BRB No. 93-0499

HERMAN J. FOSTER	)	
	)	
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 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 Travelers Insurance Company.

Laura Stomski (J. David McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), for the Director, Office of Workers' Compensation, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (91-LHC-1915) 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 pipefitter and maintenance department foreman for employer from July 1945 until September 8, 1988, when he was laid off. During this period, claimant was exposed to loud noise. On January 23, 1987, claimant filed a claim under the Act for a 4.7 percent binaural hearing loss based on the results of a December 12, 1986, audiometric test. A subsequent audiogram dated December 6, 1989, revealed a moderate bilateral sensorineural hearing loss which measured as a 0 percent impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. 1988). On May 24, 1988, Travelers Insurance Company (Travelers) assumed the risk of employer's workers' compensation coverage; prior to that time employer was self-insured.

In his Decision and Order, the administrative law judge credited the December 6, 1989, audiogram which revealed a 0 percent impairment and found that claimant was not entitled to any disability compensation. The administrative law judge determined, however, that inasmuch as at least a portion of claimant's hearing loss is noise-induced, claimant is entitled to medical expenses pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge then determined that employer is liable for claimant's medical expenses 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 may not be charged with awareness of his hearing loss until he personally receives both a copy of an audiogram and an accompanying report. The administrative law judge found that claimant received constructive notice of the December 12, 1986, filing audiogram through his attorney, and that inasmuch as both the filing audiogram and the January 23, 1987, claim predated May 24, 1988, when Travelers assumed insurance coverage of employer, employer was liable for claimant's medical expenses in its self-insured capacity.

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. Both Travelers and the Director, Office of Workers' Compensation Programs (the Director), respond, urging that the administrative law judge's decision that Travelers

is not 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 Company v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In the instant case, the administrative law judge analyzed the responsible carrier issue consistent with 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 finding the date of awareness for purposes of determining the responsible employer or carrier under the *Cardillo* standard.

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).[1] *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 which could have contributed to the disability evidenced on the determinative audiogram. *See Good*, 26 BRBS at 163; *see also Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

[1]We thus need not address the specific arguments raised by the parties with regard to claimant's date of awareness because these arguments were made based on an application of *Larson*. We note, however, that 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), *aff'd on recon. en banc*, 28 BRBS 129 (1994).

In the instant case, it is undisputed that Travelers assumed the risk on May 24, 1988, that claimant worked for employer until September 8, 1988, and that claimant was exposed to loud noise throughout his employment with employer. Thus, 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 which could have contributed to the hearing loss evidenced on the determinative December 6, 1989, audiogram, it is the responsible carrier in this case pursuant to *Cardillo*, *Port of Portland*, and *Good*.[2] The

[2]Travelers and the Director suggest that pursuant to *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991), and *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992), liability must fall on the last employer to expose the claimant to noise prior to the determinative audiogram and *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

administrative law judge's finding that self-insured employer is liable for claimant's medical benefits is, therefore, reversed, and his decision modified to reflect Travelers' liability as the responsible carrier.[3]

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could have potentially contributed to the hearing loss being compensated. *See generally Good*, 26 BRBS at 163 (same reasoning applied in rejecting application of *Larson*); *see also Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991). Moreover, contrary to Travelers' and the Director's assertions, the fact that claimant's hearing loss did not increase during Travelers' period of coverage is not determinative. An aggravation 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).

[3] Employer's remaining arguments are thus moot. We note, however, that the contentions that Travelers is the liable carrier for claimant's medical benefits pursuant to the terms of its insurance policy and that Travelers waived its right to contest liability by virtue of its January 19, 1989, letter to employer, accepting liability without reservation were addressed and rejected by the Board in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). Moreover, in an Order dated August 10, 1993, the Board denied employer's motion to certify the insurance questions in this case to the Alabama Supreme Court, noting that there is no authority under the Act for the Board to take such action.

Accordingly, the administrative law judge's finding that self-insured employer is liable as the responsible carrier is reversed. His Decision and Order is modified to reflect that Travelers is liable for claimant's medical benefits, but is, in all other respects, affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge