BRB Nos. 03-0468
and 03-0468A

WILLIE L. PERRY	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	
UNIVERSAL MARITIME SERVICES	)	
and	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED: April 6, 2004
Employer/Carrier- Petitioners Cross-Respondents	)	
and	)	
CERES MARINE TERMINALS	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

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

Gregory E. Camden (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

R. John Barrett (Vandeventer Black, L.L.P.), Norfolk, Virginia, for Universal Maritime Services and Signal Mutual Indemnity Association.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for Ceres Marine Terminals.

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

PER CURIAM:

Universal Maritime Services (Universal) appeals and claimant cross-appeals the Decision and Order (01-LHC-1909, 01-LHC-2868) of Administrative Law Judge Richard E. Huddleston 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 has been a member of Local 1248 of the International Longshoremen's Association since 1966, during which time he has been exposed to loud noise continually. From approximately 1985 to October 30, 2000, claimant worked in a gang assigned to Ceres Marine Terminals (Ceres); when Ceres had work available, claimant automatically worked for Ceres but when it did not have work, claimant picked up jobs with other employers, including Universal. While a member of the Ceres gang, claimant primarily worked as a slinger, but also performed work as a hustler (truck driver). On October 30, 2000, claimant transferred to a Universal gang, and at that time, Universal became his primary employer; claimant has since worked primarily as a hustler for Universal, although he also performs work as a slinger. Prior to claimant's transfer to the Universal gang, Universal arranged for claimant to undergo a baseline audiogram which was conducted by Taylor Made Diagnostics (Taylor) in a mobile testing van on October 26, 2000. Claimant was employed by Ceres on the date of this audiogram. The Taylor audiogram indicated that claimant suffered an eight percent binaural hearing impairment. After transferring to the Universal gang, claimant underwent subsequent audiometric testing conducted by Dr. Jacobson on December 26, 2000, which revealed a 6.3 percent binaural hearing impairment.[1] Claimant filed hearing loss claims against both Universal and Ceres, and subsequently the two claims were consolidated by the administrative law judge's Order dated August 22, 2001. At the hearing before the administrative law judge, the two issues in dispute involved which audiogram will serve as the determinative audiogram for establishing the date and extent of claimant's work-related hearing loss and whether Universal or Ceres is liable for claimant's benefits as the responsible employer.

[1] The record also contains an audiogram conducted by Miracle-Ear on December 27, 1999. UMS-7. During the hearing, the administrative law judge advised the parties that he would accord no weight to this audiogram because its internal inconsistencies rendered it invalid. *See* Decision and Order at 6 n.7; Tr. at 111.

In his Decision and Order, the administrative law judge accepted the parties' stipulations, including the stipulation that claimant suffered a work-related hearing loss and, thus, is entitled to benefits under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). Next, the administrative law judge evaluated the reliability of the audiograms administered to claimant and found Dr. Jacobson's December 26, 2000 audiogram demonstrating a 6.3 percent binaural impairment to be the most reliable. Consequently he determined that Universal is the employer liable for the payment of claimant's permanent partial disability benefits.

On appeal, Universal challenges the administrative law judge's responsible employer determination. In his cross-appeal, claimant contends that the administrative law judge erred in finding claimant was not entitled to benefits for an 8 percent binaural impairment on the basis of the Taylor audiogram conducted on October 26, 2000.[2] In responding to Universal's appeal, claimant urges affirmance of the administrative law judge's determination that Universal is the responsible employer. Ceres responds to both appeals, urging affirmance of the administrative law judge's Decision and Order in its entirety.

It is well-established that the responsible employer or carrier in a hearing loss case 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. *See Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). *See also Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Thus, the responsible employer is the last employer covered under the Act who, by exposing claimant to injurious noise, could have contributed causally to the claimant's disability evidenced on the determinative audiogram. *Id.* The employer who is claimed against bears the burden of establishing that it is not the responsible employer. *See Faulk,* 228 F.3d 378, 34 BRBS 71(CRT); *Cuevas,* 977 F.2d 186, 26 BRBS 111(CRT); *General Ship Service v. Director, OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991); *Everson,* 33 BRBS 149; *Zeringue,* 32 BRBS 275. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that in order to establish that it is not the responsible employer, the employer against whom the claim is filed must establish either that the employee's exposure with employer did not have the potential to

[2] Although claimant avers in his brief filed with the Board that the Taylor audiogram reveals an 8.8 percent binaural impairment, he previously stipulated that this audiogram demonstrates an 8 percent binaural impairment. *See* Decision and Order at 4; JX 2.

cause his harm or that the employee was exposed to injurious stimuli while working for a subsequent employer in employment covered under the Act. *See Stilley,* 243 F.3d 179, 35 BRBS 12(CRT); *Faulk,* 228 F.3d 378, 34 BRBS 71(CRT). In so holding, the Fourth Circuit has emphasized that it does not require "proof of a certain level of exposure to injurious stimuli in order to warrant the attachment of liability under the LHWCA." *Faulk,* 228 F.3d at 387, 34 BRBS at 78(CRT). *See also Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999); *Everson,* 33 BRBS 149; *Zeringue,* 32 BRBS 275.

In the instant case, resolution of both the issue of the extent of claimant's disability and the identification of the responsible employer are contingent on the determination of which audiogram was determinative of claimant's disability; *i.e.,* which audiogram represents the best measure of claimant's compensable hearing loss. *See, e.g., Mauk v. Northwest Marine Iron Works,* 25 BRBS 118, 125 (1991). The administrative law judge engaged in an exhaustive review of the audiometric evidence in determining which audiogram most reliably represents claimant's work-related hearing loss. The administrative law judge first reiterated that he would accord no weight to the Miracle-Ear audiogram administered on December 27, 1999. *See* n.1 *supra*; Decision and Order at 10-11. Next, the administrative law judge fully addressed the expert testimony and other evidence regarding the reliability of the Taylor audiogram conducted on October 26, 2000, and Dr. Jacobson's audiogram conducted on December 26, 2000. *See* Decision and Order at 6-8, 11-17. Ultimately, having taken into account the following factors: 1) claimant had not been exposed to noise for five days before the test, thus eliminating concerns of a temporary threshold shift; 2) tests which confirmed the accuracy of the audiogram, including speech discrimination, speech reception and bone conduction, were performed; 3) the experts agreed that Dr. Jacobson's audiogram was the most accurate; and 4) Dr. Jacobson's audiogram meets the requirements of a presumptive audiogram under the statute,[3] the administrative law judge concluded that Dr. Jacobson's audiogram

[3] Under the Act and implementing regulations, an audiogram provides presumptive evidence of the extent of claimant's hearing loss if the following conditions are met: 1) the audiogram was administered by a licensed or certified audiologist or physician; 2) the employee was provided with a copy of the audiogram and the accompanying report within thirty days from the time that the audiogram was administered; 3) no one has provided a contrary audiogram of equal probative value within thirty days of the subject audiogram where claimant continues to be exposed to excessive noise levels or within six months if such exposure ceases; 4) the audiometer used must be calibrated according to current American National Standard Specifications; and, 5) the extent of claimant's hearing loss must be measured according to the most currently revised edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment (*AMA *Guides). See* 33 U.S.C. §908(c)(13)(E); 20 C.F.R. §702.441(b); *Steevens v. Umpqua River Navigation,* 35 BRBS 129, 133 n.6 (2001). In

is the most credible and reliable. Decision and Order at 17. In finding the Taylor audiogram to be less reliable, the administrative law judge considered that this test was not interpreted and certified by a licensed or certified audiologist or otolaryngologist; that claimant had worked, and had been exposed to loud noise, four to five and one-half hours prior to testing,[4] that additional testing to confirm the audiogram was not performed, and that the experts agreed that the Taylor and Jacobson audiograms, although similar, are not within the values for test/retest reliability. *See* Decision and Order at 11-17. Having found Dr. Jacobson's audiogram to be the most credible and reliable, the administrative law judge considered it to be the determinative audiogram, and he accordingly found claimant to be entitled to compensation for the 6.3 percent binaural impairment demonstrated by that audiogram and found Universal, as the last employer to expose claimant to injurious noise prior to that audiogram, to be the responsible employer.

We affirm the administrative law judge's finding that Dr. Jacobson's audiogram is the most reliable evidence of claimant's hearing loss, and thus is the determinative audiogram both for establishing the degree of claimant's work-related impairment and for determining the responsible employer. The administrative law judge's finding that the Taylor audiogram and Dr. Jacobson's audiogram were not of equal probative value is reasonable and supported by substantial evidence. *See Steevens v. Umpqua River Navigation,* 35 BRBS 129, 133 (2001). We thus reject Universal's argument that the administrative law judge erred in failing to credit the Taylor audiogram. Although Universal is correct in contending that an administrative law judge is not precluded from according weight to an audiogram which does not qualify as presumptive pursuant to 20 C.F.R. §702.441(b),[5] it has failed to establish that the administrative law judge here erred

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the instant case, the parties stipulated that Dr. Jacobson's audiogram meets the requirements of a presumptive audiogram. *See* Decision and Order at 3; JX 1.

[4] The administrative law judge set forth the experts' testimony that prior to testing an employee should be removed from noise for a longer period than the four to five and one-half hours between claimant's noise exposure and his audiogram. Decision and Order at 15-16. Specifically, the administrative law judge cited the opinions of Drs. Jacobson, Hecker and Lee that the employee should not be exposed to noise for a minimum of 24 hours. *See* CX 8 at 18; Tr. at 92-93; CX 3 at 16.

[5] While conceding that the Taylor audiogram does not qualify as a *presumptive* audiogram under 20 C.F.R. §702.441(b), *see* Tr. at 12-13, Universal avers that it meets the requirements for a baseline audiogram set forth at 20 C.F.R. §702.441(c) and (d) and therefore should have been credited by the administrative law judge. Ceres, in its response brief, contends that the Taylor audiogram does not qualify as a baseline audiogram in that claimant was exposed to workplace noise within 14 hours of the testing. *See* 20 C.F.R. §702.441(c), (d); 29 C.F.R. §1910.95(g)(5)(iii). Ceres also contends that even if the Taylor audiogram qualified as a baseline audiogram, the administrative law judge was entitled to find it to be less probative than Dr. Jacobson's

in finding the Taylor audiogram to be less reliable than Dr. Jacobson's audiogram. As the administrative law judge's finding that Dr. Jacobson's audiogram is more reliable is reasonable and supported by substantial evidence, we uphold his finding that it is the determinative audiogram must be affirmed. *See Faulk*, 228 F.3d 378, 34 BRBS 71(CRT).

We also reject Universal's alternative argument that it cannot be held liable as the responsible employer because claimant's hearing loss did not have a rational connection to his employment with Universal. Universal avers that claimant's hearing loss actually decreased after his transfer to Universal's gang. The administrative law judge, however, did not find that claimant's hearing impairment decreased between the date of the Taylor audiogram on October 26, 2000, and the date of Dr. Jacobson's December 26, 2000 audiogram; rather, he rationally found Dr. Jacobson's audiogram to more reliably represent the actual amount of claimant's work-related hearing loss. Accordingly, Universal has not shown that the employee's exposure with employer did not have the potential to cause his harm. *See Stilley,* 243 F.3d 179, 35 BRBS 12(CRT); *Faulk,* 228 F.3d 378, 34 BRBS 71(CRT).[6]

Lastly, on the basis of our previous affirmance of the administrative law judge's reliance on Dr. Jacobson's audiogram, we reject claimant's contention, in his cross-appeal, that he is entitled to compensation for an eight percent binaural impairment pursuant to the Taylor audiogram. As previously stated, the administrative law judge's

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audiogram. We agree with Ceres's contentions. The administrative law judge's finding that claimant was exposed to workplace noise from four to five and one-half hours prior to the Taylor audiogram is supported by substantial evidence.

[6] Contrary to Universal's argument, the unpublished decision of the United States Court of Appeals for the Ninth Circuit in *Maersk Stevedoring Co. v. Container Stevedoring Co.,* 210 F.3d 384 (9th Cir. 2000), does not compel a different result. In *Maersk,* the Ninth Circuit held that, under the unique facts presented by that case, the responsible employer was determined by the earliest audiogram. The court ruled that the results of the first audiogram, which did not meet the standards set forth in the AMA *Guides,* were confirmed by three subsequent audiograms which did meet the AMA guidelines. The court emphasized that all the doctors agreed that the results of all four tests were "essentially the same." Thus, the court held that the validation of the first audiogram by the three subsequent tests established that the claimant's work-related exposure to noise after the first audiogram was conducted did not contribute to his hearing loss. As correctly stated by the administrative law judge here, the reasoning of the Ninth Circuit in *Maersk* has not been adopted by any other circuit or by the Board. Moreover, the administrative law judge properly distinguished the instant case on its facts from *Maersk.* Decision and Order at 12-13, 16.

decision to base his finding regarding the extent of claimant's disability on Dr. Jacobson's more reliable audiogram was reasonable and supported by substantial evidence. *See, e.g., Steevens,* 35 BRBS at 133.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge