BRB No. 00-0942

NORMAN G. VICKNAIR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED: June 18, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Frank A. Bruno (Bruno and Bruno), New Orleans, Louisiana, for claimant.

Christopher M. Landry (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-0628) of Administrative Law Judge Lee J. Romero, Jr., 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for Avondale Industries, Incorporated (Avondale), from 1969 until 1991, primarily as a pipefitter. In 1991, he left Avondale and currently works throughout the coastal regions of Louisiana and Mississippi for Inspection Services Incorporated (ISI), a company providing services to companies building drilling rigs. Claimant performs

inspections of oilfield-related equipment such as pipe jackets, decks, and platforms, during both the building process and after completion of the project. One of his regular duties is assuring that products are properly loaded onto barges for transport offshore. Tr. at 177. He testified that when he goes to work in a client company's fabrication yard, he has to observe its safety rules, such as wearing hearing protection. Tr. at 154. Claimant underwent his first audiogram on May 7, 1997, which reflected a bilateral mild to moderate sensorineural hearing loss. Tr. at 20; Cl. Ex. 3 at 1. He filed a claim against Avondale on June 26, 1997, while employed with ISI.

The administrative law judge found that claimant presented sufficient evidence to invoke the Section 20(a) presumption that his hearing loss is causally related to his employment. 33 U.S.C. §920(a). He then found that Avondale rebutted the presumption by establishing that claimant was exposed to injurious stimuli while working at ISI, a subsequent maritime employer. Specifically, the administrative law judge determined that claimant is a covered employee under the Act while working for ISI, and that he was exposed to injurious noise levels while working for ISI.[1]

Claimant appeals, arguing that Avondale failed to establish that he was exposed to injurious noise levels after he left its employ, that even if he was exposed to injurious noise after he stopped working for Avondale it was not while he was engaged in maritime activity, and that, therefore, Avondale is the responsible employer. Avondale responds, urging that the administrative law judge's findings that claimant was exposed to injurious stimuli while working for ISI and that his duties are maritime in nature be affirmed.

In an occupational disease case, 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.), *cert. denied*, 350 U.S. 913 (1955); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992). In a hearing loss case, the responsible employer is the one at the time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability for which claimant is being compensated. *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Good v. Ingalls Shipbuilding, Inc.,* 26 BRBS 159 (1992). Once, as here, claimant has invoked the Section 20(a) presumption, employer can rebut it by

[1]Claimant apparently did not file a claim against ISI, and it is not involved in this appeal.

producing substantial evidence that exposure to injurious stimuli did not cause the harm, or that the employee was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT); *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). Thus, the burden is on Avondale in this case to establish that it is not the responsible employer. *Id.*

With regard to the occupational nature of his work at ISI, we affirm the administrative law judge's conclusion that claimant engaged in maritime employment. A claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only spend "at least some of his time in indisputably covered activities." *Northwest Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Michael Foret, ISI's office manager, deposed that one of claimant's regular duties is to assure that rigs are properly loaded and tied down on barges for shipment offshore. Emp. Ex. 15 at 9, 21-22. Claimant testified that "sometimes" he is involved in inspecting the load-out process. Tr. at 152.

In finding claimant's involvement in the load-out procedure covered under the Act, the administrative law judge relied on *Conatser v. Pittsburgh Testing Laboratory,* 9 BRBS 541 (1978). In that case, the Board affirmed the administrative law judge's finding that the claimant, employed as a visual inspector assigned to help inspect the manufacture, movement, and loading of a large order of petroleum pipeline to ensure that it is free of serious defects, was covered under the Act because his duties as a visual inspector were analogous to those of a cargo checker. The administrative law judge's reasoning, in the instant case, that claimant's monitoring of the load-out process to assure that the product is properly loaded and tied down for shipment is analogous to the visual inspector job held covered by the Board in *Conatser*, is rational and supported by substantial evidence. Moreover, load-out work is indisputably maritime employment. *See, e.g., Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989). Accordingly, as claimant is covered under the Act if some portion of his overall employment is spent in maritime work, we affirm the administrative law judge's determination that claimant's monitoring of load-out and tie-down operations is an activity covered under the Act. *See id.; Conatser,* 9 BRBS 541.

We next reject claimant's argument that he does not meet the status requirement because he was not engaged in maritime work at the time of his injury. Under the law of the United States Court of Appeals for the Fifth Circuit, where this case arises, a claimant may satisfy the status requirement by fulfilling the "moment of injury" test, that is, by being engaged in maritime employment at the time of injury. *Universal Fabricators, Inc. v. Smith*,

878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). Contrary to claimant's argument, however, the Fifth Circuit uses the "moment of injury" test not to narrow, but to broaden, coverage under the Act. Such an interpretation is consistent with the Supreme Court's pronouncement in *Caputo* that coverage is not limited to that engaged in at moment of injury, but is based on the employee's overall employment. *See Caputo*, 432 U.S. at 273, 6 BRBS at 165; *see also Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Thornton*, 23 BRBS 75; *Henry v. Gentry Plumbing*, 18 BRBS 95 (1986). Therefore, even if claimant was injured during the course of performing non-maritime work, this fact alone is insufficient to deny coverage, as the status inquiry under Section 2(3) involves the overall nature of the claimant's work, and not just that which he was performing when he was exposed to injurious noise.[2]

Claimant next argues that he monitored load-outs of fabricated products for only three weeks during his eight-year employment with ISI, and traveled offshore for inspections on four occasions in eight years, and that each of these activities amounted to less than one percent of his total employment, based on a forty-hour week. Claimant maintains that he did not perform the load-out operation on a regular basis, that his participation in this work was sporadic and momentary, and that the load-out operations were not part of his regular duty assignments. Claimant thus asserts that his arguably maritime activities were so infrequent that they were "momentary or episodic," and therefore insufficient to confer coverage. A claimant's time need not be spent primarily in longshoring operations, but must be more than episodic or momentary. *Boudloche*, 632 F.2d 1346, 12 BRBS 732. Work, to be considered "episodic," must be "discretionary or extraordinary" as opposed to that which is "a regular portion of the overall tasks to which [claimant] could have been assigned." *Levins v. Benefits Review Board*, 724 F.2d 4, 8, 16 BRBS 24, 33(CRT)(1st Cir. 1984); *see also Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997). "Work cannot be considered 'episodic' when it is a part of the employee's regular job assignments." *Lewis*, 31 BRBS at 40.

In finding that claimant's maritime work was not momentary or episodic, the administrative law judge stated that it was claimant's regular responsibility to insure that all completed projects are properly loaded and tied down. This finding is supported by Mr. Foret's deposition testimony. Mr. Foret deposed that there was a list of duties required of ISI inspectors. Emp. Ex. 15 at 18, 81-82. He confirmed that one of the duties of an inspector

[2]Moreover, as we will discuss, substantial evidence supports the finding that claimant was exposed to injurious noise during covered employment.

at ISI is to verify that the products manufactured at the yard were properly loaded on the vessels, *id.* at 9, or, in other cases, that modules were properly tied down on the vessel. *Id.* at 21-22. As monitoring load-outs and tie-downs was a duty claimant could be called upon to perform, the administrative law judge properly found that it is a regular, rather than discretionary or extraordinary, part of claimant's job, even if it was performed infrequently. *See McGoey*, 30 BRBS 237; Decision and Order at 29-30. Accordingly, as claimant engages in, or could be assigned, maritime employment as part of his regular duties, we affirm the administrative law judge's determination that claimant is covered under the Act. *Caputo,* 432 U.S. at 273, 6 BRBS at 165.

We next address claimant's contention that the administrative law judge erred in finding that claimant was exposed to injurious noise at ISI, and that therefore Avondale is not the responsible employer in this case. First, contrary to claimant's argument that ISI cannot be held liable because it is not a maritime employer, where claimant is engaged in maritime employment and covered under the Act, employer is a statutory employer under Section 2(4), 33 U.S.C. §909(4). *See Lewis,* 31 BRBS at 41. Therefore, as claimant was engaged in maritime employment while working for ISI, ISI is a maritime employer.

We also reject claimant's contention that his exposure to injurious stimuli while he was engaged in maritime employment was too insignificant to have caused his hearing impairment. The Fifth Circuit has held that, regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious. *Cuevas,* 977 F.2d at 190, 26 BRBS at 113(CRT), *citing Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012, 12 BRBS 975, 978 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981) (refusing to set *de minimis* standards for duration of exposure);[3] *Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998).

[3]Claimant's argument that in both *Cuevas* and *Fulks,* the claimant was performing covered employment when exposed to injurious stimuli has been addressed in the "moment of injury" discussion, *supra.*

We affirm the administrative law judge's determination that claimant was exposed to injurious stimuli while employed by ISI, after working for Avondale, at least on projects conducted at the Gulf Island facility. Claimant concedes that he was exposed to noise in the pipe shop, pipe mill and fabrication shops while working at the Gulf Island facility. Indeed, in the vocational history claimant gave to Drs. Gaudet and Seidemann, claimant related that as an inspector he is exposed to a lot of noise. Emp. Exs. 17 at 15, 16 at 21. The administrative law judge relied on the testimony of Mr. Foret that claimant performed structural and welding inspections for ISI on all jobs, some of which occurred in high noise areas. Emp. Ex. 15 at 37-40; Ex. 4 to Emp. Ex. 15 at 81-82; Decision and Order at 27. Mr. Franklin, quality control manager at Gulf Island, stated that the pipe shop is a high noise area. Emp. Ex. 13 at 17-18. Further, the noise studies conducted by Gulf Island in December 1998 confirmed that the pipe shop, pipe mill and fabrication shop, where claimant performed his regular functions, were high noise areas, which exceeded the OSHA action level for employees working eight-hour days. Emp. Ex. 12 at 22-25, 24, 31-34. Significantly, Mr. Downey, Vice-President of Operations for Gulf Island, stated that load-outs typically require the use of welders and gougers to secure the completed project to the barge, and if inspectors are present during load-out, they would be exposed to the noise generated by these tools which would require the use of hearing protection. Emp. Ex. 14 at 22-24. Inasmuch as there is substantial evidence of record to support the administrative law judge's finding that Avondale established that claimant was exposed to injurious noise while working for a subsequent maritime employer, including in maritime employment during the load-outs,[4] we affirm the administrative law judge's conclusion that Avondale met its burden of establishing that it is not the responsible employer.[5] *See*

[4]Claimant correctly argues that the administrative law judge's statement that "The record is devoid of any evidence that injurious noise did not exist at Gulf Island and perhaps other fabrication yards where Claimant performed his regular inspection functions," Decision and Order at 28, erroneously places the burden of proof on him with respect to the noise issue, rather than on Avondale. *See Cuevas,* 977 F.2d at 190, 26 BRBS at113(CRT). This error is harmless, however, because the administrative law judge supports his finding that claimant was exposed to noise at the Gulf Island facility with substantial evidence affirmatively establishing noise exposure. *See* discussion*, supra.*

[5]Claimant's argument that his hearing did not get worse after he left Avondale is irrelevant since the last employer rule is one of allocation of liability, and an actual causal relationship between the employment and the hearing loss need not be shown; the exposure to injurious noise need only have the potential to cause the impairment. *See Susoeff v. The San Francisco Stevedoring Co.,* 19 BRBS 149 (1986). In any event, the administrative law judge noted that claimant testified that he noticed his hearing had worsened. Tr. at 164; Decision and Order at 5.

Zeringue, 32 BRBS 275; *Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge