

JERRY L. TAYLOR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND	)	
SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Petitioner	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE	)	
COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order 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 (92-LHC-0077) 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 for employer from 1952 until August 25, 1988, where he was exposed to loud noise. On January 6, 1987, claimant filed a claim under the Act for a 32.3 percent binaural hearing loss based on the results of a November 8, 1986, audiogram. Claimant's attorney apparently received a copy of this audiogram. Thereafter, claimant underwent additional audiometric evaluations on October 24, 1989, November 22, 1989, and July 27, 1992, which revealed binaural impairments of 1.6, 7.81 and 3.75 percent respectively.

On August 18, 1992, the parties submitted a proposed settlement agreement pursuant to Section 8(i), 33 U.S.C. §908(i), to the administrative law judge in which employer agreed to pay claimant a lump sum of \$2,284.71, representing \$1,784.71 in compensation and \$500 in lieu of medical benefits, plus \$2,000 for his attorney's fee, affixing copies of the November 8, 1986 and October 24, 1989, audiograms and supporting documentation. The proposed settlement was approved by the administrative law judge in a Decision and Order - Approving Settlement dated September 2, 1992. The remaining issue to be decided by the administrative law judge was whether self-insured employer or 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 Decision and Order, the administrative law judge determined that employer is liable for claimant's benefits in its self-insured capacity, thereby 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 could not be charged with awareness of his occupational hearing loss until after Travelers became responsible because claimant did not personally receive a copy of the November 8, 1986, audiogram and accompanying report until his June 29, 1992, deposition. Inasmuch as both the November 8, 1986, filing audiogram and the January 6, 1987, claim predated May 24, 1988, when Travelers assumed the risk, the administrative law judge concluded that employer is liable for claimant's occupational hearing loss benefits in its self-insured capacity.

Employer appeals the administrative law judge's finding that it is liable for the claim in its capacity as a self-insurer. Specifically, employer argues that Travelers had assumed the risk at the time claimant received a copy of the November 1986 audiogram and accompanying report, that language contained in the insurance policy renders Travelers liable, that claimant continued to be exposed to injurious stimuli subsequent to Travelers' assuming the risk, and that the November 8, 1986, filing audiogram cannot serve as a proper basis for assessing carrier liability because it is invalid under Section 702.441 of the regulations, 20 C.F.R. §702.441.<sup>1</sup> Travelers responds, urging affirmance of the administrative law judge's finding that employer is liable for claimant's benefits.

---

<sup>1</sup>In an Order dated July 14, 1993, the Board rejected employer's motion that it certify questions of Alabama law to the Supreme Court of Alabama.

Employer's arguments that the determination of the responsible employer is contingent upon claimant's receipt of the audiogram and accompanying report, that Travelers is liable pursuant to the terms of its insurance policy with employer, and that Travelers waived its rights to contest liability by virtue of its January 19, 1989, letter to employer have previously been considered by the Board and are rejected for the reasons stated in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993); see also *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). In *Good*, the Board 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. 1992), that receipt of an 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 most recent exposure related to the disability evidenced on the audiogram determinative of the disability for which claimant is being compensated.<sup>2</sup> See *Good*, 26 BRBS at 163; *Mauk v. Northwest Marine Iron*

---

<sup>2</sup>Travelers asserts that it cannot properly be held liable as the responsible carrier pursuant to *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), because it is impossible for any exposure claimant may have had during its period of coverage to have contributed to the November 1986 audiogram which formed the basis for the filing of the claim. The responsible carrier, however, is the one on the risk at the time of the most recent exposure which could have contributed to the disability evidenced on the determinative audiogram. To hold that responsible employer/carrier liability cuts off as of the filing of the claim, would ignore the fact that claimant continued to work for employer and to receive additional noise exposure which could have potentially contributed to the hearing loss being compensated. See generally *Good*, 26 BRBS at 163; see also *Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991). Moreover, contrary to Travelers' assertions and the findings of the administrative law judge, the fact that claimant's hearing loss did not increase during Travelers' period of coverage is not determinative. An actual aggravation

*Works*, 25 BRBS 118 (1991); see also *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

---

need not occur for an employer or carrier to be held responsible; exposure to injurious stimuli is all that is required. See generally *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).

We note, however, that in the instant case the administrative law judge made no finding as to which of the four audiograms of record is determinative of claimant's disability. Additionally, the settlement agreement is also silent as to which audiogram is determinative; rather, the parties attached copies of the 1986 and 1989 audiograms to their proposed agreement in support of the settlement. Thus, since the party liable for claimant's hearing loss benefits is the one on the risk at the time of claimant's most recent exposure to injurious stimuli related to the disability evidenced on the determinative audiogram, and the administrative law judge did not make a finding as to which audiogram is determinative, we vacate the administrative law judge's Decision and Order dismissing Travelers and we remand the case to the administrative law judge to make such a finding and determine the liable party consistent with *Barnes, Good and Port of Portland*.<sup>3</sup>

Accordingly, the administrative law judge's Decision and Order dismissing Travelers Insurance Company and holding employer liable in its self-insured capacity is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

---

<sup>3</sup>If the administrative law judge bases his findings on an average of the audiometric results, then the carrier at the time of the last audiogram relied upon could be held liable. Contrary to employer's assertions the fact that the November 1986 audiogram may not comply with the presumptive evidence requirements of Section 702.441 of the regulations, 20 C.F.R. §702.441, is irrelevant to the responsible carrier determination as it is within the administrative law judge's discretion to view such audiograms as probative. See *generally Dubar v. Bath Iron Works Corp.*, 25 BRBS 5 (1991).

