BRB Nos. 93-1693
and 93-1693A

MILLARD MEARDRY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INTERNATIONAL PAPER COMPANY	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Sandy G. Robinson and Robin K. Fincher (Helmsing, Lyons, Sims & Leach, P.C.), Mobile, Alabama, for self-insured employer.

Walter R. Meigs, Mobile, Alabama, for Alabama Dry Dock and Shipbuilding Corporation, *amicus curiae*.

LuAnn Kressley (J. Davitt McAteer, Acting Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (92-LHC-1917) of Administrative Law Judge C. Richard Avery 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).

Employer operates a several hundred acre paper mill within the limits of Mobile, Alabama, on the Chickasobogue Bayou, which is connected to the Mobile River. Cl. Ex. 7.05. Employer's mill has its own barge facility on the bayou, which is navigable for approximately two to three miles beyond the mill; at the end of the bayou there is a tug facility and a refinery. Employer receives a portion of the raw materials utilized by the mill through its barge operations. The wood products delivered to the mill by the barges are unloaded by crane. Claimant was employed by employer from 1946 until his retirement in 1984. For some of this period, claimant's work included the unloading of pulp wood from trucks, rail cars and barges that arrived at employer's paper mill facilities. The parties stipulated that claimant's last barge work occurred on May 14, 1961. They also agreed that his average weekly wage at that time was $92.30.

In 1972, as part of employer's health monitoring program, claimant's hearing was tested, and the audiometric results showed a "mild hearing impairment." Emp. Ex. 1. In 1990, claimant received the results of two audiograms which revealed binaural impairments of 30.62 and 28.8 percent respectively. Cl. Exs. 8, 9. Subsequent to these later audiograms, claimant filed a notice of injury and a claim under the Act alleging a work-related hearing loss.

After a formal hearing on the claim, the administrative law judge found that claimant's employment satisfied the status and situs requirements of the Act, 33 U.S.C. §§902(3), 903(a). The administrative law judge also found that claimant's hearing loss is work-related, and he averaged the results of the audiograms and awarded claimant benefits for a 29.71 percent binaural impairment pursuant to 33 U.S.C. §908(c)(13). *See Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993). The administrative law judge imposed a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), for employer's failure timely to controvert the claim, and also held employer liable for interest "on all the sums determined to be in arrearage" as of the date on which the Decision and Order was served, with interest due from June 8, 1972, the date employer was deemed to have known of claimant's injury as a result of the audiometric testing which showed a "mild" hearing loss. *See* Decision and Order at 7. These appeals followed.

I. Coverage

In its cross-appeal from the administrative law judge's finding that claimant's hearing loss was covered under the Act, employer challenges first the finding that claimant suffered from a noise-induced hearing loss during his employment with International Paper, contending that claimant was not exposed to injurious noise while unloading barges. Employer cites as support for this assertion noise studies of its facilities which revealed that the barge area was not considered a "high noise area," and contends that claimant experienced high levels of exposure to noise in non-maritime employment elsewhere at its facilities after 1961, the year in which his work unloading barges ended. Employer also contends that the administrative law judge erred in finding that claimant regularly performed maritime duties while working for employer, asserting that claimant did not routinely or regularly perform such unloading duties, that the mill was not involved in the maritime industry, and that claimant was not hired as a maritime employee. These arguments are without merit.

In order to be covered under the Act, a claimant must satisfy both the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3)(1988), and the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a)(1988). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *see also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U.S. Department of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1252 (1993). Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker . . . ." *See* 33 U.S.C. §902(3)(1988). Accordingly, while maritime employment is not limited to the occupations specifically enumerated in Section 2(3), an employee's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). Moreover, an employee is engaged in maritime employment so long as some portion of his job activities constitutes covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166.

In determining that claimant's status was sufficient to confer jurisdiction under the Act, the administrative law judge properly found that claimant was engaged in maritime employment during part of his tenure with employer. The administrative law judge found that claimant sometimes unloaded barges while working for employer as a crane helper up to 1961, crediting claimant's testimony that some of his duties were performed in barge operations. Decision and Order at 2-3. Claimant recalled that while he did not work in the barge operations exclusively during this period, he did at times unload a barge every other week, sometimes for an entire week at a time. Tr. at 9.

Unloading duties such as those performed by claimant constitute longshoring activities pursuant to Section 2(3), as they were not momentary or episodic. *See Browning v. B.F. Diamond Construction Co.*, 676 F.2d 547, 548, 14 BRBS 803, 804 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 57, 13 BRBS 1048, 1051 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983); *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101, 107 (CRT)(11th Cir. 1990)(activities essential to unloading or loading). Although claimant may not have been engaged in these activities full-time, based upon the fact that at least "some" portion of his job activities constituted maritime employment, we affirm the administrative law judge's determination that claimant's unloading duties were sufficient to confer coverage under Section 2(3) of the Act. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT); *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *Coleman*, 904 F.2d at 617-618, 23 BRBS at 106 (CRT); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348, 12 BRBS 732, 734 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

Employer also contends that the administrative law judge erred in finding that claimant was injured on a covered situs, specifically asserting that claimant's hearing loss did not arise while he was working in or around the barge facility, but that it occurred in other areas of its facility where noise levels were much higher. There is no serious contention in this case that employer's barge

facility on the navigable Chickasobogue Bayou is not a maritime situs.[1] Employer rather asserts that claimant was not "injured" in this area because he was not exposed to sufficient noise. This contention is without merit.

The administrative law judge credited claimant's testimony that he was exposed to loud noises while working at employer's barge facility and that he was not furnished any ear protection. Decision and Order at 3; Tr. at 10. Indeed, claimant testified that he stood very close to the crane, and that the noise required that he use sign language to communicate with other workers. Tr. at 10-13. The administrative law judge also noted that employer failed to establish the noise levels of the barge area, and thus did not demonstrate that claimant suffered no exposure to industrial noise while working in the barge operations. Decision and Order at 3, 4. On this record, the administrative law judge reasonably found that the noise to which claimant was exposed while unloading employer's barges was sufficient to constitute injurious exposure. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981); *see also Wayland v. Moore Dry Dock*, 25 BRBS 53, 60 (1991). Claimant's arguably greater exposure to noise while working elsewhere in the "non-maritime" sections of the mill does not undermine the administrative law judge's finding that claimant was injured on a covered situs. *Fulks*, 637 F.2d at 1008, 12 BRBS at 975. Because the administrative law judge's credibility determinations are neither inherently incredible nor patently unreasonable, *see Cordero v. Triple A Machine Shop*, 580 F.2d 1335, 8 BRBS 744 (9th Cir. 1978), *cert. denied* 440 U.S. 911 (1979), and substantial evidence supports the administrative law judge's finding, we affirm the administrative law judge's finding that claimant, when unloading barges adjacent to navigable water, was exposed to industrial noise, and that as a result claimant established coverage under the Act.[2]

II. Interest

[1]Employer's quality improvement facilitator, Mr. Smallwood, testified that employer's barge facility is located on the Chickasobogue Bayou, which connects with the Mobile River, and that the bayou is navigable for at least two or three miles upstream. Cl. Ex. 7.

[2]To the extent that employer's argument relates to causation and not coverage, it also is rejected. In establishing that an injury arises out of his employment, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption which applies to the issue of whether an injury is causally related to his employment. *See Perry v. Carolina Shipping Co.*, 20 BRBS 90, 92 (1987). To invoke this presumption, claimant must establish two elements of his *prima facie* case, *i.e.*, that he sustained some harm and that working conditions existed which could have caused or aggravated the harm. *See Kelaita v. Triple A Machine Shop*, 13 BRBS 326, 329-31 (1981); *see also Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986). In this case, claimant has a documented hearing loss and he testified that he suffered from noise exposure during the barge operations. Tr. at 10. This testimony, as credited, is sufficient to trigger the presumption. Employer does not offer any proof to rebut this presumption, as the administrative law judge so found.

In his appeal, claimant takes issue with the administrative law judge's determination of the date from which the interest award should commence, first contending that interest should accrue as of May 14, 1961, the date on which, by stipulation, claimant was last exposed to injurious noise while unloading barges, and not from the point at which, in 1972, employer obtained knowledge of claimant's injury through its health monitoring audiograms. Claimant further asserts that the interest awarded "should be compounded annually as a matter of equity and justice" to compensate claimant for the fact that his average weekly wage, pursuant to the decision in *Bath Iron Works*, is based on his wages in the year prior to his last exposure on May 14, 1961.

In its cross-appeal, employer contends that the accrual of any interest commences on the 14th day after it received notice of the work-related injury, *i.e.*, in 1990, and avers that the administrative law judge erred in ruling that interest accrued from June 8, 1972. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief agreeing with claimant that the correct date for the accrual of interest is May 14, 1961. The Alabama Dry Dock and Shipbuilding Corporation has filed an *amicus* brief in support of employer's position on the interest issue.

At the outset, we reject claimant's and the Director's contention that entitlement to interest accrues from the date of claimant's last exposure to injurious noise in 1961. In *Renfroe v. Ingalls Shipbuilding, Inc.*, ___ BRBS ___, BRB Nos. 91-170/A (June 24, 1996)(reconsideration *en banc*), the Board held that in a hearing loss case interest on compensation accrues from the date benefits become due under Section 14(b), 33 U.S.C. §914(b), and accrues on all benefits due and unpaid from that date until they are paid. The Board held that benefits do not become "due" under Section 14(b) until employer has knowledge of the work-related injury, or notice of such injury pursuant to Section 12, 33 U.S.C. §912. *Renfroe*, slip op. at 7, 9. An employer is imputed to have knowledge if it knows of the injury and of such facts that a reasonable man would consider that compensation liability was possible and that further investigation should be made. *See Pardee v. Army & Air Force Exchange*, 13 BRBS 1130, 1137 (1981); *Willis v. Washington Metropolitan Area Transit Authority*, 12 BRBS 18, 24 (1980). The Board thus held in *Renfroe* that the date of injury (date of last exposure) in a hearing loss case does not establish the date from which interest is due, unless the provisions of Section 14(b) are satisfied. *Renfroe*, slip op. at 7. As the administrative law judge found that the earliest date that employer could possibly be held to have the requisite knowledge, *see* discussion, *infra*, was in 1972, and therefore benefits became "due" as of that date, we reject the contention that interest accrued from claimant's date of last exposure in 1961.[3]

In its cross-appeal, employer asserts that the administrative law judge erred in assessing

[3]We also disagree with claimant's contention that interest should be compounded annually to recompense claimant for his low average weekly wage as of the date of last exposure. The "American" rule pertaining to interest is that it should be calculated on a simple rather than compound basis. *See Santos v. General Dynamics Corp.*, 22 BRBS 226, 228 (1989). The statutory provision set forth at 28 U.S.C. §1961, which provides guidance for interest rate determinations under the Act, does not expressly authorize compounding interest in cases arising under the Act. *Id.* There are no factors which may support the compounding of interest on this record. *See generally Renfroe*, slip op. at 10.

interest from June 8, 1972, when an employment audiogram discovered a "mild" hearing loss. *See* Emp. Ex. 1. Employer assails the administrative law judge's findings that claimant's benefits became "due" on June 8, 1972, and that employer possessed sufficient knowledge of a work-related hearing loss so as to trigger the application of Section 14(b), and thus the accrual of interest, at that time.

We agree with employer that the administrative law judge's finding that benefits became due as of the date of the first audiogram in 1972 cannot be affirmed. The administrative law judge, noting that claimant underwent his first audiometric testing in 1972, inferred "from the evidence produced at the hearing" that claimant's "hearing loss was documented and known to employer." Decision and Order at 6. Although the 1972 audiogram revealed a "mild hearing impairment," Emp. Ex. 1, the administrative law judge did not address whether this evidence provided employer with knowledge that claimant's hearing loss was "work-related," a necessary component for the application of Section 14(b). *See McQuillan v. Horne Brothers, Inc.*, 16 BRBS 10, 14 (1983); *Pardee*, 13 BRBS at 1137. Because the administrative law judge must in the first instance determine when benefits became due under Section 14(b), *see Davenport v. Apex Decorating Co.*, 13 BRBS 1029 (1981), we vacate the administrative law judge's finding that benefits became due on June 8, 1972, the date of the first employer-administered audiogram, and remand this case to the administrative law judge to reconsider this issue consistent with the legal standard.[4]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated insofar as it awards interest from 1972, and the case is remanded to the administrative law judge for proceedings consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[4]We reject claimant's contention that, pursuant to Section 20(b), 33 U.S.C. §920(b), employer presumptively knew of claimant's injury as of the time it occurred in 1961. Section 20(b) affords a presumption that, in the absence of evidence to the contrary, claimant gave employer sufficient notice of the injury under Section 12. *See Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989). Timely notice is not an issue in this case. Moreover, "knowledge," as used in Section 12(d), requires employer to be aware of the fact of injury and the work-relatedness thereof. *See Kulick v. Continental Baking Corp.*, 19 BRBS 115 (1986). Because the record does not show that claimant first underwent audiometric testing prior to 1972, employer could not have had the requisite "knowledge" of a work-related hearing loss at any time prior to this date.

REGINA C. McGRANERY
Administrative Appeals Judge