BRB No. 92-1152

HAROLD L. BYRD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED: _____
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
THE TRAVELERS INSURANCE COMPANIES	)	
	)	
Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

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

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (90-LHC-2254) of Administrative Law Judge James W. Kerr, 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 as an insulator, burner, and boilermaker for employer from 1956 to September 1988, where he was exposed to noise. On January 9, 1987, claimant filed a claim under the Act for a 32.2 percent binaural hearing loss based on the results of an October 31, 1986, audiogram. On May 24, 1988, the Travelers Insurance Company (Travelers) became employer's carrier for one year; until then employer was self-insured. Following termination of work with employer in September 1988, claimant worked for several other maritime employers, but denied further exposure to noise. A subsequent audiogram, performed on September 21, 1989, revealed a 34.4 percent binaural hearing impairment.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 32.2 percent binaural hearing loss pursuant to Section 8(c)(13)(B) of the Act, 33 U.S.C. §908(c)(13)(B), based on the results of the October 31, 1986, audiogram, as well as interest, and medical expenses pursuant to Section 7, 33 U.S.C. §907. The administrative law judge noted that claimant has filed his claim based on the impairment reflected in this audiogram and that claimant had not requested him to consider the subsequent, September 22, 1989, audiogram reflecting a slightly higher level of impairment. The administrative law judge also determined that employer is liable for claimant's benefits in its self-insured capacity, thereby rejecting employer's assertion that it was not liable because claimant continued to work after May 24, 1988, when Travelers came on the risk, and did not personally receive a copy of the October 31, 1986, audiogram and accompanying report until June 25, 1991. The administrative law judge found that claimant received constructive notice of the October 31, 1986, filing audiogram through his attorney, and that inasmuch as both the filing audiogram and the January 9, 1987, claim predated May 24, 1988, when Travelers assumed insurance coverage of employer, 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,[1] 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 failed to address these arguments.

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[1]The 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; Travelers Exhibit 2 at 2.

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 moves the Board to certify the insurance questions presented in this case to the Alabama Supreme Court. Travelers responds, urging that the administrative law judge's order holding self-insured employer liable as the responsible carrier be affirmed and the request for certification to the Alabama Supreme Court denied. Employer replies, reiterating the arguments made in its Petition for Review.

It is well established that the employer or carrier responsible for paying benefits in an occupational hearing loss case is the last 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), holding that the time of awareness under Sections 12 and 13, 33 U.S.C. §§912, 913, would be applied in finding the date of awareness for purposes of determining the responsible employer or carrier under the *Cardillo* standard. Finding claimant was "aware" under this standard based on his constructive receipt of the October 31, 1986 audiogram, the administrative law judge found employer liable as self-insurer.

Subsequent to the administrative law judge's decision in the present case, however, the Board reconsidered the issue of "awareness" for purposes of determining the responsible employer or carrier, overruled *Larson*, and 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. 1991). *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 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.[2] *See Good*, 26 BRBS at 163.

Employer's argument that the administrative law judge erred in holding it liable for claimant's benefits in its self-insured capacity is rejected. The administrative law judge's determination that the self-insured employer is liable for claimant's hearing loss benefits is consistent with *Port of Portland* and *Good*. In the present case, the administrative law judge credited the October 31, 1986 audiogram as indicative of the extent of claimant's hearing loss. Inasmuch as self-

[2]Subsequent to the administrative law judge's decision, the Board held that the receipt of an audiogram by counsel is not constructive receipt by the employee; 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). For the reason discussed *infra*, any error made by the administrative law judge in this regard is not dispositive of the responsible carrier determination at issue in this case.

insured employer was the carrier on the risk at the time of claimant's most recent exposure to injurious stimuli which could have contributed to the hearing loss evidenced on the determinative October 31, 1986 audiogram, the administrative law judge's finding that self-insured employer is liable for claimant's occupational hearing loss benefits is affirmed. Although employer also contends that Travelers should be held liable because claimant continued to receive exposure to injurious stimuli subsequent to May 24, 1988, any injurious exposure which may have occurred while Travelers was on the risk in this case is irrelevant; such exposure could not have contributed to the hearing loss evidenced on the earlier October 31, 1986 audiogram which the administrative law judge found to be determinative of claimant's disability. *See Good*, 26 BRBS at 163; *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

Employer's remaining arguments 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 a February 1, 1989 letter written to employer, were previously considered by the Board in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, BRBS , BRB No. 91-1374 (September 22, 1983), and are rejected for the reasons stated therein.[3]

[3]Employer'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 Decision and Order of the administrative law judge holding employer liable in its self-insured capacity for claimant's occupational hearing loss benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge