

EMMITT ANDRY)	
)	
Claimant)	
)	
v.)	
)	
ALABAMA DRY DOCK AND)	
SHIPBUILDING CORPORATION)	
)	
Self-Insured)	
Employer-Petitioner)	
)	DATE ISSUED: _____
and)	
)	
TRAVELERS INSURANCE COMPANY)	
)	
Carrier-Respondent)	DECISION AND ORDER

Appeal of the Order Dismissing Travelers Insurance Company of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Walter R. Meigs, Mobile, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Order Dismissing Travelers Insurance Company (89-LHC-2848) of Administrative Law Judge Richard D. Mills 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 a chipper from February 1975 until September 8, 1988 where he was exposed to loud noise. On March 10, 1987, claimant filed a claim under the Act for a 3.8 percent monaural hearing loss based on the results of a January 31, 1987 audiogram. A hearing was conducted which was limited to the issue of 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 June 20, 1991 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 1990 when he personally received a copy of the January 31, 1987 audiogram and accompanying report.¹ Analyzing the responsible carrier issue under the standard set forth in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), the administrative law judge found that claimant received constructive notice of the January 31, 1987 audiogram through his attorney, who made note of it in the March 10, 1987 claim. Inasmuch as both the filing audiogram and the March 10, 1987 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. Although employer also argued that Travelers was liable for the hearing loss claims under Alabama state law pursuant to the terms of its insurance policy with employer,² and should be estopped from denying responsibility based on its prior acceptance without reservation of the claims on February 1, 1989, the administrative law judge did not address these arguments as he found that he lacked jurisdiction to rule on the contractual rights of the parties. On July 18, 1991, the parties submitted a proposed settlement agreement to the administrative law judge in which employer agreed to pay claimant a lump sum of \$500 plus \$1,000 for his attorney's fee and future medical benefits, affixing a copy of the January 31, 1987, audiogram as supporting documentation.³ The proposed settlement was approved by the administrative law judge in a Decision and Order dated July 20, 1991.

¹Claimant was provided with a copy of the audiogram on November 30, 1990. The accompanying report was prepared on November 7, 1990.

²The applicable insurance contract between Travelers and employer provides, in pertinent part:

A.How This Insurance Applies

This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.

1.Bodily injury by accident must occur during the policy period.

2.Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

Employer's Exhibit 1 at 10; Traveler's Exhibit 3 at 2.

³Settlement negotiations had been completed prior to the time that the hearing was held concerning Travelers' potential liability. Although Travelers was not a party to these agreements, it acknowledged its acceptance of the proposed settlement amount as reasonable in the event that it was determined to be the responsible carrier.

Employer appeals the administrative law judge's finding that it is liable for the claim in its capacity as a self-insurer, reiterating the arguments it made below. In the alternative, employer asks that the Board certify the insurance questions presented in this case to the Alabama Supreme Court. Neither carrier nor the Director, Office of Workers' Compensation Programs, have responded to this appeal.

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 right to contest liability by virtue of its February 1, 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.*, BRBS __, BRB No. 91-1374 (September 22, 1993).⁴ The *Larson* standard, which the administrative law judge employed in analyzing the responsible carrier issue was subsequently overruled in *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 the 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 time of the most recent exposure related to the disability evidenced on the audiogram determinative of the disability being compensated. *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). As self-insured employer was the carrier on the risk at the time of claimant's most recent exposure to injurious stimuli prior to the determinative January 31, 1987 audiogram which formed the basis of the claim,⁵ the administrative law judge's finding that employer is liable for claimant's hearing loss benefits in its capacity as a self-insurer is, nonetheless, affirmed as it is consistent with *Good* and *Port of Portland*.

Accordingly, the Order Dismissing Travelers Insurance Company of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

⁴Employer's Motion for Certification of the insurance questions to the Alabama Supreme Court is denied, as there is no authority under the Act for the Board to take such action.

⁵The audiograms attached to claimant's deposition also predated the commencement of the period for which Travelers provided coverage.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge