BRB No. 93-498

RONNIE E. CHESTANG	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED: _____
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
THE TRAVELERS INSURANCE COMPANY	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

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

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

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-2004) 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).

Claimant worked as a carpenter and pipefitter for employer from 1974 until September 9, 1988, where he was exposed to noise. On January 23, 1987, claimant filed a claim under the Act for a 3.1 percent binaural hearing loss based on a December 17, 1986, audiogram. An audiometric test performed by Jim McDill, Ph.D. on March 4, 1992 revealed a bilateral high frequency sensorineural hearing loss, which measured as a zero percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment*. On May 24, 1988, the Travelers Insurance Company (Travelers) became employer's carrier for one year; until then employer was self-insured.

In his Decision and Order, the administrative law judge, crediting the March 4, 1992, audiogram indicating a zero percent hearing loss, concluded that claimant sustained no compensable disability under the Act. The administrative law judge determined, however, that although claimant sustained no compensable impairment, he did suffer a work-related noise-induced hearing loss, entitling him to reasonable and necessary medical benefits under Section 7 of the Act, 33 U.S.C. §907. The administrative law judge also determined that employer was liable for claimant's medical benefits in its self-insured capacity, thereby rejecting employer's assertion that it was not liable because claimant continued to work after May 24, 1988, when Travelers came on the risk, and that claimant did not personally receive a copy of the December 17, 1986 audiogram and February 3, 1992, accompanying report until the date of the hearing. The administrative law judge also rejected employer's assertion that Travelers was estopped from denying responsibility because it had already accepted coverage based on a June 7, 1989 letter indicating that it would not defend a claim filed before the date of the policy. He failed, however, to address employer's argument that Travelers was liable for the hearing loss claim under Alabama state law pursuant to the terms of its insurance policy with employer.

Employer appeals the administrative law judge's finding that it is liable for the claim in its capacity as a self-insurer, reiterating the arguments it made below.[1] Travelers responds, urging that the administrative law judge's Decision and Order holding the self-insured employer liable as the responsible carrier, be affirmed.

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 claimant to injurious stimuli prior to the date upon which claimant becomes aware that he is suffering from an occupational disease arising out of his employment. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In resolving the responsible carrier issue in this case, the administrative law judge rejected employer's argument that the responsible carrier determination was contingent upon claimant's receipt of an audiogram and accompanying report consistent with the requirements of Section 8(c)(13)(D). He determined that Section 8(c)(13)(D) was intended to protect claimant's claim from being time-barred, and was not relevant to the responsible employer

[1]Employer filed a motion to certify the insurance questions presented in this case to the Alabama Supreme Court with the Board. This motion was denied by the Board in an Order dated January 5, 1994, which noted that there was no authority under the Act for the Board to take this action.

determination. The administrative law judge further determined that while the failure to receive an audiogram could be raised by claimant as an affirmative defense to the running of the statute of limitations, it was not intended as "some fictional method to shift liability to Travelers, who in this instance provided no coverage until well after the claim was filed." Finally, the administrative law judge concluded that notwithstanding that claimant's attorney had knowledge of the results of the 1986 audiogram, "what better evidence of awareness on the part of the claimant could possibly be available than the filing of a claim." Decision and Order at 6.

Employer's argument that the determination of the responsible employer or carrier is contingent upon claimant's receipt of the audiogram and accompanying report is rejected. Employer's argument is premised on application of the standard set forth in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), that the time of awareness under Sections 12 and 13, 33 U.S.C. §§912, 913, would be applied in finding the date of awareness for purposes of determining the responsible employer. In *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992), however, the Board abandoned the *Larson* standard in favor of that adopted by 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).[2] 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 of the Act, and 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 disability. *See Good*, 26 BRBS at 163.[3]

In the instant case, although the administrative law judge rejected the *Larson* standard in

[2]We thus need not address the specific arguments raised by the parties with regard to claimant's date of awareness to the extent the arguments made were based on application of *Larson.* We note, however, that while not dispositive in this case, the Board has held that the receipt of an audiogram by counsel is not constructive receipt by the employee; pursuant to Section 8(c)(13)(D), the statute of limitations period for filing a claim for hearing loss under the Act commences only upon the physical receipt by claimant of an audiogram, with its accompanying report, which indicates that claimant has suffered a work-related loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992), *aff'd in pert. part on recon. en banc*, 28 BRBS 129 (1994).

[3]In light of the Board's adoption of *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), we reject self-insured employer's argument that the Board's iteration of the responsible carrier standard outside the jurisdiction of the United States Court of Appeals for the Ninth Circuit set forth in *Mauk v. Northwest Marine Iron Works* , 25 BRBS 118 (1991), is dispositive. Self-injured employer also cites *Bath Iron Works Corp. v. Director, OWCP*, ___ U.S. ___, 113 S.Ct. 692, 26 BRBS 151 (CRT) (1993), for the proposition that the time of injury in a hearing loss case continues until the exposure to noise ceases. We agree with Travelers, however, that *Bath Iron Works*, which addressed whether hearing loss benefits for a retiree are properly calculable under 33 U.S.C. §908(c)(13) or 33 U.S.C. §908(c)(23)(1988), has no bearing on the responsible carrier determination in the present case.

making his responsible carrier determination, his finding that self-insured employer is liable for claimant's medical benefits cannot be affirmed because it is inconsistent with *Good* and *Port of Portland*. It is undisputed that Travelers' risk as insurer commenced on May 24, 1988 and the parties, including Travelers, stipulated that claimant was exposed to workplace noise which could have caused injury. As it is uncontroverted that claimant continued to work for employer until September 9, 1988, claimant was exposed to injurious stimuli during Travelers' period of coverage. Inasmuch as Travelers was the carrier on the risk at the time of claimant's most recent exposure to injurious stimuli prior to the March, 4, 1992, audiogram which the administrative law judge found determinative of the extent of claimant's disability, Travelers is the responsible carrier pursuant to *Cardillo*, *Port of Portland*, and *Good*. The administrative law judge's finding that self-insured employer is liable for claimant's benefits is therefore reversed, and his decision is modified to reflect Travelers' liability for claimant's work-related medical expenses.[4]

Employer's argument that Travelers is liable pursuant to the terms of its insurance policy with employer has previously been considered by the Board and is rejected for the reasons stated in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188, 191-192 (1993). Employer's final argument that Travelers waived its right to contest liability by virtue of a January 19, 1989 letter written to employer similarly must fail. *See* RX. 5. This letter indicates only that Travelers was forwarding various claims submitted by employer to its claims department and cannot rationally be viewed as a voluntary surrender or relinquishment of its responsible carrier defense. *See generally American Casualty Co. v. Wright*, 554 So.2d 1015 (Ala. 1989). Accordingly, we affirm the administrative law judge's determination that Travelers did not waive its right to contest liability on the facts presented in this case.

Accordingly, the administrative law judge's determination that employer is liable for claimant's medical benefits in its self-insured capacity is reversed, and the Decision and Order is modified to provide that Travelers is liable for these benefits. The Decision and Order is, in all other respects, affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

[4]Travelers argues that it cannot be held liable for claimant's medical benefits because both the filing audiogram and the claim preceded May 24, 1988 and claimant sustained no injury during its period of coverage. We reject this argument. A distinct aggravation of an injury need not occur for an employer or carrier to be held liable; all that is required is evidence of exposure to potentially injurious stimuli. *Good*, 26 BRBS at 163-164, n.2; *Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pertinent part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989).

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge