BRB No. 91-1376

JAMES E. PRINGLE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
THE TRAVELERS INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order of C. Richard Avery, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-2551) of Administrative Law Judge C. Richard Avery awarding benefits 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 from 1947 to 1988. He underwent audiometric testing on

August 15, 1987, which revealed a 19 percent noise-induced binaural impairment. Although claimant was not given a copy of this audiogram, claimant's attorney was made aware of the results and a claim was filed on November 5, 1987, while employer was self-insured. Claimant continued to work after the claim was filed, and on May 24, 1988, Travelers Insurance Company assumed the risk. Claimant underwent a second audiometric exam on December 13, 1989, which revealed a 14.1 percent binaural impairment. Claimant received a copy of the report from the first audiometric examination on October 23, 1990. Emp. Ex. 23 at 29.

In his Decision and Order, the administrative law judge found that employer, as self-insurer, was the last carrier to expose claimant to injurious stimuli prior to the date he became aware of the fact that he suffered an occupational disease. The administrative law judge averaged the results of the two audiograms of record and concluded that claimant suffers from a 16.55 percent binaural impairment. Thus, the administrative law judge ordered employer as self-insurer to pay permanent partial disability compensation under Section 8(c)(13), 33 U.S.C. §908(c)(13), for a 16.55 percent binaural impairment. The administrative law judge noted that the district director accepted Section 8(f), 33 U.S.C. §908(f), liability on the part of the Special Fund for a pre-existing loss of 15.9 percent, and found employer liable for a penalty under Section 14(e) of the Act, 33 U.S.C. §914(e).

On appeal, employer contends that the administrative law judge erred in finding it liable for claimant's benefits, when Travelers was the carrier on the risk at the time of claimant's receipt of the determinative audiogram and report, and exposure to the conditions aggravating the bodily injury last occurred during Travelers' period of coverage. Lastly, employer contends that Travelers should be estopped from denying responsibility, inasmuch as it accepted responsibility for the class of claims listed in the January 13, 1989, notice from employer. Carrier responds, urging affirmance of the administrative law judge's Decision and Order.

Initially, employer contends that the administrative law judge erred in finding it liable for claimant's benefits, when Travelers was the carrier on the risk at the time of claimant's receipt of the audiogram and report in October 1990. The administrative law judge found that the fact that claimant filed a claim after the August 15, 1987, audiogram is evidence that claimant had earlier knowledge of his occupational disease. Moreover, the administrative law judge summarily stated that there is no evidence that claimant's hearing loss worsened after August 15, 1987, or of further exposure to injurious noise after that time.

The responsible employer rule is set forth in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). Under the Act, the carrier responsible for a claimant's disability benefits is the last carrier which insured a covered employer that exposed the claimant to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease. *Id.*; *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

Employer contends that the awareness component of the *Cardillo* standard is the same as the awareness requirement of Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and thus that

claimant did not become "aware" until he received a copy of the audiometric report in October 1990 when Travelers was on the risk. The administrative law judge cited the Board's decision in *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *rev'd in pert. part sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), for the proposition that awareness in a hearing loss case occurs upon the receipt of an audiogram with accompanying report. However, the administrative law judge based his responsible carrier determination on the finding that claimant had "constructive awareness" that he suffered from an occupational disease given that the audiogram of August 15, 1987, was sent to claimant's attorney, and he found the fact that a written report was not prepared until later is not material to the issue of awareness in this case. Moreover, the administrative law judge concluded, based on the Board's holding in *Ranks v. Bath Iron Work Corp.*, 22 BRBS 301 (1989), that liability is not shifted to carrier in this case, as the fact that claimant filed a claim is sufficient evidence that claimant had the requisite awareness prior to the period when Travelers was the carrier on the risk.

Subsequent to the administrative law judge's decision in this case, 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. 1991) *rev'g Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), and 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 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. *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992). Additionally, 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), *aff'd on recon. en banc*, 28 BRBS 129 (1994).

Travelers contends it was not on the risk at the time claimant was last exposed to injurious noise prior to his date of awareness and the filing of the claim. Specifically, Travelers maintains that the "rational connection" between the time claimant worked for employer during Travelers' period of coverage and claimant's disability is missing because it assumed the risk of coverage after claimant became aware of his hearing loss and filed a claim in November 1987. Moreover, it argues that claimant's 1987 audiogram is determinative of his disability as it reflects a greater impairment than the 1989 audiogram.[1]

In the instant case it is not clear which audiogram is determinative. The administrative law

[1]We note that a distinct aggravation of an injury need not occur for an employer or carrier to be held liable; all that is required is evidence of exposure to potentially injurious stimuli. *Good*, 26 BRBS at 163-164 n.2; *Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT)(9th Cir. 1989).

judge averaged the results of the two audiograms of record, and the initial audiogram indicates a higher binaural impairment than the audiogram taken over two years later. In addition, during examination by employer's counsel at his deposition, claimant testified that beginning in the early 1980's, at the latest, he wore company-issued earplugs which protected him from exposure to noise. Emp. Ex. 23 at 20, 27, 32, 37-39.

Inasmuch as the administrative law judge in the instant case applied the law in existence prior to the Board's adoption of the holding in *Port of Portland*, we vacate the administrative law judge's finding that self-insured employer is the responsible carrier and remand the case for further fact-finding and consideration of the responsible carrier issue in accordance with the present law under *Cardillo*, *Port of Portland*, and *Good*. On remand, the administrative law judge must discuss the audiograms of record and ascertain which is determinative of claimant's hearing loss, *see Port of Portland*, 932 F.2d at 841, 24 BRBS at 143 (CRT); *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993); *Good*, 26 BRBS at 163, and discuss the evidence of claimant's exposure to injurious stimuli. If the administrative law judge finds that the 1989 audiogram is determinative of claimant's disability, and claimant was exposed to injurious stimuli after May 24, 1988, Travelers is the carrier responsible for paying claimant's benefits. If the administrative law judge determines that the 1987 audiogram is determinative of claimant's disability, then employer in its self-insured capacity is liable for claimant's benefits.[2] *See Barnes*, 27 BRBS at 191; *Good*, 26 BRBS at 161-163. Finally, we affirm the administrative law judge's Decision and Order in all other respects.

[2]We reject 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 January 19, 1989, letter written to employer, as they were previously considered, and rejected, by the Board in *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

Accordingly, the administrative law judge's Decision and Order finding employer liable in its self-insured capacity for claimant's occupational hearing loss benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge