BRB Nos. 00-0414
and 00-0414A

JAMES BENJAMIN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
CONTAINER STEVEDORING COMPANY	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Jan. 5, 2001
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Frank B. Hugg, San Francisco, California, for Container Stevedoring Company.

Roger A. Levy (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco,

California, for Stevedoring Services of America and Eagle Pacific Insurance Company.

Joshua T. Gillelan II (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), and Stevedoring Services of America (SSA) appeal the Decision and Order Awarding Benefits (97-LHC-2502) of Administrative Law Judge Alexander Karst 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, who began working as a longshoreman in 1969, underwent audiometric testing on January 9, 1991, which showed a binaural hearing loss. He filed a claim under the Act and the California workers' compensation scheme. A follow-up audiometric test performed on February 4, 1991, revealed a 28.5 percent binaural loss. Container Stevedoring last employed claimant prior to the February 4, 1991, audiogram. Claimant continued to work as a longshoreman until April 3, 1992, when he retired. It is undisputed that SSA was claimant's last employer prior to his retirement, and both Container Stevedoring and SSA conceded that they exposed claimant to injurious noise. Claimant underwent an audiometric evaluation on January 12, 1994, which revealed a binaural loss of 18.8 percent, and thereafter, claimant filed a second claim under the Act. Claimant underwent further audiometric testing on September 25, 1996, which revealed a 34 percent binaural loss.[1]

[1]The administrative law judge determined that audiograms performed on January 9, 1991, and January 12, 1994, were improperly performed as they did not measure claimant's hearing at 3000 HZ. This finding is not challenged on appeal.

In his decision, the administrative law judge found that the test administered on September 25, 1996, was the best measure of claimant's hearing loss, as it reflected the increased level of claimant's hearing loss caused by his employment subsequent to the February 4, 1991, audiogram. Thus, as he found it to be the "determinative audiogram," the administrative law judge found that SSA, the last employer to expose claimant to injurious stimuli prior to the examination on September 25, 1996, is the responsible employer. After determining that SSA is entitled to relief under Section 8(f) of the Act, 33 U.S.C. §908(f), the administrative law judge awarded claimant permanent partial disability compensation pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), for a 34 percent binaural impairment, and found that SSA is liable for a 5.5 percent binaural loss and the Special Fund is liable for a 28.5 percent loss.

The Director appeals, contending that the administrative law judge erred in not finding Container Stevedoring liable for the level of impairment reflected in the February 4, 1991, audiogram. Specifically, the Director contends that the administrative law judge erred in deeming only one audiogram to be determinative, as the instant case concerns two hearing loss injuries, for which claimant filed two claims. Therefore, according to the Director, the administrative law judge should have found both Container Stevedoring and SSA separately liable for the amount of impairment caused by each employer as reflected in both the 1991 and 1996 audiograms; consequently, the Director requests that the Special Fund be granted a credit, payable by Container Stevedoring, for the amount it paid pursuant to the administrative law judge's Decision and Order. SSA also appeals, supporting the Director's contention that both the 1991 and 1996 audiograms should be deemed determinative, and that Container Stevedoring should be liable for claimant's hearing loss established by the first 1991 audiogram. SSA raises public policy considerations, arguing that the one determinative audiogram rule frustrates the purposes of the Act by encouraging employers to escape liability by ordering new audiograms and joining subsequent employers in a hearing loss claim. Container Stevedoring responds, urging affirmance of the administrative law judge's decision. Specifically, Container Stevedoring asserts that the administrative law judge's decision is supported by precedent of both the Board and the United States Court of Appeals for the Ninth Circuit, wherein this case arises.

In an occupational disease case, the responsible employer or carrier is the employer or carrier during the last employment where 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). In *Cardillo*, the court specifically stated that:

> the employer during the last employment in which claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally

out of his employment, should be liable for the full amount of the award.

Cardillo, 225 F.2d at 145. Thereafter, in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the Ninth Circuit stated that the "onset of disability is a key factor in assessing liability under the last injurious-exposure rule." In *Port of Portland v. Director, OWCP [Ronne I]*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), the Ninth Circuit reviewed the issue of responsible employer under *Cardillo* and *Cordero* in a hearing loss case, and held that the responsible employer or carrier is the one on the risk 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. The court also relied on the statement in *Cordero* that there must be a "rational connection" between the onset of the claimant's disability and his exposure; thus, the court held liable the last employer who, by injurious exposure, could have contributed causally to the claimant's disability evidenced on the determinative audiogram. *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT); *see Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991). In the context of calculating average weekly wage, the Ninth Circuit adopted the Board's definition of "determinative" audiogram as being the one the administrative law judge determines is the best measure of claimant's hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206 (CRT)(9th Cir. 1998); *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

In the instant case, the administrative law judge found that Container Stevedoring and SSA conceded that they each exposed claimant to injurious noise levels. *See* Decision and Order at 2. After reviewing the medical evidence, the administrative law judge, relying on the opinions of Drs. Boyle and Hotchkiss, found that the September 25, 1996, audiogram was the best measure of claimant's hearing loss, as that evaluation reflected claimant's increased level of hearing loss caused by claimant's noise exposure subsequent to the February 4, 1991, audiogram. *See* Decision and Order at 8-9; Container Stevedoring Ex. 5 at 15-16, 20-21; Cl. Ex. 9 at 47-48. Thus, the administrative law judge found that the 1996 audiogram is determinative of claimant's hearing loss, and therefore that SSA is the responsible employer as the last employer to expose claimant to injurious stimuli prior to this audiogram. On appeal, the Director and SSA contend that the administrative law judge erred in finding the September 25, 1996, audiogram to be the sole audiogram determinative of claimant's hearing loss and, therefore, of the responsible employer issue. Rather, the Director and SSA assert that the administrative law judge should have found both the 1996 audiogram and the February 4, 1991, audiogram to be determinative of claimant's hearing loss, thereby making Container Stevedoring liable for 28.5 percent of claimant's hearing loss, as reflected in the 1991 audiogram, and SSA liable for the increased work-related hearing loss of 5.5 percent, as reflected in the 1996 audiogram. We reject this contention.

Initially, as no action was taken on claimant's 1991 claim, and since both the 1991 and

1994 claims were for the same injury, hearing loss due to noise exposure, the administrative law judge properly treated claimant's two claims as one. *See Balzer v. General Dynamics Corp.*, 22 BRBS 447 (1989), *aff'd on recon. en banc*, 23 BRBS 241 (1990)(Brown, J., dissenting). Thus, we disagree with the Director's argument that the instant case concerns two separate injuries. Furthermore, it is undisputed that claimant's continued work with SSA exposed him to injurious stimuli which resulted in greater hearing loss. Therefore, claimant is entitled to be compensated for the entire disability resulting from the combination of his exposure to noise while working for Container Stevedoring and SSA, consistent with the aggravation rule, which states that where an employment-related injury aggravates, accelerates, or combines with an underlying condition, employer is liable for the entire resultant condition. *See Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998). In this situation, the last employer rule calls for a single employer to be liable in order to avoid the complexities of assigning joint liability and to ensure that a worker will recover for his injuries. *See General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT)(9th Cir. 1991). Indeed, in adopting the last employer rule, the Second Circuit in *Cardillo* noted that Congress had specifically rejected a joint liability scheme due to the "realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it." *Cardillo*, 225 F.2d at 145. While the Ninth Circuit has recognized that the last employer rule may appear to be somewhat arbitrary, it nevertheless "apportions liability in a fundamentally equitable manner because 'all employers will be the last employer a proportionate share of the time.'" *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), *quoting Cordero*, 580 F.2d at 1336, 8 BRBS at 747. We therefore reject the contention raised by the Director and SSA that the administrative law judge should have acknowledged two determinative audiograms and apportioned liability between Container Stevedoring and SSA, and affirm the administrative law judge's imposition of liability on SSA as the last employer to expose claimant to injurious stimuli prior to the 1996 audiogram as it is consistent with law. *See Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *Mauk*, 25 BRBS at 118.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge