BRB Nos. 91-1833, 91-1833A,
and 91-1833B

JOHN W. WILLIAMS (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FMC CORPORATION	)	)
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	DATE ISSUED:
	)	
Carrier-Respondent Cross-Petitioner B	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner A	)	DECISION AND ORDER

Appeals of the Decision and Order On Remand of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Mildred J. Carmack (Schwabe, Williamson & Wyatt) and Delbert J. Brenneman (Hoffman, Hart & Wagner), Portland, Oregon, for self-insured employer.

Robert E. Babcock (Littler, Mendelson, Fastiff & Tichy), Portland, Oregon, for Liberty Mutual Insurance Company.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol 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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer (FMC) appeals, and the Director, Office of Workers' Compensation Programs (the Director) and Liberty Mutual Insurance Company (Liberty Mutual) cross-appeal, the Decision and Order on Remand (86-LHC-136) of Administrative Law Judge Edward C. Burch awarding benefits 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 worked for employer as a shipwright and as a marine foreman for employer for approximately 24 years until August 11, 1983, when there was a strike. Claimant did not return to work when the strike ended, and he retired on December 31, 1983. The parties stipulated that claimant was exposed to noise that could have caused a hearing loss during all periods relevant to the claim. Liberty Mutual was the insurer on the risk from October 1, 1965 through September 30, 1975; employer became self-insured thereafter. In the original Decision and Order, the administrative law judge took the average of nine audiograms administered between January 30, 1976 and July 26, 1984, and determined that claimant suffered a 31 percent binaural loss. Based on Dr. Mettler's opinion that it was medically probable that claimant's hearing loss was not aggravated by his exposure to injurious noise between September 30, 1975 and January 30, 1976, and that claimant's hearing loss did not progress after January 1976, the administrative law judge found that claimant's injurious exposure while employer was on risk did not contribute to claimant's hearing loss. The administrative law judge therefore concluded that Liberty Mutual was the responsible carrier. The administrative law judge calculated claimant's average weekly wage based on his annual earnings in the year prior to claimant's retirement, which included the period of the strike, and awarded claimant benefits based on an average weekly wage of $427.64.

Liberty Mutual appealed to the Board, contending that the administrative law judge erred in finding it was the responsible carrier, and erred in finding that an actual causal relationship between the exposure to noise while employer was on the risk and the hearing loss was necessary to establish employer's liability. Claimant cross-appealed, challenging the administrative law judge's finding of his average weekly wage. In *Williams v. FMC Corp.*, BRB Nos. 86-2392/A (July 31, 1989)(unpublished), the Board reversed the administrative law judge's finding that Liberty Mutual was the responsible carrier. The Board held that employer is liable on the ground that claimant was exposed to injurious noise while it was on the risk, and that an actual causal relationship between the exposure and the disability need not be shown. The Board also held that the administrative law judge erred in calculating claimant's average weekly wage as it should be based on his annual earnings during the 52-week period prior to the strike pursuant to Section 10(i) and Section 10(d)(2)(A), 33 U.S.C. §910(d)(2)(A),(i) (1988). The Board therefore remanded the case for the

administrative law judge to determine claimant's average weekly wage during the period from August 1982 to August 1983.

In the Decision and Order on Remand, the administrative law judge relied on the parties' stipulation that claimant's average weekly wage is $732.82. FMC, the Director, and Liberty Mutual now appeal to the Board.

On appeal, FMC contends that the Board erred in holding it liable as the responsible carrier under 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), which was decided after the Board's initial decision in this case. BRB No. 91-1833. The Director cross-appeals, stating that although she agrees that FMC is liable, the rationale by which the Board so held must be changed in light of the decision in *Port of Portland.* The Director also challenges the calculation of claimant's average weekly wage, and contends that employer is liable for a penalty pursuant to Section 14(e). BRB No. 91-1833A. Liberty Mutual also cross-appeals, urging affirmance of the determination that FMC is the responsible carrier. BRB No. 91-1833B. Claimant has not responded to this appeal.[1]

We reaffirm the Board's holding that FMC is the responsible carrier.[2] In *Port of Portland*, the Ninth Circuit 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 claimant's disability. *Port of Portland*, 932 F.2d at 841, 24 BRBS at 144-145 (CRT); *see also Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955); *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993); *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992); *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1992). In *Port of Portland*, because the claimant's claim was based on an audiogram administered prior to the time employer came on the risk, employer could not be held liable as there was no rational connection between exposure with the subsequent employer and the disability. The court held that although a finding of an actual causal relationship was not necessary to establish liability, it

[1]Claimant died during the pendency of this appeal, and the Board reformed the caption to reflect this. Order of January 18, 1995. The Director states that a determination must be made as to who should receive the award if it has not been fully paid. Inasmuch as claimant's award falls under the schedule at Section 8(c)(13), 33 U.S.C. §908(c)(13), distribution of any unpaid benefits must be made in accordance with Section 8(d), 33 U.S.C. §908(d). *Clemon v. ADDSCO Industries*, 28 BRBS 104 (1994); *Wood v. Ingalls Shipbuilding, Inc.*, 28 BRBS 27 (1994), *modified in part on recon.*, 28 BRBS 156 (1994).

[2]Generally, when, in a subsequent proceeding, a party seeks to raise an issue previously decided by the Board, the Board will apply the "law of the case doctrine" and decline to readdress the issue. *See, e.g., Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988). There is, however, no procedural rule that prevents the Board from reconsidering the issue presented in this case given new case law decided in the intervening period. *See generally Stone v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB Nos. 88-3467/A (Feb. 27, 1995).

was factually impossible for the claimant's injurious exposure with employer to have contributed to his disability because the claimant did not start working for employer until after the audiogram was performed. The court held that the injurious exposure must, at least theoretically, be able to contribute to the claimant's disability. *Port of Portland*, 932 F.2d at 841, 24 BRBS at 144-145 (CRT).

In this case, all of the audiograms relied on by the administrative law judge in determining the extent of claimant's impairment were administered while FMC was on the risk, and claimant filed his claim based on an audiogram performed after he retired. As claimant was exposed to injurious noise at all relevant times, all of his exposure could therefore have contributed to the disability evidenced on the determinative audiograms, and the Board's conclusion that FMC is the responsible carrier is consistent with *Port of Portland*. We reject FMC's assertion that *Port of Portland* requires a showing that claimant's exposure to injurious noise actually contributed to or aggravated his hearing loss. The court in *Port of Portland* specifically rejected this construction. *Id.*; *see also Lustig v. U. S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Accordingly, we reaffirm the Board's holding that FMC is the responsible carrier.[3]

On cross-appeal, the Director contends that claimant's average weekly wage should be calculated as of January 30, 1976, the date of the first of the nine credited audiograms, which revealed a binaural impairment of 32.51 percent and reflected the fullest extent of claimant's hearing loss evidenced on any of the credited tests. The Director also contends that January 30, 1976, is the date employer acquired knowledge of claimant's hearing loss inasmuch as it conducted an audiometric examination on that date, and therefore was obligated to commence payment of benefits or to file a notice of controversion at this time. *See* 33 U.S.C. §914. As employer did not do so, the Director contends that employer is liable for a Section 14(e) penalty on claimant's entire disability award based on his average weekly wage as of January 30, 1976, commencing on that date and running for 62 weeks.

FMC responds, contending that the Director lacks standing to challenge the administrative law judge's acceptance of the parties' stipulated average weekly wage. In the alternative, employer contends that pursuant to *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), the case should be remanded for the administrative law judge to calculate claimant's average weekly wage based on the date of last exposure, which it contends is prior to the period it was on the risk. FMC also contends it is not liable for a Section 14(e) penalty. It maintains that while it knew of the results of the 1976 audiogram, it had no knowledge regarding the cause of claimant's hearing loss, and was not required to commence payment or to controvert the claim.

The Director, as a party in interest, has standing to file an appeal with the Board raising a

[3]Inasmuch as the Director agrees that the Board properly held FMC liable, we need not address her specific contentions in this regard.

substantial issue of law or fact. 33 U.S.C. §921(b)(3); 20 C.F.R. §§801.2(10), 802.201(a). The Director may appeal to the Board when an erroneous legal or factual determination is alleged, even though she did not participate in the proceedings before the administrative law judge. *Hitt v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 353 (1984). In this case, inasmuch as the Director alleges that the administrative law judge's acceptance of the stipulated average weekly wage is not in accordance with law, the issue is properly raised. *See generally Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133, 135 (1991).

In *Bath Iron Works*, the Supreme Court held that hearing loss is an occupational disease which immediately results in disability, and that the injury is complete when the exposure ceases. *Bath Iron Works*, 113 S.Ct. at 699, 26 BRBS at 154 (CRT). The court therefore held that Section 10(i) which requires the use of claimant's date of awareness for purposes of average weekly wage is not applicable to hearing loss claims, and that the relevant time of injury for calculating a retiree's benefits for occupational hearing loss is the date of last exposure to injurious stimuli, which is the date the injury is complete. *Id.*, 113 S.Ct. at 700, 26 BRBS at 154 (CRT).

The Supreme Court's decision, however, does not affect the Board's holding in its initial decision in this case that claimant's average weekly wage should be calculated based on the 52-week period prior to August 1983, even though this directive was based on an application of Section 10(i). Inasmuch as claimant continued to be exposed to noise, the Board's determination is consistent with the holding in *Bath Iron Works*.[4] On remand, the parties submitted a stipulated average weekly wage in accordance with the Board's instructions. We reject the Director's contention that claimant's injury for purposes of average weekly wage was complete as of January 30, 1976, when his audiogram evinced the highest impairment of the credited tests. There is no reason to depart from the plain language of *Bath Iron Works* in this case -- the date of last exposure is the date used for calculating average weekly wage. Where, as here, claimant is being compensated for the hearing loss demonstrated on a variety of audiograms, including ones administered after his retirement, to use the date of one particular audiogram for average weekly wage purposes removes it from the context of the claim as a whole. The injury being compensated in this case was not complete until claimant retired. *Bath Iron Works*, 113 S.Ct. at 700, 26 BRBS at 154 (CRT). We therefore find no error in the administrative law judge's acceptance of the parties' stipulated average weekly wage.

[4]We again reject FMC's contention that claimant was not exposed to injurious stimuli while it was on the risk.

We also reject the Director's contention that FMC is liable for a Section 14(e) penalty inasmuch as it did not pay benefits or controvert the claim in a timely manner after January 30, 1976, when FMC's first audiogram established claimant's hearing loss. First, claimant's benefits run from the date of last exposure in 1983. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993). Moreover, as FMC contends, there is no evidence that it had the requisite awareness under Section 14 on January 30, 1976, merely because it instituted an audiometric testing program, and because claimant's test revealed a hearing loss. The "knowledge" element of Section 14(d) is the same as the "knowledge" element under Section 12(d)(1), 33 U.S.C. §912(d)(1), and the fact that an employer has instituted a hearing protection program and recommends that claimant wear ear plugs is insufficient to impute knowledge to employer that claimant's condition is work-related and that compensation liability is possible.[5] *See generally McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983). The Director's attempt, through hindsight, to impute knowledge to employer at this time, prior to even claimant's knowledge of his injury, artificially inflates the significance of one audiogram in relation to the claim as a whole. The Director's argument is therefore rejected.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]We also reject the Director's contention that employer was obligated to file a report pursuant to Section 30(a), 33 U.S.C. §930(a), on January 30, 1976. The failure to file a Section 30(a) report is not significant outside the requirements of Section 13. *See generally Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990). *See also Skelton v. Bath Iron Works Corp.*, 27 BRBS 28 (1993) (under amended Section 30(a), report need not be filed for a "no time lost" injury).