BRB No. 91-1374

F. D. BARNES	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND SHIPBUILDING CORPORATION	)	DATE ISSUED: _____
	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
THE TRAVELERS INSURANCE COMPANIES	)	
	)	
	)	
Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
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.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor, Carol DeDeo, Associate Solicitor, Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (89-LHC-2527) 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 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 shipbuilder/repairer where he was exposed to loud noise from 1964 until September 8, 1988. On January 6, 1987, claimant filed a claim under the Act for a 1.9 percent monaural hearing loss in his left ear based on the results of a November 21, 1986, audiogram.

In his Decision and Order, the administrative law judge awarded claimant compensation for a 1.9 percent monaural hearing loss pursuant to Section 8(c)(13)(A) of the Act, 33 U.S.C. §908(c)(13)(A), based on the results of the November 21, 1986, audiogram, a 10 percent assessment pursuant to Section 14(e), 33 U.S.C. §914(e), and medical expenses pursuant to Section 7, 33 U.S.C. §907. The administrative law judge also determined that employer is liable for claimant's benefits in its self-insured capacity. The administrative law judge thereby rejected employer's assertion that it was not liable, as pursuant to Section 8(c)(13)(D), 33 U.S.C. §908(c)(13)(D), claimant could not be charged with "awareness" of his occupational hearing loss until October 4, 1990, when he personally received a copy of the November 21, 1986, audiogram and accompanying report. The administrative law judge found that claimant received constructive notice of the November 21, 1986, filing audiogram through his attorney and that inasmuch as both the filing audiogram and the January 6, 1987, claim predated May 24, 1988, when Travelers Insurance Company (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 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 the former argument and explicitly rejected the latter.

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. Both Travelers and the Director, Office of Workers' Compensation Programs (the Director) respond, urging that the administrative law judge's order dismissing Travelers 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), 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, basing his awareness determination on claimant's constructive receipt of the November 21, 1986 audiogram.[1]

Subsequent to the administrative law judge's decision in the present case, however, the Board reconsidered this issue, 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. *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. Although the *Larson* standard is no longer applicable, the administrative law judge's ultimate 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 November 21, 1986 audiogram, the only audiogram of record, and found it to be determinative of claimant's compensable hearing loss. Inasmuch as self-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 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, when Travelers was on the risk, we note that the administrative law judge found otherwise, and that, in any event, any subsequent exposure which may have occurred during the policy period is irrelevant because no part of the claim was based on such exposure. *See*

[1]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). The administrative law judge further found the fact that a written report had not been prepared until later to be irrelevant. As Section 8(c)(13)(D) provides that the time limitations do not commence in hearing loss cases until claimant receives both an audiogram and accompanying report, this finding would also constitute error. For the reason discussed, *infra*, these issues are not dispositive in this case.

Good, 26 BRBS at 163; *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

We also reject employer's argument that Travelers is liable for claimant's benefits pursuant to the terms of its insurance policy with employer. 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 3 at 2.

The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act.[2] *Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 n.2 (1990), *aff'd in pert part on recon.*, 24 BRBS 169 (1991); *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984). Although the administrative law judge in the present case did not address the contractual rights of the parties, we hold that his failure to do so is harmless. The contractual language here states an exposure rule consistent with *Cardillo*. Moreover, employer purchased its standard form Workers' Compensation and Employer's Liability Policy from Travelers with the Longshore and Harbor Workers' Compensation Act endorsement prescribed by 20 C.F.R. §703.109, which provides that "[t]he obligations of the policy include the LHWCA and all laws amendatory or supplementary thereof . . . ." Pursuant to this regulation, the contractual language at issue here must therefore be interpreted consistent with the relevant precedent under the Act, specifically *Cardillo*, *Port of Portland* and *Good*.

Employer's final contention, that Travelers waived its right to contest liability by virtue of its February 1, 1989, letter to employer, similarly must fail. This letter was written in response to a January 13, 1989, letter from employer's counsel informing Travelers of a large number of cases which appeared to be covered under employer's insurance policy with Travelers. In the letter, Travelers noted its agreement with employer's counsel that the last date that an employee was exposed to injurious stimuli would determine the party responsible for defending and indemnifying the claims. Travelers further indicated that any worker last exposed past May 24, 1988 would be covered by Travelers, but that anyone whose exposure occurred before this time would not be covered. Because this letter cannot logically be viewed as a voluntary and intentional surrender or relinquishment of Travelers' responsible carrier defense, the administrative law judge's determination that Travelers did not waive its right to contest liability in this case is affirmed. *See*

[2]Employer's motions for certification of the insurance questions to the Alabama Supreme Court are denied, as there is no authority under the Act for the Board to take such an action.

generally American Casualty Co. v. Wright, 554 So.2d 1015 (Ala. 1989).

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.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge