BRB No. 91-0732

THOMAS GRIFFIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HALTER MARINE, INCORPORATED	)	
	)	
and	)	
	)	
EMPLOYERS NATIONAL INSURANCE COMPANY	)	DATE ISSUED:
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
CONTINENTAL INSURANCE COMPANY	)	
	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples and Lomax, P. A.), Pascagoula, Mississippi, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for employer and carrier Employers National Insurance Company.

John M. Sartin, Jr. and Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for carrier Continental Insurance Company.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

PER CURIAM:

Employer and its carrier, Employers National Insurance Company (Employers National), appeal the Decision and Order Awarding Benefits (89-LHC-1513) 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 if they 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 a shipfitter from January 15, 1979 through June 14, 1979, and as a welder from July 20, 1981 through May 3, 1983, and from August 13, 1987 through November 18, 1988. Claimant presented uncontroverted testimony that during his first two periods of employment with employer, he was exposed to considerable noise and did not regularly wear hearing protection. Prior to the commencement of his employment in 1987, claimant underwent an audiometric evaluation at the request of employer; although claimant was subsequently advised that this examination showed a hearing loss, claimant was not given a copy of the audiogram or its accompanying report. During his last period of employment with employer, claimant was required to wear hearing protection, in the form of foam earplugs issued to him by employer, at all times while in the shipyard. Claimant's uncontroverted testimony indicated that, during this last period of employment, he regularly wore the employer-issued ear plugs with the exception of those times when he needed to replace them because they were lost or dirty, or when he needed to remove them in order to hear approaching equipment. *See* Continental Ex. 3 at 16-21; Continental Ex. 4 at 22-25, 32-34, 40-43. During claimant's employment from 1981 to 1983, employer was insured by Continental Insurance Company; during claimant's final period of employment from 1987 to 1988, employer was insured by Employers National. On September 29, 1988, claimant filed this claim for permanent partial disability benefits due to his hearing loss, based upon the results of a May 9, 1988 audiometric evaluation. At the formal hearing, Employers National stipulated that there was noise in the workplace which could have caused claimant's hearing loss; it asserts the noise did not do so in this instance because claimant was protected by earplugs. *See* Joint Ex. 1; Hearing Tr. at 36-37.

The administrative law judge determined that claimant sustained a 20.6 percent binaural impairment,[1] and thereafter awarded claimant benefits pursuant to Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13). The administrative law judge further found Employers National to be the responsible carrier since that carrier was on the risk at the time of claimant's last exposure to harmful stimuli prior to the time claimant became aware that he had sustained a work-related hearing loss.

[1]The results of three audiometric evaluations were submitted into the record. Claimant's August 11, 1987 pre-employment audiogram, conducted by Ms. Towell, revealed a 36.2 percent binaural impairment; a May 9, 1988 evaluation conducted by James H. Wold, PhD., on May 9, 1988 revealed a 44.9 percent binaural impairment and, lastly, a September 26, 1989 evaluation, which was found to be determinative by the administrative law judge, conducted by Jim McDill, PhD., revealed a 20.6 percent binaural impairment.

On appeal, Employers National challenges the administrative law judge's determination that it is the responsible carrier for the payment of claimant's benefits. Specifically, Employers National contends that the administrative law judge erred by failing to apply the correct legal standard set forth in *Todd Pacific Shipyards Corp. v. Director, OWCP* (*Picinich)*, 914 F.2d 1317, 24 BRBS 36 (CRT)(9th Cir. 1990) that, under the last responsible employer or carrier rule, the employee must have been exposed to potentially injurious stimuli in sufficient quantities to cause the disease. Both claimant and Continental Insurance Company have filed response briefs, averring that the administrative law judge correctly found Employers National to be the carrier responsible for the payment of claimant's benefits and thus urging the affirmance of the administrative law judge's decision.

The sole issue presented by this appeal is whether the administrative law judge erred in finding Employers National to be the carrier responsible for the payment of the benefits due claimant for his work-related hearing loss. In support of his conclusion that Employers National is the responsible carrier for the payment of benefits, the administrative law judge relied upon the decision of the United States Court of Appeals for the Second Circuit in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In *Cardillo,* the court held that the responsible employer in cases involving the potential liability of multiple employers in occupational disease cases is the "employer during the last employment in which the claimant was exposed to the 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." *Id.* at 145. The court additionally held that the treatment of carrier liability is to be handled in the same manner and that the carrier who last insured the "liable" employer during the claimant's tenure of employment prior to the date on which the claimant was aware of the fact that he was suffering from an occupational disease should be held responsible for the discharge of the duties and obligations of the "liable" employer. *Id.*; *see also Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992)(Dolder, J., dissenting). In discussing the "awareness" component of the *Cardillo* standard in hearing loss cases, the Board has held that liability falls on the last covered employer to expose the claimant to injurious stimuli prior to administration of the determinative audiometric examination establishing disability. *See Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992).[2] Accordingly, the

[2]In *Good*, 26 BRBS at 159, the Board adopted the reasoning 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), wherein the court held that the last employer prior to the date of the determinative audiogram, and not the last employer prior to claimant's receipt of the audiogram, is liable for claimant's benefits. In the Decision and Order in the instant case, which was issued prior to the circuit court's decision in *Port of Portland* and the Board's decision in *Good*, the administrative law judge based his awareness determination on the date of claimant's initial receipt of an audiogram and accompanying report, May 9, 1988. We note that Employers National concedes that the date of claimant's awareness for purposes of ascertaining the responsible carrier was May 9, 1988. The administrative law judge's utilization of the date of claimant's receipt of the audiogram and report to establish the date of awareness does not result in reversible error, however, inasmuch as Employers

responsible carrier in a hearing loss case is the carrier on risk during the last employment in which the claimant was exposed to injurious stimuli prior to the date on which the determinative audiogram was administered.

Employers National now contends that claimant's use of hearing protection during the period of his employment when it was on the risk, *i.e.*, 1987 through 1988, relieves it from liability for claimant's benefits since claimant during that period of time was not exposed to noise in sufficient quantities to cause his hearing loss. We disagree. Because the first component of the *Cardillo* standard focuses only upon a claimant's exposure to injurious stimuli, the Board has consistently rejected the contention that a claimant's exposure to the injurious stimuli must actually contribute to his disability before a carrier or employer may be held liable for the benefits due claimant. *See, e.g., Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988). Whether claimant was exposed to injurious stimuli during the relevant period of employment is a question for the administrative law judge as the trier-of-fact. *See Whitlock v. Lockheed Shipbuilding and Construction Co.*, 12 BRBS 91, 93-94 (1980). The United States Court of Appeals for the Fifth Circuit, under whose jurisdiction the instant case arises, when addressing the issue of injurious exposure, has stated that "regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious." *See Avondale Industries, Inc. v. Director, OWCP (Cuevas),* 977 F.2d 186, 190, 26 BRBS 111, 113 (CRT)(5th Cir. 1992); *see also Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981). In *Cuevas,* the court specifically stated that claimant does not bear the burden of proving an employer's liability; rather, once the employee has established a *prima facie* case under Section 20(a) of the Act, 33 U.S.C. §920(a), he has established exposure to injurious stimuli during covered employment. *Id.*; *see also Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In the instant case, we hold that substantial evidence supports the administrative law judge's conclusion that claimant was last exposed to injurious stimuli during his employment with employer during 1987 and 1988, prior to the time that he became aware that he had a work-related hearing loss, and at which time Employers National was on the risk. Specifically, the administrative law judge rationally relied on the parties' stipulation that workplace noise existed during that period of time which could have caused claimant's hearing loss, as well as claimant's uncontroverted testimony that he did not always wear hearing protection, to conclude that claimant was last exposed to harmful noise during the period when Employers National was on the risk. *See Cuevas*, 977 F.2d at 186, 26 BRBS at 111 (CRT); *Fulks*, 637 F.2d at 1008, 12 BRBS at 975. Thus, based on the record before us, we cannot say that the administrative law judge's determination that Employers National is the carrier responsible for claimant's benefits is unreasonable, since his findings are supported by substantial evidence and his decision is consistent with applicable law.[3] *See generally*

National was also on the risk at the time of claimant's last exposure to harmful noise prior to the administration of the 1989 audiogram which the administrative law judge found to be determinative of disability.

[3]We reject employer's contention that the decision of the United States Court of Appeals for the Ninth Circuit in *Todd Pacific Shipyards Corp. v. Director, OWCP* (*Picinich*), 914 F.2d 1317, 24

Ricker v. Bath Iron Works Corp., 24 BRBS 201 (1991). We therefore affirm the administrative law judge's conclusion that Employers National is liable for the payment of claimant's benefits.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge

BRBS 36 (CRT) (9th Cir. 1990), mandates a different result. Initially, we note that the instant case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has specifically addressed the issues raised in this case. *See* discussion *infra*. Furthermore, the instant case is factually distinguishable. In *Picinich*, a case involving a responsible employer determination in a claim for an employee's asbestos-related death, the record contained evidence that claimant had been exposed to levels of asbestos which were below levels allowed by occupational safety and health regulations; the court concluded that, on these facts, claimant could not have been exposed to "injurious" stimuli in the workplace. In the instant case, Employers National, although asserting that employer was in compliance with the permissible noise standards set by the Occupational Safety and Health Administration, submitted into the record no evidence in support of that contention; rather, Employers National stipulated that workplace noise existed that could have caused hearing loss.