BRB No. 96-1343

SHELDON FALGOUT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
AVONDALE INDUSTRIES, INCORPORATED	)	DATE ISSUED:
	)	
	)	
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.

Timothy W. Porter (Wm. Roberts Wilson, Jr.,P.A.), Jackson, Mississippi, for claimant.

Richard S. Vale (Blue Williams, L.L.P.), Metairie, Louisiana, for the self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-0209) of Administrative Law Judge Lee J. Romero, Jr., denying benefits 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 as an electrician between 1956 and 1979. After leaving employer, claimant worked as a field engineer for Professional Solids, where his duties included working on offshore rigs in the Gulf of Mexico to ensure the correct setup of metal equipment. Thereafter, he worked for Louisiana Maintenance as a first class electrician, and then as a supervisor of a crew which cleaned tanks for Harmony Construction at the Becker/Agrico plant. After Harmony, claimant worked for Pala Taft as a first-class electrician. While working for Pala Taft, claimant underwent an audiogram on August 10, 1990, which was interpreted by Dr. Irwin as indicative of a 20.9 percent binaural

hearing loss consistent with acoustic trauma. Claimant filed a claim for occupational hearing loss benefits under the Act against employer on April 16, 1992.

In his Decision and Order, the administrative law judge found that although claimant established a severe hearing loss, he was not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption because the only evidence that claimant was exposed to injurious stimuli at employer's facility was claimant's own testimony indicating that it was very noisy at Avondale and that he did not wear hearing protection in the early years. The administrative law judge found that, even without doubting claimant's credibility, his testimony was insufficient to establish claimant's *prima facie* case because claimant had not introduced any noise surveys showing the decibel levels or intensity of work place noise present at employer's facility when claimant worked there, much less evidence that the decibel level exceeded Occupational Safety and Health Administration (OSHA) guidelines and was thus presumptively injurious.

Claimant appeals the denial of benefits, arguing that the administrative law judge erred in determining that his testimony alone was not sufficient to establish that he was exposed to injurious stimuli which could have caused his hearing loss and that claimant was required to introduce evidence of decibel levels and noise studies at employer's facility in order to establish the working conditions element of his *prima facie* case under Section 20(a). Employer responds, urging affirmance. In the alternative, employer agues that if the Board determines that claimant established causation, the case must be remanded for the administrative law judge to make a definitive finding regarding whether employer was claimant's last maritime employer, an issue raised below but not addressed by the administrative law judge.

We are unable to affirm the denial of benefits in this case because the administrative law judge erred in holding that claimant's testimony was not sufficient to invoke Section 20(a) and in requiring claimant to introduce noise surveys establishing the level of noise at employer's facility and that this level exceeded OSHA standards in order to invoke the presumption. 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, however, the administrative law judge found that, without doubting the credibility of claimant's testimony, his testimony regarding his exposure to noise at employer's facility was insufficient to entitle him to the Section 20(a) presumption as a matter of law because claimant was required to introduce noise survey evidence documenting that the level of exposure at employer's facility exceeded OSHA standards. Contrary to the administrative law judge's determination, however, claimant was not required to introduce noise survey evidence in order to invoke Section 20(a); claimant's credible testimony alone may properly establish the working conditions element of his *prima facie* case. *See generally Manship v. Norfolk & Western Railway Co.,* 30 BRBS 175, 179 (1996); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). Once claimant establishes these two elements of his *prima facie* case, the Section 20(a) presumption operates to link the harm or pain with claimant's employment. *Brown v. I.T.T./Continental*

Baking Co., 921 F.2d 289, 295-296, 24 BRBS 75, 80 (CRT)(D.C. Cir. 1990).

In the present case, as employer does not dispute that claimant sustained a 20.9 percent binaural hearing loss as evidenced on Dr. Irwin's August 10, 1990, audiogram, and the administrative law judge did not discredit claimant's uncontradicted testimony that he was exposed to loud noise while performing work with various companies, including employer,[1] we conclude that claimant is entitled to invocation of the Section 20(a) presumption as a matter of law. *Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). Accordingly, we reverse the administrative law judge's finding to the contrary. *See Peterson v. General Dynamics Corp.* 25 BRBS 71, 78 (1991)*, aff'd sub nom. Insurance Company 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). Moreover, as Dr. Irwin, who provided the only relevant testimony, related claimant's hearing loss to acoustical trauma and employer failed to introduce any evidence that noise exposure did not cause, aggravate, or contribute to claimant's condition, the Section 20(a) presumption is not rebutted, and causation is established as a matter of law. *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988).

As claimant's hearing loss is work-related, the last covered employer to expose claimant to potentially injurious stimuli is liable as the responsible employer. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT)(9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 144-145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). An actual causal relationship between claimant's hearing loss and that employment is not necessary. *See generally Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 n.2 (1992); *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 was not the last maritime employer to expose claimant to injurious stimuli prior to the audiogram, in this case. *Id.; Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995) (decision on recon.).

Employer argued below that it was not liable as the responsible employer because

[1]We note that while the case was before the administrative law judge, employer did not dispute that claimant was exposed to noise at its facility but instead argued that as it was not the last maritime employer to expose claimant to noisy conditions, it was not liable as responsible employer.

after leaving employer claimant worked for two subsequent maritime employers, Professional Solids and Harmony Construction, where he was exposed to noise. The administrative law judge did not reach this issue in light of his determination that claimant failed to establish his *prima facie* case under Section 20(a). In light of our reversal of the administrative law judge's finding in this regard, the case is remanded for the administrative law judge to consider 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 *Suseoff*. *See Lins*, 26 BRBS at 65.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge