BRB No. 96-515

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

Appeal of the Decision and Order on Remand of Richard D. Mills, 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 Travelers Insurance Company.

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

PER CURIAM:

Travelers Insurance Company (Travelers) appeals the Decision and Order on Remand (89-LHC-3527) 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).

This case is before the Board for the second time. To recapitulate, claimant worked as a burner for employer from 1963 until he retired in September 1988, and during this time he was exposed to loud noise. On June 12, 1987, claimant filed a claim under the Act for a 3 percent

binaural hearing loss based on the results of a May 1, 1987, audiometric examination performed at the University of South Alabama Speech and Hearing Center. A subsequent audiometric examination performed by Dr. McDill on October 28, 1989, revealed a .6 percent binaural hearing loss. At the hearing before the administrative law judge, the sole issue was whether Travelers, which provided insurance coverage to employer from May 24, 1988 to May 24, 1989, is liable for claimant's benefits as the responsible carrier.

In his June 19, 1991, Order Dismissing Travelers, the administrative law judge determined that employer is liable for claimant's benefits in its self-insured capacity, 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 may not be charged with awareness of his hearing loss until he personally receives a copy of an audiogram and accompanying report. The administrative law judge relied on claimant's constructive receipt of an audiogram and accompanying report through his attorney who attached a copy of the May 1, 1987, audiogram to the June 12, 1987, claim. 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 determined that, inasmuch as claimant was aware of his work-related hearing loss on May 1, 1987, prior to Travelers' assuming coverage on May 24, 1988, employer is liable in its self-insured capacity. He thus issued an Order on June 19, 1991, dismissing Travelers from the proceedings.

On July 29, 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 $1,300 plus $1,700 for his attorney's fee, and future medical benefits, affixing copies of the May 1, 1987 and October 28, 1989, audiograms as supporting documentation.[1] The parties' proposed settlement was approved by the administrative law judge in a Decision and Order dated August 12, 1991.

Employer appealed the administrative law judge's June 19, 1991, Order to the Board. In its Decision and Order, the Board noted that, in *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992), it had 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), wherein 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 in a hearing loss case 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.

[1]Claimant and the employer had completed their settlement negotiations prior to the time that the hearing was held concerning Travelers' potential liability. Although Travelers was not a party to this agreement, it acknowledged its acceptance of the proposed settlement amounts as reasonable in the event that it was determined to be the responsible carrier. At the hearing, claimant and the employer indicated that the $1,300 settlement amount was somewhat greater than the $1,207.12 in disability compensation claimant would have been entitled to receive based on the average of the two audiograms. Tr. at 5.

The Board thus vacated the administrative law judge's finding that the self-insured employer is liable for the benefits owed claimant pursuant to the parties' settlement agreement, and remanded the case for the administrative law judge to ascertain which audiogram of record is determinative of claimant's hearing loss and to thereafter reconsider the responsible carrier issue consistent with *Port of Portland* and *Good*. *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, BRB No. 92-2148 (March 31, 1995)(unpublished).

On remand, the administrative law judge initially determined that averaging the May 1, 1987, and the October 28, 1989, audiometric evaluations of record constituted the best method of determining claimant's hearing loss. Next, the administrative law judge found that claimant was exposed to injurious noise during the period Travelers provided coverage from May 24, 1988 until claimant retired on September 1, 1988. Accordingly, as Travelers was the carrier at the time of the last audiogram relied upon, and claimant was exposed to injurious noise during the applicable period, the administrative law judge concluded that Travelers is the party responsible for the payment of claimant's benefits.

On appeal, Travelers contends that the administrative law judge's decision to hold it liable for claimant's benefits is not in accordance with *Port of Portland* and *Good* and must therefore be reversed. Specifically, Travelers avers that claimant was not exposed to injurious noise during the course of claimant's employment while Travelers was on the risk. Travelers additionally asserts that the October 1989 audiogram, indicating a .6 percent hearing loss, when compared to claimant's May 1987 audiogram which indicates a 3 percent hearing loss, establishes that claimant's hearing loss was not aggravated by his employment with employer while Travelers was on the risk. Employer responds, urging affirmance.

Travelers contends that the administrative law judge erred in determining that it is the party liable for the payment of claimant's benefits; specifically, Travelers asserts that the responsible carrier issue should be determined by the filing audiogram taken on May 1, 1987, when employer was self-insured, notwithstanding claimant's exposure to noise during its period of coverage, since the subsequent audiometric evidence of record establishes that claimant's exposure to noise did not contribute to his hearing impairment.[2] The long-standing rule for allocating liability in an occupational disease case is that the responsible employer or carrier is the employer or carrier during the last employment where claimant was exposed to injurious stimuli prior to the date on which

[2]We reject Travelers' contention that the administrative law judge erred in determining that claimant was not exposed to injurious noise while it was on the risk. In the instant case, the administrative law judge on remand credited claimant's testimony that, when Travelers was on the risk, he was required at times to remove his hearing protection during the course of his work, and that he was exposed to injurious noise. Travelers EX 9 at 40-45. As the administrative law judge's finding that claimant was exposed to potentially injurious stimuli while Travelers was on the risk is supported by substantial evidence, it is affirmed. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT)(5th Cir. 1991).

claimant was aware or should have been aware he was suffering from an occupational disease. *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). In *Cardillo*, the court specifically stated that

> the employer during the last employment in which claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Cardillo, 225 F.2d at 145. The court went on to hold that the same standard applies in determining carrier liability.

Thereafter, in *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979), accepting the standard established by *Cardillo*, the United States Court of Appeals for the Ninth Circuit further stated that "the onset of disability is a key factor in assessing liability under the last injurious-exposure rule." In *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51 (CRT)(11th Cir. 1988), the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, after initially noting its prior agreement with the *Cardillo* standard, also adopted the *Cordero* rule, *i.e.*, that the responsible employer/carrier is the last one to expose claimant to injurious stimuli prior to the onset of claimant's disability. Accordingly, the court in *Patterson* determined that the last employer or carrier prior to claimant's awareness of the relationship between his occupational disease, employment and disability is liable for benefits under the Act. In that case, the court held the carrier on the risk when claimant first lost time from work liable for his occupational lung disease.

In *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991), the United States Court of Appeals for the Ninth Circuit reviewed the issue of the responsible employer in a hearing loss case under *Cardillo* and *Cordero* and held the employer at the time of the audiogram which establishes the amount of the compensation liable for benefits. The court also relied on the statement in *Cordero* that there must be a "rational connection" between the onset of the claimant's disability and his exposure; thus, the court held liable the last employer who, by injurious exposure, could have contributed causally to the claimant's disability evidenced on the audiogram that formed the basis of this hearing loss claim.[3] *Port of Portland*, 932 F.2d at 840, 24 BRBS at 143 (CRT). The Board subsequently held in *Good* that it would follow the decision in *Port of Portland* in hearing loss cases regardless of the circuit in which the case arose.[4]

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[3]The court explained that, while it agreed that a demonstrated medical causal relationship was not necessary for an employer to be held liable based on exposure in its employ, liability could not be imposed on an employer who could not, even theoretically, have contributed to the disability.

[4]We note that, although the Eleventh Circuit's decision in *Patterson* stated a standard based on

In the original Decision and Order in this case, the Board remanded the case to the administrative law judge to determine which audiogram of record was determinative of claimant's hearing loss impairment consistent with *Port of Portland* and *Good*. On remand, the administrative law judge specifically found that "averaging the two audiograms is the best method of determining Claimant's hearing loss." *See* Decision and Order on Remand at 2. Thus, the administrative law judge effectively concluded that both audiograms are determinative of claimant's disability. As a matter of law, therefore, claimant's initial audiometric evaluation performed in May 1987 represents the onset of his disability. Moreover, as the May 1, 1987 audiometric evaluation, performed when employer was self-insured, revealed a 3 percent hearing loss, and the October 1989 audiometric evaluation, performed after Travelers was on the risk, revealed a .6 percent binaural loss, we agree with Travelers that the employer/carrier on the risk during the period of claimant's exposure to injurious stimuli subsequent to the termination of employer's self-insured status on May 24, 1988, cannot be held liable for claimant's hearing loss, as the subsequent exposure could not have contributed causally to the compensable hearing loss. Accordingly, on the facts presented in this case, we hold that the responsible party for claimant's hearing loss benefits is the one on the risk immediately prior to May 1, 1987, the date of the determinative audiogram yielding the highest impairment rating, as this date represents the date of onset of claimant's disability. *See Patterson*, 846 F.2d at 715, 21 BRBS at 51 (CRT); *Cordero*, 580 F.2d at 1331, 8 BRBS at 744. Thus, based upon the facts of this case, we vacate the administrative law judge's finding that Travelers is liable for the benefits owed claimant, and we modify the administrative law judge's decision on remand to reflect self-insured employer's liability for those benefits.

Accordingly, the administrative law judge's Decision and Order on Remand is modified to provide that employer, in its capacity as self-insurer, is the responsible party for paying claimant's benefits under the Act pursuant to the approved settlement agreement. In all other respects, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

"awareness," while *Port of Portland* found "onset of disability" rather than awareness to be controlling, these decisions do not state conflicting standards. In *Port of Portland*, the court found that although *Cardillo* referred to the last exposure before claimant became "aware" of his disease, in that case nothing turned on the distinction between the date of awareness and the date of onset of disability. By contrast, in *Port of Portland*, claimant's awareness based on his receipt of an audiogram, *see* 33 U.S.C. §908(c)(13)(D), occurred after the date of the audiogram establishing his disability and after he began work for another employer. In such a case, the court concluded that, consistent with *Cordero*, the employer at the time of the audiogram was liable, as the exposure at the subsequent employer bore no relationship to the disability evinced on the audiogram. In *Patterson*, the court found claimant should have been able to connect his work-related disease to a compensable disability by the time he first lost time from work; thus, similar to *Cardillo*, there was no distinction between the awareness of disability and its onset. Since the holding of *Port of Portland* rests on *Cordero*, and the Eleventh Circuit explicitly adopted the *Cordero* standard, we conclude that *Port of Portland* is good authority in that circuit.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH,
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge