BRB Nos. 93-0771
and 93-0771A

| | | |
|---|---|---|
| LEON V. MALONE | ) | |
| | ) | |
| Claimant<br>Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION | ) | DATE ISSUED:________ |
| | ) | |
| Self-Insured<br>Employer-Petitioner<br>Cross-Respondent | ) | |
| | ) | |
| and | ) | |
| | ) | |
| TRAVELERS INSURANCE COMPANY | ) | |
| | ) | |
| Carrier-Respondent<br>Cross-Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees of A. A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Sr. (Lattof & Lattof), Mobile, Alabama, for claimant.

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

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Travelers Insurance Company.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer, Alabama Dry Dock and Shipbuilding Corporation (ADDSCO), appeals the Decision and Order - Awarding Benefits and claimant appeals the Supplemental Decision and Order Awarding Attorney Fees (91-LHC-2527) of Administrative Law Judge A. A. Simpson, Jr., 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant worked as an electrician, outside machinist and laborer for ADDSCO in Mobile, Alabama, from 1976 to September 1988. During this tenure he was exposed to noise at the shipyard which could have caused his hearing loss. Joint Exhibit 1, Stipulation 4; Decision and Order at 2. After leaving ADDSCO, claimant worked briefly for Norconsult Engineering as an outside machinist and then until October, 1991, for ADDSCO's successor shipyard, Atlantic Marine, as an outside machinist and security guard. Emp. Ex. 24 at 13-14.

On April 3, 1987, claimant underwent an audiological examination administered by Daniel Sellers, Ph.D. Cl. Ex. 7; Car. Ex. 3. Based on the results of this audiogram, Dr. Sellers diagnosed a 21 percent hearing loss for the left ear, and a zero percent hearing loss for the right, which translated into a three percent binaural hearing loss. *Id.* Claimant's hearing was also tested by audiogram on June 28, 1990, which demonstrated a binaural hearing impairment of 8.75 percent. Decision and Order at 3.[1] A third audiogram was administered on August 26, 1991. This test revealed a zero percent right ear impairment and a 16.9 percent hearing loss of the left ear, with a resultant binaural hearing loss of 2.8 percent. Car. Ex. 8; Emp. Ex. 18.

Claimant filed a claim for benefits under the Act on April 23, 1987, seeking compensation for work-related hearing loss as revealed in this first audiogram. On October 28, 1992, the administrative law judge issued his Decision and Order awarding benefits for a 2.9 percent binaural impairment based on the average of the first and last audiograms,[2] and holding ADDSCO liable for the payment of this award.[3] On July 7, 1993, the administrative law judge issued his Supplemental

---

[1]The administrative law judge rejected the results of this test because it was not accompanied by a report. Decision and Order at 3.

[2]Employer had been granted relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer's Exhibit 7. The administrative law judge also assessed a Section 14(e) penalty against employer. 33 U.S.C. §914(e). These determinations are not before us on appeal.

[3]The administrative law judge found that all three audiograms of record reflected a "bilateral" hearing loss, and rejected the assertion that claimant should be compensated for a monaural hearing loss. Decision and Order at 3; *see* 33 U.S.C. §908(c)(13)(A), (B). This finding is not contested on appeal. *See Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 836 (7th Cir. 1994). Moreover, we note that although three circuit courts of appeals have held that a claimant should be compensated on a monaural basis for measurable occupational hearing loss in only one ear, *see Baker v. Bethlehem Steel Corp.*,, 24 F.3d 632, 28 BRBS 27 (CRT) (4th Cir. 1994); *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 27 BRBS 113 (CRT)(5th Cir. 1993); *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT) (2d Cir. 1993), the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, has not spoken on this issue,

Decision and Order Awarding Attorney Fees and expenses in the amount of $1500, of a total of $4075 requested by claimant's counsel, to be assessed against employer.

The administrative law judge determined that employer is liable for claimant's benefits in its capacity as the self-insurer. The administrative law judge rejected 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. Citing the Board's decision in *Mauk v. Northwest Marine Ironworks*, 25 BRBS 118 (1991), the administrative law judge concluded instead that the "determinative audiogram for Responsible Employer purposes" need not include the accompanying report, and effectively ruled that an audiogram becomes determinative when a claimant becomes aware of its results. Decision and Order at 3. In this instance the administrative law judge found that claimant became aware of his disability as of the date on which this claim was filed, April 23, 1987, when claimant alleged a 21 percent left ear hearing loss. This date was prior to the commencement of coverage by Travelers Insurance Company (Travelers) on May 24, 1988.

On appeal, ADDSCO challenges the administrative law judge's determination that it is responsible for the payment of compensation for claimant's occupational hearing loss in its capacity as a self-insurer. ADDSCO reiterates the argument made below that claimant cannot be charged with awareness of the hearing loss revealed on the April 3, 1987, audiogram until claimant actually received a copy of the determinative audiogram and an accompanying report, which occurred during the period Travelers provided insurance coverage from May 24, 1988 to May 24, 1989.[4] ADDSCO also contends that Travelers must be liable for the payment of benefits in this instance because claimant continued to suffer from exposure to injurious stimuli subsequent to the date of the filing audiogram and during the period covered by the insurance policy in question.

Travelers responds 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 reasons that it cannot be held liable because it is impossible for any exposure claimant may have sustained during its period of coverage to have contributed to the hearing loss evidenced on the April 3, 1987, audiogram which formed the basis of the claim and which predated Travelers' period of coverage.

Under the "last employer rule" or "last injurious exposure rule," full liability for an occupational disease resulting from the claimant's exposure to injurious stimuli during more than one period of employment or insurance coverage is assigned to a single employer or insurer. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.) *cert. denied*, 350 U.S. 913 (1955). In

---

and the amount of the award of benefits is not raised by any party on appeal.

[4]Employer also moved the Board to certify the insurance questions presented in this case to the Alabama Supreme Court. By Order dated August 12, 1993, the Board denied employer's motion.

*Cardillo*, the court of appeals stated the general rule as follows:

> the employer [and its carrier] during the last employment in which claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

*Id.* at 145; *see Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981)(adopting *Cardillo* standard for the Eleventh Circuit). In hearing loss cases, the responsible employer/carrier is the one on the risk at the time of the most recent audiogram which is determinative of the disability. *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188, 190 (1993); *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159, 163 (1992). The last employer or carrier will be liable regardless of whether its exposure actually aggravated the employee's condition.[5] *Good*, 26 BRBS at 163-64 n.2; *Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207, 213, *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 596, 22 BRBS 159, 162 (CRT)(9th Cir. 1989).

Subsequent to the administrative law judge's decision in the present case, the Board adopted the decision of the United States Court of Appeals for the Ninth Circuit in *Port of Portland* in *Good*, 26 BRBS at 159. In *Port of Portland*, the Ninth Circuit ruled 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 audiogram determinative of the disability. *See Good*, 26 BRBS at 163; *see also Barnes*, 27 BRBS at 188.

We thus reject ADDSCO's contention that the date of claimant's receipt of the audiogram report dictates the date of awareness for purposes of determining the party responsible for the

---

[5]The court of appeals observed in *Cardillo* that

> [d]uring the course of the hearings which preceded the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a 'last employer' would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment.' Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered ... .

*Cardillo*, 225 F.2d at 145; *see also General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991)(stating that purpose of last employer rule is to avoid complexities of assigning joint liability).

payment of benefits. We also reject employer's assertion 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. *Id.*

Although ADDSCO's arguments are without merit, we nevertheless must vacate the Decision and Order. In fixing the extent of claimant's hearing loss, the administrative law judge averaged the results of the April 3, 1987 and August 26, 1991 audiograms to determine that claimant suffered a 2.9 percent binaural hearing loss. As different carriers were on the risk prior to the administration of each audiogram, we vacate the administrative law judge's finding regarding the responsible carrier and we remand the case for the administrative law judge to reconsider the responsible carrier issue consistent with *Port of Portland*, *Barnes* and *Good*. On remand, the administrative law judge must discuss the audiograms of record and ascertain which is determinative of claimant's hearing loss. The carrier on the risk at the time of the last exposure related to the disability evidenced on this audiogram is liable for claimant's benefits.[6] *See Port of Portland*, 932 F.2d at 841, 24 BRBS at 143 (CRT); *Barnes*, 27 BRBS at 191; *Good*, 26 BRBS at 163.

---

[6]If the administrative law judge bases his finding 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 the contention of our dissenting colleague that we have misconstrued the holding of *Port of Portland*, we note that this case is factually dissimilar to *Port of Portland* in an important aspect. In *Port of Portland*, the claimant underwent audiometric testing on June 22, 1981, and he was awarded benefits for the impairment reflected on this audiogram. The claimant was last exposed to injurious noise by Jones Oregon prior to the administration of this test. The claimant then went to work for Port of Portland and became aware of the results of his audiogram during this period of employment. The court stated that in holding Port of Portland liable, the Board erred in fixing liability as of the date of awareness as determined by Section 8(c)(13)(D). *Port of Portland*, 932 F.2d at 841, 24 BRBS at 143-44 (CRT). Moreover, the court required a "rational connection" between the exposure and the disability evidenced on the determinative audiogram. Because the determinative audiogram was administered prior to the time the claimant worked for Port of Portland, no exposure claimant had while employed for it could have been measured on the determinative audiogram. *Id.*

We thus disagree with our dissenting colleague that Travelers can under no circumstances be held liable on the facts of this case, as claimant was exposed to injurious noise while both ADDSCO and Travelers were on the risk, and the exposure claimant had while Travelers was on the risk is measured on the 1991 audiogram. As we have noted, it is not necessary for claimant's employment while Travelers was on the risk to have actually aggravated his hearing loss. *See* discussion *supra* at 4-5 and n.5. The rule of law that the responsible employer or carrier is the one on the risk at the time of the most recent exposure related to the disability does not require an actual causal relationship in the sense of medical opinion linking the impairment to the employment. The court in *Port of Portland* recognized this in stating

> [w]e agree with the Board that *Cordero* [*v. Triple A Machine Shop,* 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 991 (1979)], does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease.

*Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT). *See also Lustig*, 881 F.2d at 596, 22 BRBS at 162 (CRT). The requirement that the exposure be "related" to the disability refers to the necessity that there be exposure "rationally connected" to that being compensated on the audiogram or audiograms that form the basis for the award of benefits. Thus, the fact that the hearing loss demonstrated on the 1991 audiogram is two-tenths of a percentage point lower than the 1987 audiogram is not dispositive as claimant was exposed to injurious noise after Travelers assumed the risk.[7] This exposure is related in kind to the disability evidenced on the 1991 audiogram utilized by the administrative law judge in entering the award of benefits.

We now turn to claimant's appeal challenging the attorney's fee award. Claimant contests the administrative law judge's reductions in both the hours and the hourly rate claimed in his

[7]We note that Dr. Sellers, Ph.D., testified that if two audiograms are within 10 decibels of each other at four or more of the tested frequencies, the tests are considered to be consistent "because this is not an exact science." Cl. Ex. 11 at p. 11.06.

attorney's fee petition. Employer responds, urging that the Board affirm the Supplemental Decision and Order.

We first disagree with claimant's assertion that the administrative law judge erred by characterizing this hearing loss claim as "routine and repetitive" in order to reduce his hourly rate from the $150 requested by counsel to $100. The complexity of the legal issues is a relevant factor to be considered when awarding an attorney's fee. *See* 20 C.F.R. §702.132; *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988). The administrative law judge in this case considered the complexity of the legal issues, as well as counsel's qualifications and experience, and his finding that the hourly rate of $100 was commensurate with the services performed is neither arbitrary nor an abuse of discretion. Because claimant's assertions that counsel's qualifications require a higher hourly rate are insufficient to meet his burden of proving that the hourly rate awarded by the administrative law judge was unreasonable, we affirm the rate awarded by the administrative law judge as within his discretion. *See Fergusen v. Southern States Cooperative*, 27 BRBS 16 (1993); *Watkins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 179 (1993), *aff'd mem.*, 12 F.3d 209 (5th Cir. 1993).

Claimant next contests the administrative law judge's reduction of the number of hours requested in the fee petition, urging that they were not excessive. Claimant also specifically takes issue with the administrative law judge's rejection of the one-quarter hour "minimum billing method" utilized by counsel to reduce many quarter-hour tasks claimed by counsel to one-eighth of an hour. These arguments are without merit. The administrative law judge did not abuse his discretion in relying on the Fifth Circuit's ruling in *Ingalls Shipbuilding, Inc. v. Director, OWCP*, No. 89-4459 (5th Cir. July 25, 1989)[*Fairley*], in which the court of appeals disallowed a "minimum billing method" identical to that employed by counsel here, and concluded that "on the average, no more than one-eighth of an hour should be required for reading a one page-letter and no more than one-quarter hour for writing a routine one-page letter." *See Ingalls Shipbuilding, Inc. v. Director, OWCP* [*Biggs*], 46 F.3d 66 (5th Cir. 1995)(Table). Moreover, in striking much of the time claimed for "review of file," the administrative law judge provided an adequate rationale by stating that repetitive reviews of file were excessive in view of the nature of the case. Because claimant has not demonstrated that the fee award in this instance is arbitrary or constitutes an abuse of discretion, we affirm the Supplemental Decision and Order awarding an attorney's fee.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated with regard to the determination of the responsible carrier, and the case is remanded for further consideration consistent with this decision. In all other respects, the administrative law judge's Decision and Order and Supplemental Decision and Order are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

NANCY S. DOLDER
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determination to affirm the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. I dissent, however, from the majority's determination that the administrative law judge erred in holding Alabama Dry Dock and Shipbuilding Corporation (ADDSCO), to be the responsible carrier. I would further hold that the administrative law judge's binaural hearing loss award was plain error on the face of the Decision and Order, and I would modify the award to reflect a monaural impairment.

The pertinent facts are as follows: On April 23, 1987, claimant, an employee of ADDSCO, filed a claim for compensation under the Longshore and Harbor Workers' Compensation Act, based upon an audiogram performed on April 3, 1987, when ADDSCO was self insured. That audiogram revealed a 21 percent left ear hearing loss and zero percent right ear hearing loss, which combined to establish a three percent binaural impairment. Thereafter, on August 26, 1991, claimant had another audiogram. This test showed a 16.9 percent left ear hearing loss and a zero percent right ear hearing loss which combined to establish a 6.8 percent binaural impairment. At that time claimant was working for ADDSCO's successor, Atlantic Marine. The administrative law judge averaged the results of the two audiograms and awarded benefits for a 2.9 percent binaural hearing impairment pursuant to 33 U.S.C. §908(c)(13)(B).

The administrative law judge properly determined that ADDSCO was the responsible carrier for two, sound reasons: first, because claimant filed his claim on the basis of the audiogram taken when ADDSCO was self-insured, about a year before Travelers insured ADDSCO, and thus, the first audiogram reveals the injury for which claimant sought compensation under the Act; and second, because the audiogram taken when Travelers was on the risk reveals that there was no additional hearing loss subsequent to that revealed in the first audiogram, therefore the "aggravation

theory" cannot apply to hold liable the subsequent insurer on the risk. Decision and Order at 4.

Despite the compelling logic of this ruling, the majority asserts that it must be vacated because the administrative law judge averaged the results of the two audiograms, taken when different carriers were on the risk, while holding liable the first carrier. The majority remands the case to the administrative law judge to determine the responsible carrier in light of 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), the rationale of which was adopted by the Board in *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). In so doing, I believe that the majority misreads *Port of Portland*. The court held in that case that the Board had erred in holding Port of Portland to be the liable employer, even though it was the last employer to expose claimant to injurious stimuli. The court declared that Port of Portland could not be held liable for claimant's injury because the injury, which was the subject of the claim, was established by an audiogram performed prior to claimant's employment with Port of Portland. Although the Ninth Circuit adopted in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1337 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), the "last employer rule" propounded in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the Ninth Circuit emphasized that "*Cordero* does require that liability rest on the employer covering the risk at the time of the most recent injurious exposure *related* to the disability." *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT) (emphasis in original).

The majority contends that the Ninth Circuit's requirement that exposure be "related" to the disability is satisfied when it is the *kind* of exposure which caused the disability. Since claimant seeks compensation for hearing loss and both ADDSCO and Travelers were on the risk when ADDSCO exposed claimant to injurious noise, the majority holds that either the self-insured ADDSCO or Travelers could be held liable. But the majority's construction of "related" fails to explain the Ninth Circuit's decision in *Port of Portland*. It was undisputed in that case that a series of covered employers exposed the longshoreman to injurious noise. The court held that the Board had erred in holding the last covered employer liable, because the audiogram which measured claimant's disability was taken prior to employment with the last employer. The court reasoned that the disability, which preceded exposure from the last employer, could not possibly be related to that exposure. Hence, the last employer who exposed claimant to injurious stimuli prior to the date on which claimant took the audiogram was liable, because that is the last employer which "could have contributed causally to [claimant's] disability." *Port of Portland*, 952 F.2d at 841, 24 BRBS at 143 (CRT). Thus, when the Ninth Circuit insists that an employer cannot be held liable for exposure which is not related to claimant's disability, the court is addressing a causal connection. When the sequence of events demonstrates that the disability was determined prior to exposure by the last employer, the last employer cannot be held liable.

The majority fails to distinguish between those cases in which disability is determined after injurious exposure by the last employer in the case, like *Cardillo* and *Cordero*, and those cases in which disability is determined prior to injurious exposure by the last employer in the case, like *Port of Portland* and the instant case. *Port of Portland*, 932 F.2d at 840 n.5, 24 BRBS at 143 n.5 (CRT).

In the former cases, the last employer bears full liability, whether or not claimant can show a causal connection between his disability and exposure from the last employer; that connection is presumed. In the latter cases, the last employer cannot be held liable because evidence in the record demonstrates that exposure from the last employer could not have contributed to claimant's disability; liability must fall then on the last employer to expose claimant to injurious stimuli prior to the determination of disability. The Ninth Circuit made clear in *Port of Portland* that subsequent exposure to injurious stimuli is insufficient to hold liable a last employer where the exposure did not contribute or add to the disability: "The fact that [claimant] may have experienced subsequent exposure to industrial noise while working for Port of Portland is irrelevant because no part of the claim is based on any such exposure." *Id.*

The significance of *Port of Portland* is that where the evidence of record affirmatively proves that exposure by the last employer in the case did not contribute to claimant's disability, that employer (and its carrier) cannot be held liable. Applying this rationale to the case at bar, Travelers cannot be held liable on the basis of the first audiogram, because it preceded the time when Travelers was on the risk. Travelers also cannot be held liable on the basis of the second audiogram, because it proves that subsequent exposure did not increase claimant's disability. In sum, *Port of Portland* reveals the limits of the last employer rule: The last employer will not be held liable for claimant's disability when the evidence establishes that the disability is not causally related to the exposure by that employer.

The analysis of the administrative law judge in the instant case, holding ADDSCO to be the liable carrier, is entirely consistent with *Port of Portland*, *i.e.*, ADDSCO was on the risk at the time of the injury which was the subject of the claim and there was no aggravation of this injury. Thus, there was no basis upon which to hold a subsequent insurer liable because the disability established was unrelated to any subsequent injurious stimuli. The uncontradicted evidence of record proves that claimant suffered no increase in disability when Travelers was on the risk. Hence, the administrative law judge's reasons for holding ADDSCO to be the liable carrier are entirely valid.

I agree with my colleagues that the administrative law judge did not err in averaging the results of the two audiograms, in view of his affirmable findings that both audiograms are credible and the absence of medical evidence in the record to support crediting one audiogram over the other. The majority appears to suggest that the administrative law judge cannot hold ADDSCO to be the liable carrier if the administrative law judge averages the results of the two audiograms because the second was taken after Travelers was on the risk. The majority would be correct if, as discussed, *supra*, the second audiogram showed increased hearing loss. Since, however, it indicates a lesser hearing loss and since hearing loss cannot decrease, it was reasonable for the administrative law judge to average the two results to determine the extent of impairment for which ADDSCO should be held liable.

I would hold, however, that the administrative law judge erred in determining that claimant suffered a binaural hearing loss, because the evidence is uncontradicted that claimant suffered a ratable hearing loss in only one ear. In *Tanner v. Ingalls Shipbuilding, Inc.*, 2 F.3d 143, 146, 27

BRBS 113, 115 (CRT) (5th Cir. 1993), the Fifth Circuit declared that in the Longshore Act, the Congress had made clear its intent that a "monaural impairment should be compensated according to the specific language of subsection (A)" providing for "[c]ompensation for loss of hearing in one ear, fifty-two weeks;" in contrast to subsection (B), providing for "[c]ompensation for loss of hearing in both ears, two-hundred weeks." 33 U.S.C. §908(c)(13). *Accord, Baker v. Bethlehem Steel Corp.*, 24 F.3d 632, 28 BRBS 27 (CRT)(4th Cir. 1994); *Rasmussen v. General Dynamics Corp.*, 993 F.2d 1014, 27 BRBS 17 (CRT)(2d Cir. 1993).

As the majority acknowledges, the only circuit courts which have addressed the issue have held that if a claimant has a work-related hearing impairment in one ear and a zero percent impairment in the other, his disability must be compensated as a monaural impairment pursuant to subsection (A). *Tanner; Baker; Rasmussen*. Like the Fifth Circuit, both the Fourth Circuit and the Second Circuit relied upon the clear words of the statute to render their decisions, *Baker*, 24 F.3d at 634, 28 BRBS at 29-30 (CRT); *Rasmussen*, 993 F.2d at 1016-17, 27 BRBS at 23 (CRT). Essentially, all three courts held that there was no other reasonable construction of the statute. Under these circumstances, it is obvious that the administrative law judge's binaural award in the case at bar was error, even though the instant case arises in the Eleventh Circuit, where the United States Court of Appeals has not yet addressed the issue. Although the administrative law judge's error has not been raised by a party, since it is plain error on the face of the decision, failure to correct it would be inconsistent with substantial justice. *See* Fed. R. Civ. P. 61. Accordingly, I would modify the administrative law judge's award to reflect a monaural hearing loss of 18.95 percent[8] pursuant to subsection A. *Tanner; Baker; Rasmussen*.

____________________

REGINA C. McGRANERY
Administrative Appeals Judge

[8]This number reflects the average of the results of the two audiograms which the administrative law judge credited, finding a work-related hearing loss in the left ear of 21 percent and 16.9 percent respectively.