BRB No. 93-0775

LLOYD CUNNINGHAM	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:_____)
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Petition for Reconsideration of Martin J. Dolan, Jr., Administrative Law Judge, United States Department of Labor.

Joseph M. Hochadel and Elizabeth P. Eddy (Monaghan, Leahy, Hochadel & Libby), Portland, Maine, for self-insured employer.

Stephen Hessert and Patricia E. Donahue (Norman, Hanson & DeTroy), Portland, Maine, for Liberty Mutual Insurance Company.

Kevin M. Gillis (Richardson & Troubh), Portland, Maine, for Commercial Union Insurance Company.

James C. Hunt (Robinson, Kriger, McCallum & Greene, P.A.), Portland, Maine, for Birmingham Fire Insurance Company.

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

PER CURIAM:

Self-insured employer appeals the Decision and Order and Decision and Order on Petition for Reconsideration (91-LHC-2769) of Administrative Law Judge Martin J. Dolan, 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).

Claimant worked for employer as an apprentice from 1959-1964, as a lead man from 1964-1967, as a planner from 1967-1975, as a detail planner from 1975-1982 and as a project planner from 1982-1991. In each of these positions with employer, he was exposed to loud noise. In the latter years of his employment with employer until January 1991, he was intermittently exposed to noise at the same level as in earlier years. The parties stipulated that Commercial Union Insurance Company insured employer from January 6, 1963 through February 28, 1981, Liberty Mutual Insurance Company insured employer from March 1, 1981 through August 31, 1986, Birmingham Fire Insurance Company insured employer from September 1, 1986 through August 31, 1988, and that employer has been self-insured since September 1, 1988. On October 23, 1990, claimant became aware of his hearing loss and its relation to his employment when he received an audiogram and accompanying report indicating a 7.2 percent binaural hearing impairment.

On November 19, 1990, claimant filed a claim for a work-related hearing loss under the Act. Applying the presumption in Section 20(a) of the Act, 33 U.S.C. §920(a), the administrative law judge found that claimant sustained a work-related hearing loss. The administrative law judge, therefore, awarded claimant permanent partial disability benefits for a 7.2 percent binaural impairment. The administrative law judge additionally awarded claimant medical benefits pursuant to Section 7 of the Act, 33 U.S.C. §907. The administrative law judge held that self-insured employer is responsible for the payment of the benefits. Self-insured employer's motion for reconsideration was summarily denied. On appeal, self-insured employer challenges the administrative law judge's finding that it is the responsible carrier. Liberty Mutual, Commercial Union and Birmingham Fire Insurance Companies have each filed separate response briefs to which self-insured employer has replied.

It is well-established that the responsible carrier for paying benefits in an occupational hearing loss case is the carrier insuring the last employer to expose claimant to injurious stimuli prior to the date upon which he 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). A demonstrated medical causal relationship between claimant's exposure and his occupational disease is not required; liability rests on the carrier covering the risk at the time of the most recent injurious exposure related to the disability evidenced on the determinative audiogram. *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).

Self-insured employer contends that, contrary to the administrative law judge's finding, the determination of responsible carrier should not be based merely on the most recent exposure. Self-insured employer asserts that Dr. Haughwout's deposition testimony fails to demonstrate that the duration, frequency and intensity of claimant's intermittent exposure to noise in the latter part of his employment with employer was injurious. Self-insured employer also asserts that claimant's testimony that he was exposed to intermittent noise in later years at the same level as earlier years does not establish that the intermittent noise exposure was injurious. Based on these assertions, self-insured employer requests that the Board reverse the administrative law judge's finding and modify it to hold Liberty Mutual Insurance Company the responsible carrier.

In holding that the self-insured employer was the responsible carrier, the administrative law judge initially noted that claimant did not become aware of his hearing loss and its relation to his employment until he received the audiogram and accompanying report on October 23, 1990. Decision and Order at 6; Claimant's Exhibit 16; Employer's Exhibit 15. Up until his voluntary retirement on April 30, 1991, claimant worked with employer, and he was exposed to noise until January 1991. Decision and Order at 6; Tr. at 25. In the latter part of his employment with employer, claimant testified he was intermittently exposed to noise at the same level as in earlier years as he was required to talk to other workers who were in the yard. Decision and Order at 6; Tr. at 24-25. Although Dr. Haughwout testified that the intermittent exposure could contribute to claimant's permanent hearing loss, he could not specifically state that the intermittent exposure in fact caused further injury because he did not know the frequency, intensity and duration of this intermittent exposure. Decision and Order at 6; Claimant's Exhibit 18 at 9-11. Based on the parties' stipulations that employer was self-insured from September 1, 1988 to present, the administrative law judge concluded that the self-insured employer is the responsible carrier as the last exposure prior to awareness occurred at a time when employer was self-insured. Decision and Order at 6-7.

We affirm the administrative law judge's finding that self-insured employer is the responsible carrier as it was on the risk at the time of claimant's last exposure to injurious stimuli prior to the administration of the determinative audiogram on October 23, 1990. *Port of Portland*, 932 F.2d at 836, 24 BRBS at 137 (CRT); *Good*, 26 BRBS at 159; Decision and Order at 6-7. Contrary to self-insured employer's argument, it must show that claimant's exposure to noise was not injurious before it can escape liability. *See Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT)(5th Cir. 1992); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62

(1992); *Good*, 26 BRBS at 164; *Suseoff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986). In this case, self-insured employer has not met its burden through Dr. Haughwout's testimony, as he did not state that the intermittent loud noise in the latter years of claimant's employment was not injurious with respect to claimant, although he could not state for certain that it was injurious because he did not know the intensity, frequency and duration of the exposure. *See generally Suseoff*, 19 BRBS at 149; Claimant's Exhibit 18 at 9-11. Further, employer has not met its burden through claimant's testimony that in the latter part of his employment he was only intermittently exposed to noise at the same level as in earlier years. Tr. at 24-25. Inasmuch as there is no other evidence to show that claimant's exposure to noise was not injurious, we affirm the administrative law judge's holding that the self-insured employer is the responsible carrier.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Petition for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge