BRB No. 93-1191

JAMES S. PRATT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION CORPORATION	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANIES	)	
	)	
Carrier-Respondent	)	
	)	DATE ISSUED:
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision Upon Motion for Reconsideration of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

Ronald W. Lupton (Stinson, Lupton & Weiss, P.A.), Bath, Maine, for claimant.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for self-insured employer.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for Commercial Union Insurance Companies.

Daniel Rapaport (Preti, Flaherty, Beliveau & Pachios), Portland, Maine, for Birmingham Fire Insurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order and Decision Upon Motion for Reconsideration (92-LHC-1415 and 92-LHC-1416) of Administrative Law Judge Eric Feirtag 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 if they 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 the pipe shop between 1974 and March 1990 where he was exposed to loud noise. The parties stipulated and the administrative law judge found that claimant suffers from a 14.7 percent hearing impairment. Commercial Union Insurance Companies (Commercial Union) was at risk from January 1, 1963 to February 28, 1981, Liberty Mutual Insurance Company was at risk from March 1, 1981 to August 31, 1986, Birmingham Fire Insurance Company (Birmingham Fire) was at risk from September 1, 1986 to August 31, 1988, and thereafter employer was self-insured. Claimant's pre-employment audiogram in 1974 demonstrated some degree of permanent hearing loss. CX 16a, 25 at 5. Claimant also underwent audiometric testing in 1982, 1983, 1989 and 1991.

The administrative law judge denied claimant's claim, finding that claimant's hearing loss is not work-related. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's hearing loss is work-related, but found it rebutted. The administrative law judge relied on Dr. Dixon's December 14, 1982 opinion that there had been "no significant change" in claimant's condition in 1982 attributable to noise induced hearing loss since February 1974, and Dr. Haughwout's 1991 opinion that claimant's condition above 3000 Hz represented a level of impairment that was essentially identical to the results of the 1982 audiogram. The administrative law judge also relied on Dr. Haughwout's opinion that claimant's hearing loss in the low frequencies, which he defined as from 500 to 3000 Hz, was not due to noise exposure. The administrative law judge concluded that since claimant's low frequency loss is not due to noise exposure, and there was no deterioration since 1982 with respect to the high frequency status, employer established the absence of a causal relationship between claimant's hearing loss and his employment. The administrative law judge summarily denied claimant's Motion for

Reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption, as the evidence of record does not rule out noise exposure as a cause of or contributor to claimant's hearing loss. Self-insured employer, Commercial Union and Birmingham Fire respond, urging affirmance.

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 Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45, 46-47 (1996); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89 (1995); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 78 (1991), *aff'd sub nom. Insurance Co. 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). Under the aggravation rule, if an employment related injury contributes to, combines with, or aggravates an underlying condition, the entire resultant condition is compensable; the relative contributions of the work-related injury and the prior condition are not weighed. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995); *Epps v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 1 (1986); *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

In the instant case, we hold that the administrative law judge's finding that employer rebutted the Section 20(a) presumption is not based on substantial evidence, and must be reversed. Claimant began employment with a degree of permanent loss, and now has a 14.7 percent hearing loss. Under these circumstances, employer must demonstrate that the current loss is not due to an employment-related aggravation of the prior condition or the combination of work-related and non work-related causes; as there is no apportionment in Longshore cases, the entire hearing loss is compensable if due in part to employment noise. *See generally Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982). The administrative law judge erred in finding that employer had met its burden. The administrative law judge erred in relying on Dr. Dixon's opinion that there was "no significant change" in claimant's hearing condition due to noise from 1974 to 1982 to establish rebuttal, because Dr. Dixon's opinion does not rule out the existence of some noise-induced hearing loss during that time period. CU Ex. 2; *Bridier*, 29 BRBS at 90. Moreover, Dr. Haughwout's 1991 opinion cannot establish rebuttal of the Section 20(a) presumption. He stated that claimant's hearing loss at 500-3000 Hz is "probably" due to some cause other than noise exposure. He does not rule out that claimant's hearing loss at the low frequencies was aggravated by his employment exposure to noise. Moreover, Dr. Haughwout stated claimant's hearing loss at frequencies above 3000 Hz is partly due to work-related noise exposure. CX 22, 25 at 7. As at least part of claimant's hearing loss is related to noise exposure, employer is liable for the entire hearing loss. *Epps*, 19 BRBS at 2. As there is no evidence of record that establishes that no part of claimant's hearing loss was caused or aggravated by his employment, the Section 20(a) presumption is not rebutted and causation is established as a matter of law. *Bridier*, 29 BRBS at 90. We therefore reverse the administrative law judge's denial of benefits, and remand the case for the administrative law judge to address the remaining issues.

Accordingly, the administrative law judge's Decision and Order and Decision Upon Motion for Reconsideration are reversed, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge