 3,000 hertz level and as claimant was exposed to noise within 14 hours before the test. *See* 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441.

findings, the administrative law judge concluded that Container is the party responsible for paying claimant's permanent partial disability benefits for a 20.7 percent binaural impairment.

On appeal, Container challenges the administrative law judge's responsible employer finding.[2] Maersk responds, urging affirmance.

Container challenges the administrative law judge's finding that it is the employer responsible for paying claimant's compensation under the Act. Container specifically alleges that the administrative law judge misapplied *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), as he did not hold liable the last employer who exposed claimant to injurious stimuli prior to the audiogram determinative of claimant's disability. Container further argues that the administrative law judge erred in requiring that there be a demonstrated causal relationship between claimant's employment at Maersk and his hearing impairment.

[2]In its reply brief, Container requests that the Board hold oral argument on the issues presented in this case. We deny Container's motion as oral argument will not aid in the disposition of this case and as Container's request for oral argument was not submitted in the form of a separate motion. 20 C.F.R. §§802.305, 802.306.

The long-standing rule for allocating liability in an occupational disease case is that the responsible employer is the employer during the last employment in which claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been 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 *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," *Cordero*, 580 F.2d at 1337, 8 BRBS at 748, and that liability should fall on the employer on the risk at the time of the last injury causally related to the disability. In *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), the Ninth Circuit reviewed the issue of the responsible employer under *Cordero* in a hearing loss case and held that 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 840-841, 24 BRBS at 143-145 (CRT). The "determinative audiogram" is the one that is "used for purposes of calculating benefits." *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 962, 31 BRBS 206, 212(CRT) (9th Cir. 1998) (adopting this rule for purposes of determining the "time of injury" for calculating average weekly wage and referring to this rule as creating a bright line aiding the administrative process); *see also Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

In determining whether a "rational connection" exists between the exposure and the disability, it has long been acknowledged that an actual medical causal relationship need not be established between the exposure and the disability. In *Cardillo*, in discussing various methods of allocating liability, the court noted that Congress rejected a proposal that would hold an employer liable for its proportionate share of claimant's disability. By adopting the "last employer rule," the Second Circuit recognized that the last employer "would be liable

[3]On the facts of the case before it, the Ninth Circuit held in *Port of Portland* that a "rational connection" is missing if liability were imposed on Port of Portland since the determinative audiogram which served as the basis for claimant's claim pre-dated claimant's employment with that employer and thus no exposure at Port of Portland could have, even in theory, contributed to the hearing loss demonstrated on the determinative audiogram. *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT).

for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment'." *Cardillo*, 225 F.2d at 145. In following *Cardillo*, the Ninth Circuit has specifically held that a distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer, *Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989), and that there need not be a demonstrated medical causal relationship between a claimant's exposure and his hearing loss. *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT). Rather, a claimant's exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 31 BRBS 178 (CRT) (9th Cir. 1997).

In *Jones Stevedoring*, the Ninth Circuit recently addressed the responsible employer issue in a hearing loss case. The claimant, a long-time longshoreman, worked for Eagle Marine Services on October 14-15, 1989, reported ringing in his ears, and filled out an accident report. On October 18, 1989, the claimant worked one and one-half hours for Jones Stevedoring. He testified that this employment was noisy. An audiogram was administered on October 19, 1989, which was interpreted as showing a work-related hearing loss. The court affirmed the administrative law judge's reliance on the claimant's testimony that he was exposed to injurious noise in his employment on October 18. Jones Stevedoring then argued that it was impossible for the noise exposure on that day to have caused the claimant's hearing loss because a later audiogram showed no worsening of the claimant's hearing loss. The court again held that there need not be a demonstrated medical causal relationship between a claimant's exposure and his occupational disease, and that, as substantial evidence supported the administrative law judge's finding regarding exposure to noise at Jones Stevedoring, there was sufficient evidence that the exposure "had the potential to damage [claimant's] hearing." *Id.*, 133 F.3d 693, 31 BRBS at 186(CRT). Thus, as the last employer to expose claimant to injurious stimuli, Jones Stevedoring was held liable for the full extent of the hearing loss.

In the instant case, the administrative law judge relied upon the May 27, 1993, audiogram when determining the responsible employer. However, the administrative law judge unequivocally found the September 25, 1995, audiogram to be determinative for calculating the extent of claimant's compensable hearing loss.[4] Accordingly, pursuant to *Ramey* and *Port of Portland*, the last employer to expose claimant to potentially injurious noise prior to September 25, 1995, is the employer responsible in this case for paying claimant's benefits under the Act. *Ramey*, 134 F.3d at 962, 31 BRBS at 211-212(CRT); *Port of Portland*, 932 F.2d at 840-841, 24 BRBS at 143-145 (CRT).

[4]This is the first of the three audiograms administered after claimant retired. In determining the extent of claimant's hearing loss, the administrative law judge averaged the results of the three post-retirement audiograms because they did not differ significantly.

In finding that claimant was not exposed to "injurious" noise during his employment at Maersk, the administrative law judge primarily relied on the fact that all of the audiograms of record, including the 1993 audiogram, demonstrated roughly the same degree of loss, reasoning that this fact established that there was no injurious exposure subsequent to the date of the initial May 27, 1993, audiogram. The administrative law judge specifically stated that "there must be a rational connection between the employment and the contribution to the development and aggravation of the disability," and that such a connection does not exist if Maersk is held liable as claimant's hearing loss was not contributed to or aggravated by his employment at Maersk. Decision and Order at 7.

This reasoning is erroneous as a matter of law, in that whether a claimant incurs actual injury or aggravation as a result of noise exposure is not determinative of the existence of a "rational connection" to employment exposure and thus to employer's liability under the Act. As the court stated in rejecting a similar argument in *Jones Stevedoring*, 133 F.3d at 693, 31 BRBS at 186(CRT), "[t]he problem with this argument is that under the last responsible employer rule, liability falls on the employer covering the risk at the time of the most recent injurious exposure, even if there is not a demonstrated medical causal relationship between a claimant's exposure and his occupational disease." Thus all that is required is that claimant be exposed during his work for a particular employer to levels of noise which are potentially injurious and which could theoretically contribute to the hearing loss for that employer to be held liable. *Id.; Port of Portland*, 932 F.2d at 841, 24 BRBS at 143 (CRT); *see also Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163-164 (1992). The last employer to so expose claimant is liable for the full extent of the disability. *Cardillo*, 225 F.2d at 145.

In his decision, the administrative law judge explicitly determined that claimant was exposed to noise during his last employment with Maersk on January 28, 1994. The administrative law judge specifically credited claimant's direct testimony that he was exposed to noise on his last day of employment due to the presence of blowers and reefers. *See generally Ramey*, 134 F.3d at 954, 31 BRBS at 206 (CRT); *Jones Stevedoring Co.*, 133 F.3d at 692-693, 31 BRBS at 185-186(CRT). In contrast, the administrative law judge found that the testimony of Mark Simpson, the manager for Maersk, that any noise exposure would have been minimal, was speculative and unconvincing. Thus, a "rational connection" exists in this case between the hearing loss demonstrated on the determinative audiogram dated September 25, 1995, and claimant's last employment with Maersk. *See Jones Stevedoring*, 133 F.3d at 693, 31 BRBS at 186(CRT); *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT)*; Cardillo*, 225 F.2d at 145; *see generally Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997).[5] Consequently, based upon the administrative

[5]Moreover, we note that our decision is consistent with the decision reached in *Roberts*, as in both cases the date of the determinative audiogram which establishes

law judge's credibility determination, Maersk was the last employer to expose claimant to potentially injurious noise prior to September 25, 1995, and thus, is liable for claimant's benefits in this case. *Id.* We must therefore, as a matter of law, reverse the administrative law judge's determination that Container is the responsible employer and modify the decision to reflect that Maersk is liable for claimant's benefits in this case.

For the foregoing reasons, we disagree with our dissenting colleague that Maersk cannot be held liable because claimant's hearing loss did not progress after May 27, 1993. The fact that claimant's hearing was not actually aggravated or worsened by his employment at Maersk simply is irrelevant in this case, as Maersk last exposed claimant to injurious noise prior to the determinative audiogram. The series of cases cited herein, beginning with *Cardillo* and ending most recently with *Jones Stevedoring* and *Ramey*, makes it perfectly plain that an actual causal relationship between the last exposure and the disability need not be established. There need not be medical proof that the last exposure advanced the disability or worsened the condition for the last employer to expose claimant to be held liable. *Jones Stevedoring*, 933 F.3d at 693, 31 BRBS at 186 (CRT). In fact, in *Jones Stevedoring*, the court specifically rejected the employer's argument that it could not be held liable because the claimant's hearing loss did not worsen as a result of the exposure sustained in its employ. This is the same argument advanced by our colleague, and the argument similarly must fail herein.

In this regard, our dissenting colleague's reliance on *Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich)*, 914 F.2d 1317, 24 BRBS 36 (CRT) (9th Cir. 1990) is misplaced. In *Picinich*, the Ninth Circuit held that "minimal exposure to offensive stimuli at a place of employment is not sufficient to place responsibility on a covered employer in the absence of proof that exposure in such quantities had the potential to cause his disease." 914 F.2d at 1320, 24 BRBS at 39 (CRT). In its recent decision in *Jones Stevedoring*, the court explained that the *Picinich* standard requires, in effect, that an employer establish "'the absence of proof' that exposure to noise while working for [the last employer] had the potential to injure [the claimant]." *Jones Stevedoring*, 133 F.3d at 693, 31 BRBS at 186 (CRT)(emphasis added). That "absence of proof" is missing here, as it was in *Jones Stevedoring.* Although the doctors opined that claimant's hearing loss was not aggravated by his exposure after the May 1993 audiogram, none stated that the exposure at Maersk did not have the potential to cause claimant's hearing loss evidenced on the determinative audiogram. Thus, as the last employer to expose claimant prior to the determinative audiogram, Maersk must be held

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the amount of compensation due claimant is controlling for purposes of identifying the responsible employer. *Roberts*, 30 BRBS at 229.

liable under *Jones Stevedoring, Port of Portland* and *Cardillo.*

Accordingly, the administrative law judge's finding that Container is the party responsible for the payment of claimant's compensation benefits is reversed, and the decision is modified to reflect that Maersk is the employer responsible for claimant's benefits in this case. In all other respects, the administrative law judge's the Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to vacate the administrative law judge's decision holding Container Stevedoring Company liable for claimant's injury, and to impose liability upon Maersk Stevedoring.

The administrative law judge found that claimant had worked for many different companies as a longshoreman over a twenty-seven year period prior to his retirement in 1994, and that during the last fifteen years of his employment claimant was exposed to "a great deal of noise." Decision and Order at 3. At the request of his internist, claimant consulted Dr. Robert Johnson, an otolaryngologist, on May 27, 1993. An audiogram was performed and Dr. Johnson recommended hearing aids for which claimant paid $1,550. On the day before the audiogram claimant had worked for Container Stevedoring. Thereafter, on January 28, 1994, claimant spent his last day of work in the employ of Maersk Stevedoring, which the administrative law judge found exposed claimant to noise. Decision and Order at 4.

Claimant had three more audiograms. The same person who administered the 1993

audiogram administered another on September 25, 1995. It showed a 22.5 percent binaural hearing loss as calculated under the AMA *Guides*. On behalf of Container Stevedoring Company, Dr. David Schindler administered an audiogram on February 27, 1997 and calculated a 21 percent binaural hearing loss under the AMA *Guides*. Finally, on March 26, 1997, at the request of Maersk Stevedoring, Dr. David Manace conducted an audiogram on claimant and diagnosed an 18.7 percent binaural hearing loss pursuant to the AMA *Guides*.

The administrative law judge found that Drs. Johnson, Schindler, and Manace are all Board-certified otolaryngologists. Based upon their testimony, he determined that the 1993 audiogram was a valid measurement of claimant's hearing loss, notwithstanding the fact that it did not comply with the AMA *Guides* and therefore could not be used to calculate claimant's hearing loss under the Longshore Act. *See* 33 U.S.C. §908(c)(13)(E); Decision and Order at 6. All three doctors concluded that claimant's hearing loss did not progress after May 27, 1993. Tr. at 143. The administrative law judge summarized the evidence as showing that the 1993, 1995 and 1997 audiograms were "essentially the same." Decision and Order at 4. In fact, Container's expert, Dr. Schindler, stated repeatedly that claimant's hearing had improved since May 27, 1993. Tr. at 133, 137, 138. The administrative law judge concluded: "The evidence is uncontradicted that notwithstanding claimant's exposure to noise while last employed by Maersk Stevedoring Company, it did not aggravate, cause or add to claimant's binaural hearing loss which was manifest in 1993." Decision and Order at 7.

Because the 1993 audiogram did not comply with the AMA *Guides*, which are mandatory under 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441(d), the administrative law judge held that the 1995 audiogram must be considered the audiogram determinative of claimant's hearing loss. But he held Container liable for payment of claimant's benefits even though Maersk was the last covered employer to expose claimant to industrial noise prior to the 1995 audiogram. The administrative law judge properly applied the teaching of the United States Courts of Appeals for the Ninth Circuit in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 840, 24 BRBS 137, 143 (CRT) (9th Cir. 1991), *aff'g in part and rev'g in part Ronne v. Jones Oregon Stevedoring Co.,* 22 BRBS 344 (1989), which held that "liability rest[s] on the employer covering the risk at the time of the most recent injurious exposure related to the disability." (emphasis in original). Decision and Order at 6. In *Port of Portland*, the court overturned the Board's decision holding liable the last employer which had exposed claimant to industrial noise. The court reasoned that because the determinative audiogram was administered prior to claimant's exposure by that employer, it could not have contributed to the disability for which claimant sought compensation. Similarly, the evidence in the case at bar establishes that claimant's exposure by Maersk did not contribute in any way to his disability, hence, the administrative law judge ruled that Maersk's exposure was not related to the hearing loss measured on claimant's audiograms. The administrative law judge held Container liable because it was the employer "at the time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability." Decision and Order at 6 (citation omitted).

In reversing the administrative law judge's decision, the majority relies upon the principle that "a claimant's exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard," citing *Jones Stevedoring Co. v. Director, OWCP*, 133 F.2d 683, 31 BRBS 178 (CRT)(9th Cir. 1997). Decision and Order at 4-5. That is not, however, what the Ninth Circuit stated in *Jones*: "Under the last employer rule, liability falls on the employer covering the risk at the time of the most recent exposure related to the disability. *Port of Portland*, 932 F.2d at 842." *Jones Stevedoring Co.,* 133 F.3d at 692, 31 BRBS at 185 (CRT). The court upheld the administrative law judge's imposition of liability on Jones because it was the last employer on the risk prior to the audiogram and substantial evidence supported the administrative law judge's finding that it had exposed claimant to injurious levels of noise.

In *dicta,* the *Jones* court stated:

> [U]nder the last responsible employer rule, liability falls on the employer covering the risk at the time of the most recent injurious exposure, even if there is not a demonstrated medical causal relationship between a claimant's exposure and his occupational disease.

133 F.3d at 693, 31 BRBS at 186 (CRT). The majority repeatedly emphasizes the point that a causal relationship need not be established in order to hold the last employer liable. The court, however, did not hold that the last covered employer would still be liable if uncontradicted medical evidence established that the last employer's exposure did not contribute to or aggravate claimant's injury. That is the administrative law judge's finding in the case at bar which Container does not dispute on appeal. Decision and Order at 7. Contrary to the majority's assertion, the employer in *Jones* did not advance the same argument as Maersk. Jones argued that its minimal exposure of claimant to injurious stimuli is insufficient to hold it liable for claimant's hearing loss. The court rejected this argument because substantial evidence showed that claimant's exposure at Jones had the potential to injure claimant. Unlike Jones, Maersk argues that it has proven that it did not injure claimant and for that reason should not be held liable. Since Maersk has proven that it did not contribute to or aggravate claimant's hearing loss, it would be irrational to hold Maersk liable on the basis that its exposure had the potential to injure claimant. Nevertheless, that is the majority's holding.

Because the noise exposure from Maersk did not contribute in any way to claimant's injury, the administrative law judge properly determined that there is no "rational connection" between the last employer and the disability, hence, no basis on which to impose liability, according to the teaching of the Ninth Circuit in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (CRT) (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Decision and Order at 7. In *Cordero*, the Ninth Circuit adopted the *Cardillo* rule:

> [T]he employer during the last employment in which the 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.

Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir.) *cert. denied*, 350 U.S. 913 (1955); *Cordero,* 580 F.2d at 1337, 8 BRBS at 749. The *Cordero* court held that the rule satisfies the constitutional requirements of equal protection and due process because it requires a "rational connection" between the last employer and a "contribution to the development and aggravation to the disease" for which employer is held liable. *Cordero,* 580 F.2d at 1336-1337, 8 BRBS at 748. Applying the rationale of *Cordero* to the facts of the case at bar, one must conclude that the majority's decision is unconstitutional because it holds Maersk liable when there is no "rational connection" between its exposure and claimant's disability.

The Ninth Circuit spoke even more plainly about the proper application of the *Cardillo* rule in *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1287, 16 BRBS 13, 18 (CRT) (9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984). The court explained:

> The last covered employer rule means, plainly and simply, that the last employer covered by the LHWCA who causes or contributes to an occupational injury is completely liable for that injury. (emphasis supplied).

It is essential that the employer which is held liable either caused or contributed to the injury. The Ninth Circuit demonstrated this point in *Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich),* 914 F.2d 1317, 24 BRBS 36 (CRT) (9th Cir. 1990), in which the court overruled the Board's decision in *Picinich v. Lockheed Shipbuilding,* 22 BRBS 289 (1989), holding that the last covered employer was liable because it had exposed claimant to "injurious stimuli." The court affirmed the administrative law judge's determination that because the level of asbestos at the last employer did not exceed the federally prescribed limit, the administrative law judge could infer that it was non-injurious and for that reason the last employer could not be held liable. The case at bar is even more compelling because Maersk Stevedoring presented uncontradicted medical evidence that its noise exposure did not contribute to or aggravate claimant's hearing loss. But the majority proposes to repeat the Board's mistake in *Picinich,* by holding Maersk liable because it exposed claimant to "injurious stimuli," even though it did not contribute to claimant's injury. Applying the various, last covered employer tests to the facts of this case, the administrative law judge's decision should be affirmed that Maersk, the last covered employer to expose claimant to noise is not liable for the hearing loss claimed, rather Container, which is undeniably the last employer to have contributed to claimant's hearing loss, is liable: because the evidence affirmatively established that Maersk's exposure did not "cause or contribute" to the hearing loss for which claimant sought compensation (*Black*); because Maersk's exposure was not "related to" the hearing loss for which claimant sought compensation (*Port of Portland*); because there was no "rational connection" between Maersk's exposure and the hearing loss for which claimant sought compensation (*Cordero*), and for that reason, imposition of liability on Maersk would violate the Constitution as a denial of property without due process of law (*Cordero)*.

REGINA C. McGRANERY
Administrative Appeals Judge