BRB No. 05-0856

JOHN BADEAUX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATON ROUGE MARINE CONTRACTORS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 06/29/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
EMPLOYERS NATIONAL INSURANCE COMPANY	)	
	)	
and	)	
	)	
FIDELITY AND CASUALTY COMPANY OF NEW YORK	)	
	)	
and	)	
	)	
NATIONAL BEN FRANKLIN INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA,	)	
	)	
Carriers-Respondents	)	
	)	
LOUISIANA STEVEDORES	)	
	)	
	)	
and	)	

EMPLOYERS NATIONAL INSURANCE COMPANY/LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John Dillon, Folsom, Louisiana, for claimant.

Traci M. Castille (Franke, Rainey & Salloum, PLLC), Gulfport, Mississippi, for Baton Rouge Marine Contractors and Signal Mutual Indemnity Association, Limited.

Robert E. Thomas (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Baton Rouge Marine Contractors and National Ben Franklin Insurance Company of Pittsburgh, Pennsylvania, and Fidelity and Casualty Company of New York.

Peter B. Silvain, Jr. (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Baton Rouge Marine Contractors and Signal Mutual Indemnity Association, Limited (hereinafter employer) appeal the Decision and Order Awarding Benefits (2004-

LHC-1137) of Administrative Law Judge Clement J. Kennington 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 was employed by various maritime employers, including employer and Louisiana Stevedores as a longshoreman at the Port of Baton Rouge from the 1960's until his retirement from maritime employment in July 1992. Claimant recalled working with asbestos during the 1960's and 1970's, although he did not know when he last handled asbestos. CX 9 at 8, 10, 13. Bags of raw asbestos were last exported from the Port on July 28, 1974. Decision and Order at 27. In the years immediately preceding claimant's 1992 retirement from longshore work, claimant testified that his work in ship holds was performed primarily for employer, and that his work as a forklift driver, moving cargo between the warehouse and ships, was performed exclusively for employer. CX 9 at 8, 10; Decision and Order at 28.

Claimant was first diagnosed with pleural plaques by Dr. Holstein, based on an August 19, 1994, x-ray showing scarring of claimant's pleura. CX 1 at 3, 4. On September 23, 1994, Dr. Gomes diagnosed claimant with bilateral pleural plaque disease, based on the August 19, 1994, x-ray. *Id.* at 5. In 2004, Dr. Gomes stated that claimant has asbestos-related bilateral pleural plaque disease, but is not impaired by this condition. CX 3 at 1-2, 7; CX 17 at 22-23. Nonetheless, Dr. Gomes stated that claimant has a significant amount of asbestos in his lungs which places him at a high risk of developing other asbestos-related diseases such as lung cancer and mesothelioma. *Id.* at 24. Therefore, Dr. Gomes recommended medical monitoring such as annual chest x-rays, pulmonary function studies and immunizations. CX 3 at 1-2; CX 17 at 24.

At the formal hearing, employer argued that claimant has asymptomatic pleural plaques with no impairment, and that his need for medical monitoring can be attributed to other non-work-related conditions, such as heart disease. Consequently, employer argued that claimant is not entitled to benefits under the Act. In the alternative, employer argued that Louisiana Stevedores is the responsible employer because claimant worked for this employer when it loaded the last shipment of asbestos to leave the Port in July 1974.

In his Decision and Order, the administrative law judge found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, based upon his findings that claimant suffers from asbestos-related pleural plaques and that claimant was exposed to asbestos during his employment at the Port. Next, the administrative law judge found that employer produced no evidence to rebut the testimony of Frank Parker, a Board-certified industrial hygienist, that asbestos exposure would have continued

indefinitely at the Port's warehouse subsequent to the last asbestos shipment in 1974 as the site was not decontaminated. The administrative law judge therefore found that claimant's lung condition is causally related to his continued exposure to asbestos while working at the Port. The administrative law judge found that employer was the last covered employer to expose claimant to asbestos, and thus that employer and Signal, its carrier at the time of claimant's retirement in July 1992, are responsible for the payment of claimant's medical benefits, including medical monitoring.

On appeal, employer contends that the administrative law judge erred in finding that claimant established a *prima facie* case of a compensable injury. Employer also contends that the award of medical benefits is in error. Alternatively, employer avers that the administrative law judge erred in finding that it is the liable employer.[1] Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance. Employer has filed reply briefs in support of its position.

Employer initially contends that the administrative law judge erred in finding that claimant sustained a compensable injury that is related to his maritime employment. We disagree. In determining whether an injury is work-related, claimant is aided by the Section 20(a), 33 U.S.C. §920(a), presumption, which may be invoked only after he establishes a *prima facie* case. To establish his *prima facie* case, claimant must show that he sustained a harm and that conditions existed or an accident occurred at work which could have caused or aggravated the harm. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *see generally U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996) If claimant establishes his *prima facie* case, Section 20(a) applies to relate the harm to his employment. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.2d 285, 34 BRBS 96(CRT) (5th Cir. 2000). Thereafter, in a multiple employer case, if any of the employers rebuts the presumption with substantial evidence that claimant's condition is not caused or aggravated by his employment, the presumption no longer controls, and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *See McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

In addressing whether claimant established the harm element of his *prima facie* case, the administrative law judge found that claimant's physician, Dr. Gomes, and employer's physician, Dr. Jones, diagnosed asbestos-related pleural plaques. Decision and Order at 21. As the administrative law judge's finding that claimant established the

[1] In a letter dated November 2, 2005, counsel for Baton Rouge Marine and carriers National Ben Franklin and Fidelity and Casualty Company of New York adopted by reference the brief filed on behalf of employer and Signal Mutual.

harm element of his *prima facie* case, specifically an asbestos-related condition of his lungs, is supported by substantial evidence and in accordance with law, it is affirmed. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989); *see also Crawford v. Director, OWCP*, 932 F.2d 152, 24 BRBS 123(CRT) (2d Cir. 1991). Moreover, the administrative law judge rationally found the credible testimony of claimant and his fellow employees, that they were exposed to asbestos dust while working at the Port, as well as the testimony of Mr. Parker that asbestos exposure likely continued at the Port's warehouse through the 1990's absent decontamination of that site, sufficient to establish the existence of working conditions through the date of claimant's retirement in July 1992 that could have caused his asbestos-related condition. Decision and Order at 23; *see generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). As substantial evidence supports the administrative law judge's finding that claimant established the working conditions element of his *prima facie* case that finding, and his consequent invocation of the Section 20(a) presumption, is affirmed. *See Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6 (1998), *aff'd in pert. part, rev'd on other grounds*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).

The administrative law judge found that employer did not present any evidence that claimant's asbestos-related lung condition was not caused by his exposure to asbestos while in the course of employment covered under the Act, and this finding is not appealed. Thus, the Section 20(a) presumption is not rebutted and claimant has established the compensability of his claim. The issue now turns to the identity of the employer responsible for the payment of compensation under the Act. *See Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64, *modified in part on recon.*, 40 BRBS 1 (2005); *see Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *see also Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). Claimant does not bear the burden of proving which employer is liable; rather, each employer bears the burden of establishing it is not the responsible employer. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT); *Susoeff*, 19 BRBS 149. In order to establish that it is not the responsible employer, an employer must demonstrate either that the employee was not exposed to injurious stimuli in sufficient quantities at its facility to have the potential to cause his disease or that the employee was exposed to injurious stimuli while working for a subsequent covered employer. *Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT);

see New Orleans Stevedores v. Ibos, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004). Since the determination of the responsible employer involves the assessment of liability under the Act, the responsible carrier is the carrier insuring the last covered employer to expose the employee to injurious stimuli. *See Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

The administrative law judge found that the record evidence is unclear as to which employer claimant worked for on July 27, 1974, the date the last shipment of asbestos cargo was loaded onto a vessel.[2] Therefore, the administrative law judge found that it is unclear when claimant was last exposed to asbestos *cargo*. Decision and Order at 27. Nonetheless, the administrative law judge found further inquiry into this issue irrelevant, as he found that claimant continued to be exposed to asbestos in the course of his employment for employer while working in the warehouse. In this regard, the administrative law judge found that employer produced no evidence to rebut the testimony of Mr. Parker, whom he found to be a credible witness in the areas of industrial hygiene and environmental engineering, that due to the contamination of the worksite in the 1960's and 1970's and the lack of an asbestos removal program, asbestos exposure continued indefinitely in the Port's warehouse subsequent to 1974 and that, consequently, claimant would have been exposed to asbestos fibers through his last day of employment in July 1992 working for employer. *Id.* at 28. Specifically, the administrative law judge noted that employer produced no air quality studies to show the absence of asbestos in 1992 in the warehouse, nor did employer produce an expert witness to counter Mr. Parker's opinion that claimant's exposure to asbestos continued until 1992. In this regard, the administrative law judge stated that although Mr. Parker testified that claimant's asbestos exposure after 1974 would not have been as significant as direct exposure to asbestos cargo, he credited Mr. Parker's testimony that claimant's post-1974 asbestos exposure would have contributed to claimant's asbestos-related lung-disease, as there is no minimal level of exposure that is not injurious. *Id*. It is well established that the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963). Consequently, we reject employer's contention that the administrative law judge erred in failing to find that claimant was last exposed to asbestos while working for Louisiana Stevedores on July 27, 1974.

We similarly reject employer's challenge to the administrative law judge's finding that claimant was exposed to asbestos through the last day of his employment with employer in July 1992. While employer posits that claimant did not establish his actual

[2] The administrative law judge found that claimant did not work on July 28, 1974, when the vessel sailed.

exposure to asbestos subsequent to July 1974, employer misconstrues the burden-shifting framework that underlies the last employer rule. Specifically, there is no requirement that claimant prove that employer in fact was the last employer; rather, as discussed *supra*, once claimant establishes a compensable claim, the burden is on employer to establish that it is not the responsible employer. *See McAllister*, 39 BRBS at 37; *see also Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992). In the instant case, although employer had the burden of proof, it presented no evidence of asbestos eradication efforts subsequent to July 1974, it did not question claimant regarding the whereabouts of his employment for it within the Port subsequent to that date, nor did it present any evidence that claimant was not exposed to asbestos throughout his employment with it. *See Cuevas*, 977 F.2d at 192, 26 BRBS at 115(CRT). Rather, employer bases its defense upon what it avers is the lack of Mr. Parker's credibility on the issue of whether asbestos residuals remained subsequent to the last physical asbestos cargo shipment on July 28, 1974, and the lack of affirmative evidence that claimant was actually exposed to asbestos throughout his continued employment with employer at the Port after that date.[3] In finding that claimant was exposed to

[3] We reject employer's argument that the administrative law judge's decision to give determinative weight to Mr. Parker's testimony cannot stand in light of the holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as the principles discussed in that case are inapplicable to cases arising under the Act. Section 23(a) of the Act provides:

> In making an investigation or inquiry or conducting a hearing the deputy commissioner or Board shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

33 U.S.C. §923(a); *see also* 20 C.F.R. §§702.338, 702.339. Under the Rules of Practice and Procedure Before the Office of Administrative Law Judges, the administrative law judge should admit into the record "relevant evidence." 29 C.F.R. §§18.401, 18.402. The administrative law judge is afforded wide discretion in admitting evidence into the record. *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, Nos. 91-70642, 92-70444 (9th Cir. 1993); *McCurley v. Kiewest Co.*, 22 BRBS 115 (1989). Moreover, employer is not challenging the admissibility of Mr. Parker's opinion, but the weight accorded it by the administrative law judge. *Casey v. Georgetown Univ. Medical Center*, 31 BRBS 147 (1997); 20 C.F.R. §§702.338, 702.339. Mr. Parker's credentials as a Board-certified industrial hygienist, licensed asbestos consultant, and environmental engineer qualify him as an expert witness who could be credited by an administrative law judge.

asbestos throughout his period of employment at the Port with employer, the administrative law judge rationally credited the testimony of Mr. Parker that, taking into consideration the substantial work with asbestos that occurred during the 1960's and 1970's at the Port and the lack of an asbestos eradication program, asbestos residue remained to which claimant would have been exposed during his continued employment until his retirement. *See Calbeck*, 306 F.2d 693. In this regard, the administrative law judge noted that although claimant earned wages both from employer and Ryan Walsh in 1992, there is no indication in the record that claimant's "forklift and warehouse" duties were for other than employer. Decision and Order at 28. Moreover, the administrative law judge credited claimant's testimony that he drove a forklift for employer between ships and the warehouse in 1992. *Id.* Therefore, the administrative law judge found that claimant's last exposure to asbestos in the warehouse at the Port of Baton Rouge would have been employer, and, thus, concluded that employer is the responsible employer. *Id.* The administrative law judge also concluded from the record that Signal Mutual, the insurance company which covered employer from 1989 to 1998 is the responsible carrier. As substantial evidence supports the administrative law judge's finding that claimant's last exposure to asbestos was during his employment with employer in 1992, we affirm the administrative law judge's finding that employer and Signal are responsible for the payment of the benefits due claimant under the Act. *See Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT).

Employer next challenges the administrative law judge's finding that it is liable for claimant's medical costs, including x-rays, pulmonary function studies and immunizations, required to monitor claimant's lung condition. Once claimant has established that his injury is work-related, employer is liable for reasonable and necessary medical expenses related to that injury. 33 U.S.C. §907(a); *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002); *Romeike*, 22 BRBS 57. Employer is liable for medical monitoring of a work-related condition if claimant sets forth an evidentiary basis to support a finding that such monitoring is reasonable and necessary.[4] *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Crawford*, 932 F.2d 152, 24 BRBS 123(CRT); *Romeike*, 22 BRBS 57. The

[4] We decline to address employer's challenge to the administrative law judge's apparent award of "past" medical benefits to the date of claimant's injury on August 14, 1994. *See* Decision and Order at 29. Claimant did not submit a claim for reimbursement for any specific past medical expenses incurred. As a request for medical benefits is never time-barred, if claimant makes a claim for any specific past costs, employer may raise a defense to such a claim. *See generally Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005); *Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); *Plappert v. Marine Corps Exch.*, 31 BRBS 13 (1997), *aff'd on recon. en banc*, 31 BRBS 109 (1997); *Ryan v. Alaska Constructors, Inc.*, 24 BRBS 65 (1990).

administrative law judge found that claimant is at a heightened risk for developing more serious impairments as a result of his present asbestos-related lung condition. Relying upon the opinions of Drs. Gomes and Liuzza that claimant should undergo annual chest x-rays, pulmonary function studies and immunizations, the administrative law judge found that these examinations are reasonable and necessary in order to monitor the progression of claimant's disease. Accordingly, as substantial evidence supports the administrative law judge's finding that medical monitoring of claimant's lung condition is reasonable and necessary in light of the present state of claimant's pleural plaques, the administrative law judge's award of medical benefits to claimant is affirmed.[5] 33 U.S.C. §907; *Baker,* 991 F.2d 163, 27 BRBS 14(CRT); *Davison v. Bender Shipbuilding & Repair Co., Inc.*, 30 BRBS 45 (1996).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[5] For the reasons stated in *Weikert v. Universal Maritime Serv. Corp.*, 36 BRBS 38 (2002), we reject employer's assertion that this issue is controlled by the Supreme Court's decision in *Metro-North Commuter Railroad v. Buckley*, 521 U.S. 424 (1997).