BRB No. 93-2008

VIRGILIO BONILLA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL TERMINAL OPERATING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

James R. Campbell, New York, New York, for claimant.

Christopher J. Field (Gallagher & Field), New York, New York, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Benefits (92-LHC-2818) of Administrative Law Robert D. Kaplan 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 various companies, including employer, as a holdman from December 1964 until September 5, 1987. Claimant officially retired from longshore work in June 1989, and he filed a claim for a work-related hearing loss on December 5, 1991, naming employer as the responsible employer. Claimant was employed by employer intermittently for five days from early January 1987 to September 5, 1987; claimant's last day of employment for employer was preceded by two days of employment at two other longshore companies. Employer's work records show claimant worked for employer for four hours on September 5, 1987, in New Jersey. Claimant deposed that throughout his longshore employment he was exposed to loud noise while working inside ships and that the noise was caused by the ship's winches, "hilo" machines, and the sound of

water striking against the ships. Claimant also deposed that there were no "hilos" present on September 5, and only the winch [used to bring the containers aboard the ship], which made "quite a bit of noise" or "a lot of noise," was operational. Tr. at 19, 29. Claimant deposed that he only worked a few hours on September 5 although he also stated the day was "very, very long." Emp. Ex. 7 at 9. Claimant stated he could not remember the specific work he performed on September 5 but knew he worked unloading bananas. Claimant also stated that on September 5 he worked inside the ship and on the deck counting containers and that he unhooked the containers to let them down.

The administrative law judge found that claimant suffers from a binaural hearing loss of 7.81 percent, but that claimant's deposition testimony was too vague and contradictory to establish that claimant was exposed to injurious noise on September 5, 1987, and therefore the Section 20(a), 33 U.S.C. §920(a), presumption was not invoked. The administrative law judge discounted claimant's testimony that a winch was operating on September 5 because claimant testified, in part, that he had no recollection of the work environment on his last day of work. The administrative law judge also found that claimant's testimony that the winch emitted quite a bit of noise or a loud noise is insufficient to determine whether claimant was exposed to injurious noise on September 5 since the record does not indicate the distance claimant worked from the winch. Further, the administrative law judge found that Dr. Stingle's deposition testimony that claimant's hearing loss was consistent with a history of working around winches, cranes and "hilos" was not probative on whether claimant was exposed to injurious noise on September 5 because Dr. Stingle had no knowledge of claimant's working conditions on that day and no independent knowledge of the noise levels in the industry. The administrative law judge concluded that the Section 20(a) presumption was not invoked because claimant failed to establish that, on September 5, he either suffered a work-related accident or working conditions existed which could have caused or contributed to claimant's hearing loss. The administrative law judge therefore found employer is not responsible for claimant's hearing loss, and he denied benefits.

Claimant contends that the administrative law judge erred in failing to find the Section 20(a) presumption was invoked since the administrative law judge found claimant suffered a hearing loss and Dr. Stingle testified that claimant's hearing loss was consistent with a history of working around winches, cranes, and "hilos." Claimant contends that assuming that the Section 20(a) presumption is invoked, employer failed to rebut it. 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 in accordance with applicable law. Initially, the administrative law judge did not apply the proper legal standards on the issues of 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 exposure to injurious conditions. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-145 (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 the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See id*.; *see also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert.*

denied, 466 U.S. 937 (1984). In an occupational disease case, a distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; exposure to injurious stimuli is all that is required. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992).

Claimant has the burden of proving the existence of a harm and that working conditions existed which could have caused the harm in order to establish a *prima facie* case under Section 20(a). *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 19 BRBS 6 (CRT)(5th Cir. 1986). In this case, the administrative law judge found the Section 20(a) presumption was not invoked inasmuch as he found claimant's testimony as to the nature of the work he performed on September 5 was insufficient to establish claimant was exposed to injurious noise on that day, and there was no other evidence to indicate the nature of claimant's work. While it is within the administrative law judge's discretion to evaluate the credibility of claimant's testimony, *see Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996), in this case, the administrative law judge erred in placing the burden on claimant to establish that he was exposed to injurious noise on September 5. Claimant testified that he was exposed to noise throughout his longshore employment, and the administrative law judge erred in focusing his Section 20(a) analysis only on September 5. Although the administrative law judge did not specifically find that claimant has a work-related hearing loss, moreover, he found that Dr. Stingle's opinion was the most credible medical opinion of record, and Dr. Stingle opined that claimant's binaural loss is consistent with occupational noise exposure. Cl. Ex. 5. Similarly, Dr. Brownstein stated that claimant's hearing loss is due to occupational noise exposure. Cl Ex. 2. These opinions in conjunction with claimant's testimony regarding noisy working conditions in general are sufficient to invoke the Section 20(a) presumption that claimant has a work-related hearing loss. *See generally Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Moreover, there is no evidence of record sufficient to rebut the Section 20(a) presumption as the only other opinion of record, that of Dr. Kramer, Ph.D., states only that claimant's mild, high frequency hearing loss is consistent with the normal aging process. He does not rule out claimant's work environment as a cause of or contributor to claimant's hearing loss. *Bridier*, 29 BRBS at 90. Claimant's hearing loss is therefore work-related as a matter of law. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

As claimant's hearing loss is work-related, the last employer to expose claimant 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 pert. 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). It is employer's burden of proof to establish that it is not the responsible employer. *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). *See also Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Employer may do so by establishing that it did not expose claimant to injurious stimuli, or by

establishing that claimant was exposed while working for a subsequent covered employer. *See generally id.; Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (decision on recon.).

We therefore vacate the administrative law judge's finding that claimant did not establish he was exposed to injurious noise on September 5, 1987, and remand the case to the administrative law judge for further consideration. On remand, the administrative law judge should reconsider the responsible employer issue in light of all of the relevant evidence, placing the burden of proof on the employer consistent with *Avondale Industries* and *Susoeff*.[1] *See Lins*, 26 BRBS at 65.

Accordingly, the Decision and Order Denying Benefits is vacated, and the case is remanded for reconsideration in a manner 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

[1]We note that in his decision, the administrative law judge stated that claimant and employer declined to have the case remanded to the district director to join other potentially liable employers in the action. On remand, the administrative law judge may want to reconsider whether joining other employers would be appropriate.