BRB No. 91-1749

HOWARD D. PETTY	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	DATE ISSUED:_____
THE TRAVELERS INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Dismissing Travelers Insurance Company and the Decision and Order Approving Settlement of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Walter Meigs, Mobile, Alabama, for self-insured employer.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for carrier.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative

Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Order Dismissing Travelers Insurance Company and the Decision and Order Approving Settlement (89-LHC-3216) of Administrative Law Judge Richard D. Mills 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The facts are undisputed in this case. Claimant, a pipefitter who last worked for employer on September 8, 1988, filed a claim under the Act on March 10, 1987 for an 18.8 percent binaural impairment, based on a January 30, 1987 audiometric evaluation.[1] Cl. Exs. 1-2, 5. On July 25, 1989, claimant underwent a second evaluation, the results of which revealed a 1.9 percent binaural impairment pursuant to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Cl. Ex. 6; Emp. Ex. 18. Because of the disparity between the two evaluations, claimant underwent a third evaluation in November 1989, which measured a binaural impairment of 4.0625 percent. Cl. Ex. 7; Emp. Ex. 17.

A hearing was held on January 16, 1991, wherein the sole issue disputed was whether The Travelers Insurance Company (Travelers), which provided insurance coverage to employer beginning on May 24, 1988, is liable for claimant's benefits as the responsible carrier. Jt. Ex. 1. In his Order Dismissing Travelers Insurance Company, the administrative law judge applied the standards set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955), and *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), and rejected employer's argument that claimant may not be charged with awareness of his hearing loss pursuant to Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D) (1988), until he personally receives a copy of an audiogram and accompanying report. Instead, the administrative law judge found that claimant became constructively aware of his occupational hearing loss on January 30, 1987, as his attorney received a copy of the audiogram bearing that date. Because claimant's January 30, 1987 date of awareness and his subsequent March 10, 1987 claim both precede the date on which Travelers came on the risk, the administrative law judge concluded that employer is liable for claimant's benefits in its self-insured capacity. Order at 3. Further, the administrative law judge found he lacked jurisdiction to rule on the contractual rights of the parties, so he did not address

[1]In December 1990, claimant received a written report interpreting the January 1987 evaluation. Cl. Ex. 5.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

employer's arguments that Travelers is liable for the hearing loss claim under Alabama state law pursuant to the terms of the insurance policy, and that Travelers should be estopped from denying this responsibility based on its prior acceptance of the claim without reservation on February 1, 1989. Order at 3 n.1.

Following the issuance of this Order, the parties submitted a proposed settlement agreement to the administrative law judge, in which employer agreed to pay claimant a lump sum of $1,400 in benefits, $1,600 for an attorney's fee, and future medical expenses. The parties affixed copies of claimant's July 25 and November 13, 1989 audiograms as supporting documentation.[2] The administrative law judge summarily approved the terms of the settlement in a Decision and Order Approving Settlement dated July 23, 1991.

On appeal, employer challenges the administrative law judge's finding that it is liable as self-insurer for the claim, reiterating the arguments it made below. Alternatively, employer moves for certification of the insurance questions to the Alabama Supreme Court. Both Travelers and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's decision and denial of the motion.

It is well-established that the employer or carrier responsible for paying benefits in an occupational hearing loss case is the last employer or carrier to expose a claimant to injurious stimuli prior to the date upon which the claimant becomes aware he is suffering from an occupational hearing loss. *Cardillo*, 225 F.2d at 137. In resolving the responsible carrier issue in this case, the administrative law judge applied the standard set forth in *Larson*, 17 BRBS at 205, which states that the time of awareness under Sections 12 and 13, 33 U.S.C. §§912, 913, is to be used to determine the date of awareness for purposes of ascertaining the responsible employer or carrier under the *Cardillo* standard, and concluded that claimant's counsel's receipt of the January 30, 1987 audiogram and report is constructive receipt and knowledge by claimant.[3] Thus, as employer was self-insured on the date of claimant's awareness, the administrative law judge determined that employer was on the risk at the time claimant was last exposed to injurious stimuli prior to the date of his awareness.

Subsequent to the administrative law judge's decision in this case, however, the Board overruled *Larson* and adopted the decision of the United States Court of Appeals for the Ninth Circuit in *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991).

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[2]Claimant and employer completed their settlement negotiations prior to the hearing concerning Travelers' potential liability for benefits. Although Travelers was not explicitly a party to the agreement, it agreed that the proposed settlement was reasonable. Tr. at 5-6.

[3]Since the administrative law judge issued his decision, the Board has held that the receipt of an audiogram by counsel is not constructive receipt by the employee, and that the time for filing a claim under Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D) (1988), commences only upon the employee's physical receipt of an audiogram, with its accompanying report, indicating that claimant has suffered a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992).

Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159 (1992). In *Port of Portland*, the court held that receipt of the audiogram and accompanying report has no significance outside the procedural requirements of Sections 12 and 13, and that the responsible employer or carrier is the one at risk at the time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability. *See Good*, 26 BRBS at 163.

In the instant case, it is undisputed that Travelers' risk as insurer commenced on May 24, 1988. Further, the parties stipulated that claimant sustained a hearing loss during the course of his employment with employer, and it is uncontroverted that claimant worked for employer until September 8, 1988. Thus, claimant was exposed to injurious stimuli during Travelers' period of coverage.[4] Moreover, the settlement agreed to by claimant and employer, and acknowledged as reasonable by Travelers, and which was approved by the administrative law judge, was based upon the two 1989 audiograms of record. Consequently, in approving the parties' settlement, the administrative law judge implicitly found the two 1989 audiograms to be determinative of claimant's disability. Inasmuch as Travelers was the carrier on the risk at the time of claimant's most recent exposure to injurious stimuli which could have contributed to the hearing loss evidenced on the determinative audiograms, it is the responsible carrier in this case pursuant to *Cardillo*, *Port of Portland*, and *Good*. The administrative law judge's finding that employer is liable for claimant's benefits is therefore reversed, and his decision modified to reflect Travelers liability as the responsible carrier for claimant's occupational hearing loss benefits.

[4]In its response brief, Travelers contends there is no proof claimant was exposed to injurious noise at employer's facility after it assumed the risk on May 24, 1988, and therefore it cannot be held liable as the responsible carrier. Claimant testified, however, that he was exposed to noise at employer's facility even after earplugs were issued. *See* Tr. at 36-38. Because the record indicates the parties settled this issue, *see* Jt. Ex. 1; Decision and Order at 2, and because Travelers bears the burden of showing the absence of injurious exposure during its period of coverage, we reject its contention. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 63 (1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

Employer also argues that Travelers is liable for claimant's benefits pursuant to the terms of the insurance policy,[5] and that Travelers waived its right to contest liability by virtue of its February 1, 1989 letter to employer, accepting liability without reservation. These arguments were addressed and rejected by the Board in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, ___ BRBS ___, BRB No. 91-1374 (September 27, 1993). For the reasons stated therein, we reject employer's contentions.[6] *See Barnes*, slip op. at 4-5.

Accordingly, the administrative law judge's Order Dismissing Travelers Insurance Company is reversed, and that Order and the administrative law judge's Decision and Order Approving Settlement are modified to reflect Travelers' liability for claimant's benefits. In all other respects, the administrative law judge's Decision and Order Approving Settlement is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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ROBERT J. SHEA
Administrative Law Judge

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[5]The insurance contract between Travelers and employer provides in pertinent part:

A. How This Insurance Policy Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1. Bodily injury by accident must occur during the policy period.

2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

Emp. Ex. 1 at 10; Travelers Ex. 3 at 2.

[6]Employer's motion for certification of the insurance questions to the Alabama Supreme Court is denied, as there is no authority under the Act for the Board to take such action. *See Barnes*, slip op. at 4 n.2.