BRB No. 92-2148

GEORGE M. ROBERTS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DATE ISSUED:
	)	
and	)	
	)	
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 R. Meigs, Mobile, Alabama, for self-insured employer.

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

Samuel J. Oshinsky, Counsel for Longshore (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor), 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:

Employer appeals the Order Dismissing Travelers Insurance Company and the Decision and

Order Approving Settlement (89-LHC-3527) 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 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 burner for employer from 1963 until he retired in September 1988, and during this time, he was exposed to loud noise. On June 12, 1987, claimant filed a claim under the Act for a 3 percent binaural hearing loss based on the results of a May 1, 1987, audiometric examination performed at the University of South Alabama Speech and Hearing Center. A subsequent audiometric examination performed by Dr. McDill on October 28, 1989, revealed a .6 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, is liable as the responsible carrier.

In his June 19, 1991, Order Dismissing Travelers, the administrative law judge determined that employer is liable for claimant's benefits in its self-insured capacity, rejecting employer's argument that pursuant to Section 8(c)(13)(D) of the Act, 33 U.S.C. §908(c)(13)(D) (1988), claimant may not be charged with awareness of his hearing loss until he personally receives a copy of an audiogram and accompanying report. The administrative law judge relied on claimant's constructive receipt of an audiogram and accompanying report through his attorney who attached a copy of the May 1, 1987, audiogram to the June 12, 1987, claim. 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, inasmuch as claimant was aware of his work-related hearing loss on May 1, 1987, prior to Travelers' assuming coverage on May 24, 1988, employer is liable in its self-insured capacity. The administrative law judge declined to address employer's argument that Travelers is liable for the hearing loss claim pursuant to the terms of its insurance policy 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 found that he lacked jurisdiction to rule on the contractual rights of the parties. He thus issued an Order on June 19, 1991, dismissing Travelers from the proceedings.

On July 29, 1991, claimant and employer submitted a proposed settlement agreement to the administrative law judge in which employer agreed to pay claimant a lump sum of $1,300 plus $1,700 for his attorney's fee, and future medical benefits, affixing copies of the May 1, 1987 and October 28, 1989, audiograms as supporting documentation.[1] The parties' proposed settlement was

[1]Claimant and the employer had completed their settlement negotiations prior to the time that the hearing was held concerning Travelers' potential liability. Although Travelers was not a party to this agreement, it acknowledged its acceptance of the proposed settlement amounts as reasonable in the event that it was determined to be the responsible carrier. At the hearing, claimant and the employer indicated that the $1,300 settlement amount was somewhat greater than the $1,207.12 in disability

approved by the administrative law judge in a Decision and Order dated August 12, 1991.

On appeal, employer challenges the administrative law judge's finding that it is liable for claimant's occupational hearing loss in its capacity as a self-insurer, reiterating the argument made below that claimant cannot be charged with awareness of the hearing loss revealed on the May 1, 1987, audiogram until December 7, 1990 inasmuch as no accompanying report was prepared until that time. In the alternative, employer asks that the Board certify the insurance questions presented in this case to the Alabama Supreme Court. Both Travelers and the Director, Office of Workers' Compensation Programs (the Director), respond, urging that the administrative law judge's Order dismissing Travelers as the responsible carrier be affirmed and the request for certification to the Alabama Supreme Court denied. Travelers specifically asserts that it is not liable for claimant's benefits because the claim was filed for a hearing loss diagnosed prior to the time it assumed the risk. Citing *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), Travelers avers that it cannot be held liable because it is impossible for any exposure claimant may have sustained between May and September 1988, during its period of coverage, to have contributed to the hearing loss evidenced on the May 1, 1987, audiogram which formed the basis of the claim.

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 this case, the administrative law judge applied the standard set forth in *Larson*, 17 BRBS at 205, 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 ascertaining the responsible employer or carrier under the *Cardillo* standard. Thus, pursuant to Section 8(c)(13)(D), which provides that the Sections 12 and 13 time limitations do not commence in hearing loss cases until claimant receives an audiogram and accompanying report, in *Larson*, the Board held that 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.

Subsequent to the administrative law judge's decision in the present 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). *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, 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

---

compensation claimant would have been entitled to receive based on the average of the two audiograms Tr. at 5,

audiogram determinative of the disability.[2] *See Good*, 26 BRBS at 163; *see also Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

In light of the change in the standard resulting from the Board's holding in *Good*, we vacate the administrative law judge's finding that self-insured employer is liable for the benefits owed to claimant, and we remand the case for the administrative law judge to reconsider the responsible carrier issue consistent with *Port of Portland* and *Good*.[3] On remand, the administrative law judge must discuss the audiograms of record and ascertain which is determinative of claimant's hearing loss. *See Port of Portland*, 932 F.2d at 841, 24 BRBS at 143 (CRT); *Barnes*, 27 BRBS at 191; *Good*, 26 BRBS at 163. If he finds that the 1989 audiogram is determinative of claimant's disability, then Travelers is the carrier

[2]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 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), *aff'd on recon. en banc*, 28 BRBS 129 (1994).

[3]In its response brief, Travelers also asserts that it cannot be held liable as the responsible carrier as there is no proof claimant was exposed to noise at employer's facility after it assumed the risk on May 24, 1988. Claimant testified, however, that he was exposed to noise at employer's facility even after earplugs were issued because the hearing protection provided did not block out all of the noise and he would remove the earplugs often during the normal course of a day's work. *See* Traveler's Ex. 9, pp. 40-45. As Travelers bears the burden of showing the absence of injurious exposure during its period of coverage, we reject this contention. *See Lins v. Ingalls Shipbuilding, Inc.* 26 BRBS 62, 63 (1992); *Suseoff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

responsible for paying claimant's benefits.[4] If, however, he determines that the May 1, 1987, audiogram is determinative of claimant's disability, then employer is liable in its self-insured capacity for the payment of claimant's benefits. *See Barnes*, 27 BRBS at 191; *Good*, 26 BRBS at 161-163.

Employer also argues that Travelers is liable for claimant's benefits pursuant to the terms of the insurance policy, 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 previously addressed and rejected by the Board in *Barnes*, 27 BRBS at 191-192. Accordingly, for the reasons stated therein, employer's contentions are rejected.[5] *Id.*

Accordingly, the administrative law judge's Order Dismissing Travelers Insurance Company is vacated, and the case is 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

REGINA C. McGRANERY
Administrative Appeals Judge

---

[4]Travelers contends that even if claimant was subsequently exposed to noise during its period of coverage it cannot be held liable as the responsible carrier because the noise was not injurious as evidenced by the fact that claimant's hearing loss did not deteriorate after it assumed the risk 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 v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163-164 n. 2 (1992); *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).

[5]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 v. Alabama Dry Dock & Shipbuilding, Co.*, 27 BRBS 188, 191 n.2. (1993).