BRB No. 98-1205

WARREN L. JOSEPH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McDERMOTT, INCORPORATED	)	DATE ISSUED: May 27, 1999
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis R. Stevens (Gibbens, Blackwell & Stevens), New Iberia, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-2278) of Administrative Law Judge Clement J. Kennington 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 for employer in various capacities from February 21, 1968, until his retirement on April 1, 1987. On March 14, 1996, claimant underwent an audiometric examination which revealed an 8.4 percent binaural impairment. Thereafter, on March 21, 1996, claimant filed a claim for benefits under the Act for a work-related hearing loss.

In his Decision and Order, the administrative law judge first found that claimant timely filed his claim under Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D). He next found that since claimant spent approximately seven percent of his time performing "load-outs" on barges,[1] he was a covered employee under Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge also found that causation had been established pursuant to the Section 20(a) presumption, based on claimant's demonstrated hearing loss, the parties' stipulation that claimant was exposed to work place noise which could have caused the loss, and the failure of employer to provide rebuttal evidence. 33 U.S.C. §920(a). Based on claimant's audiometric testing of March 18, 1996, the administrative law judge found that claimant suffers from a binaural hearing impairment of 8.4 percent, and thus awarded claimant permanent partial disability compensation pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13), based upon an average weekly wage of $318.17.

On appeal, employer challenges the administrative law judge's determination that claimant satisfied the Act's status requirement, contending that claimant participated in the load-out process only on an intermittent basis. Employer next asserts that the administrative law judge erred in finding causation established, as claimant was not exposed to loud noises while performing work covered under the Act. Employer also alleges that claimant's claim is time-barred as he knew he had a work related hearing loss in 1985. Claimant has not responded to this appeal.

[1]Employer's business includes the fabrication of structures such as jackets, decks and pilings, used in offshore oil drilling; a load-out involves loading one of these structures onto a barge for transportation to an offshore location.

Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. §902(3)(1994). In order to be covered under the Act, a claimant must satisfy both the status requirement of Section 2(3) of the Act, and the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a)(1994). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northwest Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Moreover, an employee is engaged in maritime employment if he spends "at least some of his time in indisputably covered activities." *Caputo*, 432 U.S. at 249, 6 BRBS at 150. A claimant's time need not be spent primarily in longshoring operations but must be more than episodic or momentary. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The load-out process is an indisputably longshoring operation and a claimant's participation in it on an as-needed basis is sufficient to confer coverage under the Act. *See Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998); *Thornton v. Brown & Root, Inc.,* 23 BRBS 75 (1989). In this case, employer stipulated that claimant spent seven percent of his overall time on this task.[2]

On appeal, employer does not challenge the administrative law judge's finding that claimant participated in load-outs while employed by employer and that this is an activity covered under the Act. Employer maintains, however, that claimant did not perform the load-out operation on a regular basis, and that his participation in this work was sporadic and momentary. Employer contends that load-out operations were not part of claimant's regular duty assignments, and that the load-out is in itself not a regular activity, because the length of time to complete a deck section or jacket section varies with the complexity and size of the structure being fabricated. This case is similar to *Zeringue,* 32 BRBS at 277, wherein claimant used a bulldozer to assist in load-out operations approximately every two months in one yard, and every three to four months at another. As in the present case, in addition to claimant's testimony regarding his participation in load-out operations, the parties stipulated that claimant performed load out operations approximately 6.84 percent of this time over a nine year period while employed with employer. The Board affirmed the administrative law judge's finding that claimant met the status requirement, since claimant participated in indisputably maritime activities, load-out operations, as part of his regular duty assignments, even though he did not participate in every load-out, and the load-outs occurred infrequently, because claimant's participation in the load-

[2]Due to this stipulation, employer's argument that claimant's testimony as to how much time he spent on load-outs was disjointed and inconsistent, is moot.

outs was more than episodic, momentary, or incidental to non-maritime work. For the reasons stated in *Zeringue,* the administrative law judge's finding that claimant has satisfied the status requirement is affirmed. *See also Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994); *Levins v. Benefits Review Board,* 724 F.2d 4, 16 BRBS 24 (CRT)(1st Cir. 1984).

Employer next challenges the administrative law judge's causation finding. Employer contends that claimant was not exposed to injurious noise while performing load-out work, but rather in other areas of the facility where noise levels were much higher. Employer argues that should the Board affirm that claimant established status, it should be held responsible for only seven percent of the hearing loss claimant sustained, corresponding to the seven percent of maritime work claimant performed, and not for the portion of the loss which occurred when he was exposed to loud noise during the 93 percent of his employment performing non-covered work in other areas.

We reject this argument. The parties stipulated that claimant was exposed to injurious noise at employer's facility. Even if claimant was also exposed to noise while working in non-maritime employment, it does not affect claimant's entitlement to benefits under the Act. *See Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied,* 454 U.S. 1080 (1981); *Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996). The suggestion of apportionment in cases where claimant was exposed to injurious stimuli in both a covered and non-covered situs has previously been rejected. *See Fulks*, 637 F.2d 1008, 12 BRBS 975; *Meardry*, 30 BRBS 160.

To the extent that employer's argument relates to causation rather than coverage, it is rejected as well. Under Section 20(a) claimant does not have to show actual causation. Once the Section 20(a) presumption linking an employee's injury with his employment is invoked, the employer has the burden of rebutting the presumption. To do so in this case, employer must present facts to show that claimant's hearing loss is not related to exposure to noise. *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). The existence of claimant's hearing loss here is not challenged. Further, employer has stipulated to the fact that conditions existed at its facility which could have caused the hearing loss. *See, e.g.*, *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Sinclair v. United Food and Commercial Workers,* 23 BRBS 148 (1989); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Accordingly, as employer does not dispute the administrative law judge's finding that it did not establish rebuttal, we affirm the administrative law judge's finding that claimant established causation.

Employer finally asserts that the claim was untimely filed in this case and that the Section 13 statute of limitations should have commenced running on May 9, 1985, when Dr. Istre, an audiologist, conducted audiometric testing on claimant which showed a binaural hearing loss. Employer contends that Dr. Istre explained to claimant that his hearing loss resulted from employment with employer and advised him to use hearing protection, and that claimant conceded that he was aware of his hearing loss at that time. Section 8(c)(13)(D) of the Act provides that in claims for a loss of hearing, the time periods for giving notice and filing a claim under Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, do not commence "until the employee has received an audiogram, with the accompanying report thereon, which indicates that the employee has suffered a loss of hearing." 33 U.S.C. §908(c)(13)(D)(1994). *See Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995).

Employer bears the burden of establishing that the claim was not timely filed pursuant to Section 20(b), 33 U.S.C. §920(b). Employer concedes that claimant was not provided with an accompanying report at the time that he allegedly saw copies of audiograms conducted in 1985 and was informed by Dr. Istre that his hearing loss was work-related. Accordingly, as there is no evidence of record sufficient to establish that claimant was provided with an audiogram with accompanying report at any time prior to March 18, 1996, we affirm the administrative law judge's finding that the claim filed on March 21, 1996, was timely filed. *See generally Bridier*, 29 BRBS at 89; *Horton v. General Dynamics Corp.*, 20 BRBS 99, 102 (1987); *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge