BRB Nos. 99-0560
and 99-0560A

LAWRENCE GLIMBERG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES, LIMITED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
MATSON TERMINALS, INCORPORATED	)	
	)	
Employer-Respondent Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order-Award of Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Richard A. Nielsen (Le Gros Buchanan & Paul), Seattle, Washington, for self-insured employer Eagle Marine Services, Ltd.

John P. Hayes (Forsberg & Umlauf, P.S.), Seattle, Washington, for employer Matson Terminals, Inc.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Eagle Marine Services, Limited (Eagle Marine) appeals, and Matson Terminals, Incorporated (Matson Terminals) cross-appeals, the Decision and Order-Award of Benefits (96-LHC-2609) of Administrative Law Judge Ellin M. O'Shea

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 longshoreman for almost 31 years. In 1988 he became an equipment operator, operating semi trucks, forklifts, side picks and top picks.[1] He testified that in the early 1990s he found many waterfront jobs noisy, and since 1993, with better technology, less so. Tr. at 75. *See also* Matson Exs. 20, 21 (claimant's depositions). The parties agree that based on audiometric testing administered on April 27, 1993, claimant sustained a 6.2 percent binaural hearing loss.[2] Prior to the April 27, 1993 audiogram claimant worked for various employers; the day before the audiogram he worked for Eagle Marine performing a strad job, involving moving six containers onto semi trucks. Claimant told Dr. Levinthal during the April 27, 1993 visit that his longshore work involved much noise exposure since 1967 and that he had last worked near noise "about four days ago." EMS Ex. 2. Claimant filed a claim for noise-induced hearing loss under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), against five longshore employers.

In her Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a) presumption, 33 U.S.C. §920(a). She found that claimant's demonstrated hearing loss along with his testimony, his representation to Dr. Levinthal, and testimony of other witnesses was sufficient to establish a *prima facie* case against all of the joined employers. She then found that Eagle Marine was the last covered employer to expose claimant to injurious stimuli on April 26, 1993, and is thus the responsible employer.[3]

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[1]Claimant deposed in 1997 that lately he had worked mainly as a strad operator who picks containers off trucks and stacks them and puts them on trucks for delivery; in 1993 he performed more tractor/semi/dock work, which involved delivering containers to ships and receiving them off ships to deliver to the pick driver. Matson Ex. 20 at 5.

[2]There is no dispute regarding claimant's entitlement to 12.52 weeks of compensation benefits under Section 8(c)(13), 33 U.S.C. §908(c)(13), at a rate of $721.14, plus interest and any related required future medical benefits, including hearing aids.

[3]Citing judicial efficiency, the administrative law judge found Matson Terminals to be the "second last responsible employer," based on noise exposure on April 24,

1993. The administrative law judge also found that claimant was exposed to injurious workplace noise by Jones Washington Stevedoring on April 22, 1993, and Stevedoring Services of America on April 21, 1993. Decision and Order at 14. She ordered that Marine Terminals, the most remote employer to have exposed claimant to noise, be dismissed from the proceeding. *Id.*

On appeal, Eagle Marine contends that the administrative law judge erred in finding it to be the responsible employer, arguing that claimant was not exposed to injurious stimuli during his last day of employment prior to the date of the audiogram, which occurred at Eagle Marine. Claimant responds, urging affirmance. Eagle Marine replies, reiterating its arguments. Matson Terminals has filed a protective cross-appeal, arguing that should the Board not affirm the administrative law judge's finding that Eagle Marine is the responsible employer, Matson should not be held liable, as it did not expose claimant to injurious stimuli.

First, to the extent that Eagle Marine argues that the administrative law judge erred in finding that claimant established his *prima facie* case, asserting that claimant did not establish that his hearing loss was caused by his employment with Eagle Marine, it confuses the issues of causation and responsible employer. *See Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998). The question of causation concerns whether claimant has an injury, in this case hearing loss, which arises out of his employment. *See* 33 U.S.C. §902(2). That issue turns on whether his hearing loss is related to his exposure to loud noise in the workplace or to some other cause. Once it is determined that claimant's hearing loss arises out of his employment exposures as a whole, then the responsible employer analysis is applied, involving whether a specific employer exposed claimant to injurious stimuli. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

As claimant here established that he was exposed to noise while working for his various employers, the administrative law judge properly invoked the presumption that his condition is causally related to his employment pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1990). *See generally Ramey v. Stevedoring Services of America,* 134 F.3d 954, 31 BRBS 206 (CRT)(9th Cir. 1998). As the Section 20(a) presumption was invoked, the burden shifted to employers to rebut it with substantial evidence that claimant's hearing loss is not related to work-place noise exposure. In addition, a specific named employer may escape liability by proving it was not the last covered employer to expose claimant to potentially injurious noise. *See 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). In this case, there is no evidence that claimant's hearing loss is due to other causes than work-place noise exposure. Thus, Section 20(a) is not rebutted, and causation under Section 2(2) of the Act is established.

The last covered employer to expose claimant to potentially injurious stimuli prior to the date of the determinative audiogram is liable as the responsible employer. *See Port of Portland v. Director, OWCP,* 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991); *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13

(CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144-145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Contrary to Eagle Marine's contention, as it is claimant's last employer prior to date of the 1993 audiogram, under *General Ship* and *Suseoff,* it bears the burden of proving it is not the responsible employer. In order to do so, Eagle Marine must establish either that while in its employ claimant was not exposed to loud noise in sufficient quantities to have the potential to cause his hearing loss or that he was exposed to loud noise while working for a subsequent covered employer.[4] *See Avondale Industries,* 977 F.2d at 186, 26 BRBS at 111 (CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). *See generally Todd Shipyards Corp. v. Director, OWCP [Picinich]*, 914 F.2d 1317, 24 BRBS 36 (CRT)(9th Cir. 1990).

Eagle Marine relies solely on claimant's testimony, arguing that claimant testified that he worked at Eagle Marine for only 20 minutes on April 26, 1993, and that he told Dr. Levinthal at the April 27 audiometric testing that he was last exposed to a noisy environment four days before. Employer also alleges that claimant was told to avoid a noisy environment for a 24-hour period prior to administration of the testing and that he complied. Employer maintains that Ms. McDaniel, the expert audiologist, stated that for noise to be injurious for the alleged 20 minutes claimant worked, it would have to be at the jackhammer-operator level and that claimant would be able to tell if the noise was that loud.

We affirm the administrative law judge's finding that Eagle Marine is the responsible employer, as the administrative law judge rationally discredited claimant's testimony as to the duration of his work that day. The administrative law judge reasoned that claimant's testimony, which was taken in 1997-1998, was generalized about the noise levels of the particular equipment he operated as well as the surrounding noise during the period at issue, April 1993. While finding that on April 26, 1993, claimant's work for Eagle Marine was limited in length, she did not believe that claimant could have completed the tasks he testified he performed that day in only twenty minutes. The administrative law judge also noted he was paid for nine hours of work. The administrative law judge fully discussed the testimony of Ms. McDaniel, noting that she testified that she is amazed by the variety of interpretations people have as to whether a noise is loud or not and that this is certainly a subjective matter, Tr. at 37, and concluding this testimony could therefore not establish claimant was not exposed to injurious noise on his last day of work.

[4]There is no allegation in this case that a subsequent longshore employer is liable.

The administrative law judge thus fully considered the relevant evidence regarding claimant's noise exposure on his last day of work. Her finding that Eagle Marine did not establish that claimant was not exposed to potentially injurious stimuli while he worked for that employer is rational and within her discretion as fact-finder. As employer thus did not meet its evidentiary burden, we affirm the administrative law judge's finding that Eagle Marine is the responsible employer.[5] *See General Ship Service*, 938 F.2d at 960, 25 BRBS at 22 (CRT); *Lins,* 26 BRBS at 62. We therefore affirm the administrative law judge's award of benefits to claimant, payable by Eagle Marine as the responsible employer.[6]

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[5]Eagle Marine argues that the administrative law judge's discrediting of claimant's testimony concerning the brevity of time claimant worked for it on April 26, 1993, leaves an evidentiary "vacuum" as there is no other testimony or evidence establishing possible exposure at that site on that date. Eagle Marine thereby essentially concedes its failure of proof. The administrative law judge found claimant offered sufficient evidence of noise exposure at work, and Eagle Marine failed to offer credible evidence that exposure to noise at its facility was not potentially injurious. *See Jones Stevedoring Co. v. Director, OWCP [Taylor],* 133 F.3d 683, 693, 31 BRBS 178, 186 (CRT)(9th Cir. 1997).

[6]We reject Eagle Marine's allegation that the administrative law judge's decision and order does not comport with the Administrative Procedure Act (APA), as she analyzed and discussed the relevant evidence and identified the evidentiary basis for her conclusions. 5 U.S.C. §557(c)(3)(A). *See, e.g., Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v Matson Terminals, Inc.*, 21 BRBS 252 (1988).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge