

EMILIE JEAN FERGUSON)	
)	
Claimant)	
)	
v.)	
)	
ALABAMA DRY DOCK AND)	
SHIPBUILDING CORPORATION)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	
)	
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 employer.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for carrier.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, 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-2625) 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 1973 until September 1988 as a welder, where she was exposed to loud noise. On February 22, 1988, claimant filed a claim under the Act for a 56.3 percent monaural hearing loss, based on the results of a November 10, 1986 audiogram. Claimant's attorney apparently received a copy of this audiogram, and claimant signed for the results of this test on January 9, 1987. Thereafter, claimant underwent additional audiometric evaluations on January 29, 1987 and May 9, 1992, which revealed monaural impairments of 45 percent and 39.4 percent respectively.

On July 17, 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 \$3,550, plus \$2,250 for her attorney's fee and future medical benefits, affixing copies of the January 29, 1987 and May 9, 1992 audiograms and supporting documentation. The proposed settlement was approved by the administrative law judge in a Decision and Order - Approving Settlement dated August 10, 1992. The remaining issue to be decided by the administrative law judge 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.

In his Decision and Order, the administrative law judge determined that employer was 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 sometime in 1992 when she personally received a copy of the May 9, 1992 audiogram and accompanying report. Inasmuch as both the November 10, 1986 filing audiogram and the February 22, 1988 claim predated May 24, 1988, when Travelers assumed the risk, the administrative law judge concluded that employer was 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 her 1992 audiogram and report, that language contained in the insurance policy makes Travelers liable, and that claimant continued to be exposed to injurious stimuli subsequent to Travelers assuming the risk.¹ Travelers responds, urging affirmance of the administrative law judge's finding that employer is liable for claimant's benefits. The Director,

¹In an Order dated August 3, 1993, the Board rejected employer's motion that it certify questions of Alabama State law to the Supreme Court of Alabama.

Office of Workers' Compensation Programs (the Director), has filed a response brief supporting Travelers' contention that employer is liable for claimant's hearing loss benefits.

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.² *See Good*, 26 BRBS at 163. *See also Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955).

We note, however, that in the instant case the administrative law judge made no finding as to which of the three audiograms of record was 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 1987 and 1992 audiograms to their proposed agreement in support of the settlement.³ 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 prior to the determinative audiogram, and the administrative law judge failed to 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 *Good* and *Port of Portland*.

Accordingly, the administrative law judge's Decision and Order dismissing Travelers Insurance Company is vacated, and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

²Employer's reliance on the decision of the United States Supreme Court in *Bath Iron Works Corp. v. Director, OWCP*, 113 S.Ct. 692, 26 BRBS 151 (CRT)(1993), is misplaced since, in the instant case, the record contains audiometric evaluations pre-dating claimant's retirement. Thus, the date of claimant's retirement may not be indicative of the most recent exposure experienced by claimant prior to the date of the determinative audiogram.

³If 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge