

EDWARD JONES)	
)	
Claimant)	
)	
v.)	
)	
ALABAMA DRY DOCK AND)	
SHIPBUILDING CORPORATION)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	
)	
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 self-insured employer.

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

PER CURIAM:

Employer appeals the Order Dismissing Travelers Insurance Company (90-LHC-140) of Administrative Law Judge Richard D. Mills 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, an outside machinist for employer from 1965 until 1988 filed a claim on January 6, 1987 for a 2.2 percent binaural hearing loss based on the results of a November 22, 1986 audiogram. An audiogram performed by Dr. McDill on February 12, 1990, revealed a bilateral high frequency sensorineural hearing loss, but measured claimant's binaural impairment as zero percent. At the hearing before the administrative law judge, the sole issue 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.

The administrative law judge determined that employer was liable for claimant's occupational hearing loss benefits in its self-insured capacity, thereby rejecting employer's assertion that claimant could not be charged with awareness of his occupational hearing loss until December 10, 1990, when an accompanying report relating to the November 22, 1986 audiogram was initially prepared. The administrative law judge found that claimant became constructively aware of his occupational hearing loss through his attorney who affixed the November 22, 1986, audiogram to the January 6, 1987, claim and Notice of Injury. Inasmuch as both the filing November 22, 1986, audiogram and the January 6, 1987, claim predated May 24, 1988, the date Travelers assumed coverage, the administrative law judge found that employer was liable in its self-insured capacity and issued an Order on June 19, 1991, dismissing Travelers from the proceedings. Although employer also argued that Travelers was liable for the hearing loss claims pursuant to the terms of its insurance policy with employer,¹ and should be estopped from denying responsibility based on its prior acceptance without reservation of the claim in question 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.

¹The 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.

....

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.

On July 18, 1991, claimant and employer submitted a proposed settlement agreement to the administrative law judge, in which employer agreed to pay claimant a lump sum of \$800 plus \$1,800 for his attorney's fees and future medical benefits, affixing copies of the November 22, 1986 and February 12, 1990, audiograms as supporting documentation.² On July 23, 1991, the administrative law judge issued a Decision and Order summarily approving the proposed settlement. This appeal followed.

On appeal, employer challenges the administrative law judge's finding that it is liable for the claim in its capacity as a self-insurer, reiterating the arguments made below. In the alternative, employer asks that the Board certify the insurance questions presented in this cases to the Alabama Supreme Court. Travelers has not responded to employer's appeal.

It is well-established that the employer or carrier responsible for paying benefits in an occupational hearing loss case is the last covered employer or carrier to expose claimant to injurious stimuli prior to the date upon which claimant 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). In resolving the responsible carrier issue in this case, the administrative law judge applied the standard set forth in *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985), which held that the time of awareness under Sections 12 and 13, 33 U.S.C. §§912, 913, would be applied in determining the date of awareness for purposes of determining the responsible employer or carrier under the *Cardillo* standard. Due to Section 8(c)(13)(D), which provides that the time limitations do not commence in hearing loss cases until claimant receives an audiogram and accompanying report, under *Larson*, the responsible carrier is the carrier providing coverage during claimant's last exposure to injurious stimuli prior to his receipt of an audiogram and accompanying report.

Employer's arguments that the determination of the responsible employer or carrier 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 27, 1993). Subsequent to the administrative law judge's decision in this case, the Board overruled *Larson* and adopted the position 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).³ *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS

²Settlement negotiations had been completed prior to the time that the hearing was held concerning Travelers' potential liability. Although Travelers was not a party to the agreement, it acknowledged its acceptance of the proposed settlement amount as reasonable in the event that it was determined to be the responsible carrier.

³We need not address the specific arguments raised by employer with regard to claimant's date of awareness because these arguments were based on application of *Larson*. We note, however, that the Board has held that the receipt of an audiogram by counsel is not constructive receipt by the

159 (1992). In *Port of Portland*, the court held 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 being compensated. *See Good*, 26 BRBS at 163.

Employer's argument that the administrative law judge's erred in holding it liable for claimant's hearing loss benefits in its capacity as a self-insurer is rejected. 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 November 22, 1986, audiogram, the only audiogram of record indicative of a compensable hearing loss,⁴ the administrative law judge's finding that self-insured employer is liable for claimant's benefits is affirmed because it is consistent with *Good* and *Port of Portland*.⁵

employee; that pursuant to Section 8(c)(13)(D), the statute of limitations period for filing a claim for hearing loss under the Act commences only upon the physical receipt by claimant of an audiogram, with its accompanying report, which indicates that claimant has suffered a loss of hearing. *Vaughn v. Ingalls Shipbuilding, Inc.*, 26 BRBS 27 (1992).

⁴The February 12, 1990, audiogram, which measured claimant's hearing impairment at zero percent, is not indicative of a compensable disability under Section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13).

⁵Employer'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.

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

SO ORDERED

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge