RICHARD M. HARRISON	)	BRB No. 91-1752
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
MARVIN MCDELL	)	BRB No. 91-1753
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
GRADY C. MOTLEY	)	BRB No. 91-1755
	)	
Claimant	)	
	)	
v.	)	
	)	

ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeals of the Orders Dismissing Travelers Insurance Company of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH and DOLDER, Administrative Appeals Judges, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Orders Dismissing Travelers Insurance Company and the Decisions and Orders Approving Settlements of Administrative Law Judge Richard D. Mills (89-LHC-2641, 89-LHC-3604 and 89-LHC-3669) on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act).[1] 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).

[1]We hereby consolidate for purposes of decision employer's appeals in *Harrison v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 91-1752, *McDell v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 91-1753, and *Motley v. Alabama Dry Dock & Shipbuilding Corporation*, BRB No. 91-1755. 20 C.F.R. §802.104.

*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).

Claimant Harrison, a retired welder who last worked for employer on September 1, 1988, filed a claim on April 21, 1988, for a 29.1 percent binaural hearing loss based on the results of a February 19, 1988 audiogram. An audiogram performed by Dr. McDill on October 6, 1989 revealed a moderate bilateral high frequency sensorineural hearing loss, but measured claimant's binaural impairment as zero percent. On December 8, 1989, claimant Harrison underwent an audiogram performed by Judith B. Huffman which revealed a 0.625 percent binaural hearing loss. At the hearing before the administrative law judge, the sole issue was whether Travelers Insurance Company (Travelers), which provided insurance coverage to employer from May 24, 1988 to May 24, 1989, was liable as the responsible carrier. Analyzing the responsible carrier issue under the standard set forth in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), the administrative law judge determined that claimant Harrison became constructively aware of his occupational hearing loss on February 19, 1988, when his attorney received a copy of the audiogram and accompanying report of that date. Inasmuch as claimant's February 19, 1988 date of awareness occurred prior to May 24, 1988, when Travelers assumed coverage, the administrative law judge found that employer was liable in its self-insured capacity and issued an Order on June 20, 1991 dismissing Travelers from the proceedings. On July 19, 1991, claimant and employer submitted a proposed settlement agreement to the administrative law judge, in which employer agreed to pay claimant Harrison a lump sum of $1,000 plus $2,000 for his attorney's fee and future medical benefits, affixing copies of the June 23, 1989 and October 6, 1989 audiograms as supporting documentation.[2] On August 12, 1991, the administrative law judge issued a Decision and Order summarily approving the proposed settlement. Employer then appealed the Decision to the Board.

On February 12, 1987, claimant McDell, who worked for employer as a pipe welder until August 24, 1988, filed a claim for an 11.2 percent binaural hearing loss, based on the results of a November 19, 1986 audiogram performed by the University of South Alabama Speech and Hearing Center. A subsequent audiogram performed on September 14, 1989 was interpreted by Dr. McDill as showing a .9 percent binaural impairment. On January 14, 1991, Joseph T. Holston, an audiologist, interpreted the earlier November 1986 audiogram as showing a 1.9 percent binaural hearing loss. After conducting a hearing limited to determining whether Travelers was liable as responsible carrier, the administrative law judge, analyzing the responsible carrier issue under the *Larson* standard, determined that claimant McDell became constructively aware of his occupational hearing loss on November 19, 1986, when his attorney received an audiogram and accompanying report of that date. As claimant McDell's November 19, 1986 date of awareness occurred prior to May 24, 1988, when Travelers assumed the risk, the administrative law judge determined that employer was liable in its self-insured capacity and issued an Order dismissing Travelers from the proceedings on June 20, 1991. On July 25, 1991, the parties submitted a proposed settlement agreement to the administrative law judge in which employer agreed to pay claimant McDell a lump

[2]In each of the consolidated cases, settlement negotiations had been completed prior to the time that the hearing was held concerning Travelers' potential liability. Although Travelers was not a party to these agreements, it acknowledged its acceptance of the proposed settlement amounts as reasonable in the event that it was determined to be the responsible carrier.

sum of $1,127.50 plus $1,000 for his attorney's fee and future medical benefits, affixing copies of the November 19, 1986 and September 14, 1989 audiograms and accompanying reports as supporting documentation. The parties' proposed settlement was summarily approved by the administrative law judge in a Decision and Order dated August 2, 1991. Employer's appeal followed.

Claimant Motley, a retired chipper and caulker, who last worked for employer on September 8, 1988, filed a claim on December 22, 1989 for a 5.6 percent monaural hearing loss, based on the results of a December 10, 1986 audiogram performed by the University of South Alabama Speech and Hearing Center. On January 7, 1991, Dr. McDill performed an audiogram which revealed a binaural impairment of 1.3 percent. After conducting a hearing limited to determining whether Travelers was liable as the responsible carrier, the administrative law judge, analyzing the responsible carrier issue under the *Larson* standard, determined that claimant Motley became constructively aware of his occupational hearing loss on December 10, 1986, when his attorney received an audiogram and accompanying report of that date. As claimant's December 10, 1986 date of awareness occurred prior to May 25, 1988, when Travelers assumed the risk, the administrative law judge determined that employer was liable in its self-insured capacity and on June 20, 1991, issued an Order dismissing Travelers from the proceedings. On July 17, 1991, the parties submitted a proposed settlement agreement to the administrative law judge in which employer agreed to pay claimant Motley a lump sum of $1,100 plus $1,000 for his attorney's fee plus future medical benefits, affixing copies of the December 10, 1986 and January 8, 1991 audiograms as supporting documentation. The proposed settlement was summarily approved by the administrative law judge in a Decision and Order dated July 30, 1991.
This appeal followed.

In each of the consolidated cases, the administrative law judge rejected employer's argument that claimant may not be charged with awareness of his hearing loss pursuant to Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D) (1988), until he personally receives a copy of an audiogram and accompanying report and instead based his finding of awareness on claimant's constructive receipt of an audiogram and accompanying report through his attorney. Although employer also argued that Travelers was liable for the hearing loss claims pursuant to the terms of its insurance policy with employer and should be estopped from denying responsibility based on its prior acceptance without reservation of the claims in question on February 1, 1989, the administrative law judge did not address these arguments as he found that he lacked jurisdiction to rule on the contractual rights of the parties.

On appeal in each of these cases, employer challenges the administrative law judge's finding that it is liable for the claims in its capacity as a self-insurer, reiterating the arguments made below. In the alternative, employer asks that the Board certify the insurance questions presented in these cases to the Alabama Supreme Court. Travelers responds, urging that the administrative law judge's orders dismissing Travelers be affirmed. Travelers also opposes employer's request for certification to the Alabama Supreme Court.

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 resolving the responsible carrier issue in these cases, the administrative law judge applied the standard set forth in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), which held that the time of awareness under Sections 12 and 13, 33 U.S.C. §§912, 913, would be applied in determining the date of awareness for purposes of determining the responsible employer or carrier under the *Cardillo* standard. Due to Section 8(c)(13)(D), which provides that the time limitations do not commence in hearing loss cases until claimant receives an audiogram and accompanying report, under *Larson*, the responsible carrier is the carrier providing coverage during claimant's last exposure to injurious stimuli prior to his receipt of an audiogram and accompanying report.[3]

Subsequent to the administrative law judge's decision in the present cases, however, the Board reconsidered this issue, 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). *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 of the Act, 33 U.S.C. §§912, 913, 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. In light of the significant change in the standard resulting from the Board's holding in *Good*, the administrative law judge's finding that self-insured employer is liable for the benefits owed in each of the consolidated cases is vacated, and the cases are remanded for reconsideration of the responsible carrier issue consistent with *Good* and *Port of Portland*. In each of the cases, the administrative law judge must determine on remand which carrier provided coverage at the time of

[3]We need not address the specific arguments raised by the parties with regard to claimant's date of awareness because the arguments made were based on application of *Larson*. We note, however, that the Board has held that the receipt of an audiogram by counsel is not constructive receipt by the employee; 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).

the claimant's last injurious exposure which could have contributed to the hearing loss being compensated. *See Port of Portland*, 932 F.2d at 841, 24 BRBS at 143 (CRT); *Good*, 26 BRBS at 163. Resolution of these cases thus may require the administrative law judge to decide which of the audiograms utilized in the settlement agreements is credible and determinative of the disability.

Employer also argues that Travelers is liable pursuant to the terms of its insurance policy with employer.[4] The administrative law judge summarily determined that he lacked jurisdiction to rule on the contractual rights of the parties. Decision and Order at 3, n. 1. Contrary to the administrative law judge's statement, he has the authority to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act. *See Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 (1990), *aff'd in pert. part on recon.*, 24 BRBS 169 (1991); *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984).[5] Moreover, the contract language providing coverage of occupational disease claims where the employee's last day of last exposure to the conditions causing or aggravating the injury occurred during the policy period is not inconsistent with *Cardillo* and the standard enunciated in this decision.

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

A. How This Insurance Applies

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

. . . .

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.

[5]Employer's motions for certification of the insurance questions to the Alabama Supreme Court are denied, as there is no authority under the Act for the Board to take such an action.

Employer's contention that Travelers waived its right to contest liability in each of these cases by virtue of its February 1, 1989 letter to employer is rejected. This letter was written in response to a January 13, 1989 letter from employer's counsel informing Travelers of a large number of cases which appeared to be covered under employer's insurance policy with Travelers. In the letter, Travelers indicated that it agreed with employer's counsel that the last date that an employee was exposed to injurious stimuli would determine the party responsible for defending and indemnifying the claims. Travelers further indicated that any worker last exposed past May 24, 1988 would be covered by Travelers, but that anyone whose exposure occurred before this time would not be covered. This letter cannot logically be viewed as a voluntary and intentional surrender or relinquishment of Travelers' responsible carrier defense in these cases. Thus, it does not constitute a waiver of Travelers' right to contest liability in the consolidated cases as a matter of law. *See generally American Casualty Co. v. Wright*, 554 So. 2d 1015 (Ala. 1989).

Accordingly, the Orders Dismissing Travelers Insurance Company in *Harrison v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 91-1752, *McDell v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 91-1753, and *Motley v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 91-1755, are vacated, and the cases are remanded for further consideration of the responsible carrier issue consistent with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge