

LEON SKELTON )  
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 Claimant )  
 )  
 v. )  
 )  
 BATH IRON WORKS CORPORATION ) DATE ISSUED:  
 )  
 and )  
 )  
 BIRMINGHAM FIRE INSURANCE )  
 COMPANY )  
 )  
 and )  
 )  
 COMMERCIAL UNION INSURANCE )  
 COMPANY )  
 )  
 and )  
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 LIBERTY MUTUAL INSURANCE )  
 COMPANY )  
 )  
 Employer/Carriers- )  
 Respondents )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, )  
 UNITED STATES DEPARTMENT OF )  
 LABOR )  
 )  
 Petitioner ) DECISION and ORDER

Appeal of the Decision and Order on Motion for Reconsideration of Anthony J. Iacobo,  
Administrative Law Judge, United States Department of Labor.

William S. Maddox (Robinson, Kriger, McCallum & Green, P.A.), Portland, Maine, for  
employer and Birmingham Fire Insurance Company.

Joshua T. Gillelan II (Judith E. Kramer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Motion for Reconsideration (88-LHC-2274) of Administrative Law Judge Anthony J. Iacobo 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).

On March 27, 1987, claimant filed a claim under the Act, alleging that he sustained an employment-related, noise-induced, binaural hearing loss. At the time of the hearing, claimant had been employed as a shipfitter with employer since January 6, 1964, where he was exposed to loud noise from blowers, grinders, and chipping hammers. In his initial Decision and Order, the administrative law judge determined that claimant is entitled to permanent partial disability benefits pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B)(1988), for a 40.9 percent binaural impairment based on the average of the five audiograms administered between March 1986 and March 1989. The administrative law judge also found that Liberty Mutual Insurance Company (Liberty Mutual) was the responsible carrier, inasmuch as Liberty Mutual was on the risk in June 1986, when claimant became aware of his hearing loss and its cause.<sup>1</sup> The administrative law judge found that employer was not entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), based on employer's failure to establish that claimant had a pre-existing hearing loss when he was hired in 1964.

The administrative law judge thereafter granted Liberty Mutual's Motion for Reconsideration which challenged the administrative law judge's finding that it is the responsible carrier and that employer is not entitled to Section 8(f) relief. In his Decision and Order on Motion for Reconsideration the administrative law judge found that Birmingham Fire Insurance Company (Birmingham Fire) is the responsible carrier and that employer is entitled to Section 8(f) relief. The administrative law judge held the Special Fund liable for claimant's 35.9 percent pre-existing binaural hearing loss as demonstrated on a 1983 audiogram, and employer liable for the subsequent 5 percentage point increase in claimant's hearing loss.

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<sup>1</sup> The parties stipulated that Commercial Union Insurance Company was the carrier on the risk from January 1, 1963 through February 28, 1981, Liberty Mutual was the carrier on the risk from March 1, 1981 through August 31, 1986, and Birmingham Fire was the carrier on the risk from September 1, 1986 through August 31, 1988.

On appeal, the Director contends that the administrative law judge erred in his Decision and Order on Motion for Reconsideration in finding that Birmingham Fire is the responsible carrier and in awarding Section 8(f) relief to employer.<sup>2</sup> Birmingham Fire responds, agreeing with the Director's contention that Liberty Mutual is the responsible carrier, but urging affirmance of the administrative law judge's conclusion that the Special Fund is liable for 35.9 percent of the employee's binaural hearing loss. Liberty Mutual has not responded to this appeal.

The Director initially argues that the administrative law judge erred in concluding on reconsideration that Birmingham Fire rather than Liberty Mutual is the responsible carrier. Specifically, the Director contends that the administrative law judge erred in basing the responsible carrier determination on the date claimant's attorney first received a copy of an audiogram and report reflecting claimant's work-related hearing impairment. We agree.

It is well established that the employer or carrier responsible for paying benefits in an occupational hearing loss case is the last covered 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 *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992), the Board recently adopted the position 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), in which the court 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 as evidenced by the determinative audiogram. In *Port of Portland*, the Ninth Circuit rejected the Board's position in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), that in a hearing loss case the awareness component of the *Cardillo* standard is the same as the awareness component of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, *i.e.*, claimant is not "aware" in a hearing loss case until he has actual receipt of an audiogram and its accompanying report indicating that he has a work-related hearing loss. *See* 33 U.S.C. §908(c)(13)(D)(1988). The court instead held that the responsible employer or carrier is the one on the risk prior to the administration of the determinative audiogram, which usually is the audiogram that causes a claim to be filed. *See Good*, 26 BRBS at 163.

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<sup>2</sup> The administrative law judge's award of benefits to claimant is not at issue in this appeal.

In the instant case, the administrative law judge applied the *Larson* standard, the law in effect at the time of his decision, to conclude on reconsideration that Birmingham Fire is the responsible carrier as claimant's attorney received a copy of the June 1986 audiogram and report in March 1987 when Birmingham Fire was on the risk. In his initial Decision and Order the administrative law judge determined that Liberty Mutual was on the risk in June 1986 when claimant became aware that he had a work-related hearing loss following the administration of an audiogram on June 4, 1986, and that claimant filed a claim in March 1987 after his attorney received a copy of this audiogram.<sup>3</sup> In light of the Board's holding in *Good*, we hold that Liberty Mutual is the responsible carrier as it was on the risk at the time of claimant's last injurious exposure, prior to his awareness, that bears a rational relationship to the hearing loss demonstrated on the June 1986 audiogram. *See Good*, 26 BRBS at 163. We therefore reverse the finding that Birmingham Fire is the responsible carrier and modify the administrative law judge's decision to hold that Liberty Mutual is the responsible carrier.

Next, we reject the Director's contention that the administrative law judge improperly awarded Section 8(f) relief to employer because all of claimant's compensable hearing impairment arose during the course of his employment for employer. Contrary to the Director's contention that a pre-employment audiogram is required to support Section 8(f) relief, the 1983 mid-employment audiograms showing a hearing loss provide the necessary support in the instant case. *See Risch v. General Dynamics Corp.*, 22 BRBS 251 (1989). Similarly, we reject the Director's argument that if the 1983 audiograms show a pre-existing permanent partial disability, then this injury was itself compensable and should be compensated by employer and Liberty Mutual. In support of this contention, the Director argues that Section 8(f) should only apply to the worsened hearing impairment of which claimant became aware in 1986, and that the Special Fund should get credit for the payments "due" claimant for the hearing loss evidenced in 1983 under the rationale in *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989). Unlike *Brown*, however, the present claimant did not file a claim for any loss in 1983 and therefore can not be separately compensated for that loss. Moreover, contrary to the Director's contention, there is no evidence of record that employer concealed the loss from claimant at that time and thus should not be entitled to Section 8(f) relief.

The Director correctly contends, however, that remand is required for the administrative law judge to consider the two audiograms performed in 1983. The administrative law judge concluded that the Special Fund is liable for the pre-existing 35.9 percent binaural hearing loss based on a December 22, 1983 audiogram. The administrative law judge however did not discuss the audiogram administered on December 29, 1983 which indicated a 33.8 percent binaural hearing loss. On remand, the administrative law judge must discuss this evidence and provide a rationale for his acceptance or rejection of it in determining the Special Fund's liability pursuant to Section 8(f).

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<sup>3</sup> We note that the receipt of an audiogram by counsel is not constructive receipt by the employee, and that 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 loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992).

Accordingly, the Decision and Order on Motion for Reconsideration is reversed with regard to the determination that Birmingham Fire is the responsible carrier, and the Decision and Order on Motion for Reconsideration is modified to hold Liberty Mutual liable. The administrative law judge's finding that employer is entitled to Section 8(f) relief is affirmed, but the case is remanded to the administrative law judge for consideration of the extent of the Special Fund's liability. In all other respects, the administrative law judge's Decision and Order on Motion for Reconsideration is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge