

BRB No. 97-1745

HAROLD J. BROWN, Jr.)	
)	
Claimant-Respondent)	DATE ISSUED:
)	
v.)	
)	
BATH IRON WORKS CORPORATION)	
)	
and)	
)	
COMMERCIAL UNION INSURANCE)	
COMPANIES)	
)	
Employer/Carrier-)	
Petitioner)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Carrier-Respondent)	DECISION AND ORDER

Appeal of the Decision and Order On Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

G. William Higbee (McTeague, Higbee, MacAdam, Case, Watson & Cohen), Topsham, Maine, for claimant.

Kevin M. Gillis (Trough, Heisler & Piampiano), Portland, Maine, for employer and Commercial Union Insurance Companies.

Stephen Hessert (Norman, Hanson & DeTroy), Portland, Maine, for Liberty Mutual Insurance Company.

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

PER CURIAM:

Employer and carrier, Commercial Union Companies (Commercial Union and/or employer/carrier), appeal the Decision and Order On Remand (84-LHC-2117) 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).

This case is before the Board for the third time. Claimant worked for employer as a shipfitter at its Bath shipyard facility from 1971 to April 1978, and thereafter was transferred to the Hardings facility where he worked until June 1, 1984, when he voluntarily retired. Claimant testified that he was exposed to loud noise at both places. In the original Decision and Order in this case, Administrative Law Judge Robert M. Glennon found that claimant's employment at the Hardings facility was on a situs covered under Section 3(a) of the Act, 33 U.S.C. §903(a), that claimant was entitled to compensation for a 39.6 binaural hearing loss based on the results of a 1983 audiogram, and that Liberty Mutual Insurance Company (Liberty Mutual), the carrier on the risk from February 28, 1981 and continuing, was the responsible carrier. Employer and Liberty Mutual appealed to the Board, arguing that the administrative law judge erred in finding that claimant's employment at the Hardings facility was on a covered situs and that Liberty Mutual is the responsible carrier.

In its initial decision, *Brown v. Bath Iron Works Corp.*[*Brown I*], 22 BRBS 384 (1989), the Board reversed Judge Glennon's finding that Hardings was a covered situs. Furthermore, holding that the aggravation of a covered injury occurring after claimant's longshore employment has terminated is non-compensable, citing *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981), the Board vacated Judge Glennon's award, and remanded the case for the administrative law judge to determine if claimant had a hearing loss prior to April 1978, based on audiograms conducted in 1955 and 1967, and to reopen the record if necessary. Lastly, the Board reversed Judge Glennon's finding that Liberty Mutual is the responsible carrier and held that Commercial Union, the carrier on the risk from January 1, 1963 until February 28, 1981, during claimant's last covered exposure to injurious noise was responsible for any work-related hearing loss claimant suffered prior to April 1978.

In the Decision and Order on Remand, Administrative Law Judge Chester Shatz denied benefits, finding that the audiograms administered prior to 1978 were

not credible and that the parties had no further evidence to submit. Claimant appealed to the Board. In its second decision, the Board affirmed Judge Shatz's finding that the pre-1978 audiograms were not credible as they lacked indications regarding the calibration of the equipment and the certification of the persons administering the tests. See *Brown v. Bath Iron Works Corp.* [*Brown II*], BRB No. 90-1058 (June 16, 1992)(unpub.). The Board further noted that Judge Shatz found the 1983 audiogram reflecting a 39.6 percent binaural hearing loss credible, but did not rely on it because it reflected a hearing loss that resulted in part from exposure occurring on a non-covered situs. Relying on case law decided after its initial decision in this case and based on the finding that the 1983 audiogram was credible, the Board reversed Judge Shatz's denial of benefits, and reinstated the award for a 39.6 percent binaural impairment.¹ *Id.*

Thereafter, Commercial Union and Liberty Mutual each filed motions for reconsideration. The Board, by decision dated May 25, 1995, reaffirmed its prior decision awarding claimant benefits for a 39.6 percent hearing loss payable by Commercial Union, but remanded the case for the administrative law judge to determine claimant's average weekly wage as of April 17, 1978, the date of his last covered employment. See *Brown v. Bath Iron Works Corp.* [*Brown III*], BRB No. 90-1058 (May 25, 1995)(unpub.). In its decision, the Board specifically rejected Commercial Union's contention that the Board must adhere to its first decision in this case and thus affirm Judge Shatz's denial of benefits. *Id.*, slip opinion at 3-4. Moreover, the Board recognized that as Liberty Mutual had previously paid claimant his compensation in full, it is entitled to reimbursement from Commercial Union for

¹Specifically, the Board noted that in *Labbe v. Bath Iron Works Corp.*, 24 BRBS 159 (1991), it had considered its holding in *Brown*, 22 BRBS at 388, and stated that *Leach*, 13 BRBS at 231, has not been applied to occupational disease cases. *Labbe*, 24 BRBS at 161-162; see also *Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991). The Board additionally stated that in occupational disease cases the last covered employer or carrier is liable for the totality of claimant's disability resulting from an occupational disease even if the disability is aggravated by subsequent non-covered employment. *Labbe*, 24 BRBS at 162. The Board held in *Labbe* that the holdings in *Brown* and *Leach* do not necessarily require claimants to recreate the precise extent of their hearing loss at the date covered employment ended and that, in the absence of credible evidence regarding the extent of hearing loss at the end of covered employment, the administrative law judge may rely on the most credible evidence of record in determining the extent of claimant's work-related hearing loss. The Board therefore held in *Brown II* that claimant was entitled to a permanent partial disability award based on the credited 1983 audiogram showing a 39.6 binaural hearing loss, and that Commercial Union, as the carrier on the risk during claimant's last period of covered employment, is the responsible carrier. *Brown II*, slip op. at 6.

compensation and attorney's fees paid by Liberty Mutual, consistent with the Board's decision. *Id.*, slip op. at 4-5.

On remand, Administrative Law Judge Alexander Karst (the administrative law judge) determined that claimant's average weekly wage as of April 17, 1978, was \$283.20, and accordingly, ordered Commercial Union to reimburse Liberty Mutual in the amount of \$188.80 per week, for a period of 79.20 weeks, for a total amount of \$14,952.96,² as well as \$2,230 for attorney's fees paid to claimant.

On appeal, employer/carrier again requests that the Board reverse its decision in *Brown II*, and affirm Judge Shatz's Decision and Order on Remand denying benefits. Claimant and Liberty Mutual respond, urging affirmance of the administrative law judge's Decision and Order On Remand.

As employer/carrier's argument that the Board committed error in its decision in *Brown II*, by departing from its initial decision in *Brown I*, was explicitly considered and rejected by the Board in its Decision and Order on Reconsideration issued May 25, 1995, see *Brown III*, slip op. at 3-4, and employer has failed to make any persuasive argument as to why this determination was in error, we reaffirm our determinations that claimant is entitled to benefits for a 39.6 percent binaural loss and that Commercial Union, as the carrier on the risk during claimant's last covered employment, is liable for said benefits. Consequently, as employer/carrier has not alleged error in the administrative law judge's decision on remand, we affirm the administrative law judge's average weekly wage determination and his order that Commercial Union shall reimburse Liberty Mutual for compensation it has previously paid on this claim totaling \$14,952.96, plus \$2,230 in attorney's fees paid to claimant's counsel in connection with work performed in this case.

²Specifically, the administrative law judge arrived at the compensation rate of \$188.80 by taking two-thirds of claimant's average weekly wage, and then multiplied that figure by a total of 79.20 weeks, which represents 39.6 percent of 200 weeks. See 33 U.S.C. §908(c)(13), (19).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge