BRB No. 05-0854

CURLES D. McGEE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BATON ROUGE MARINE CONTRACTORS	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 06/21/2006
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
EMPLOYERS NATIONAL INSURANCE COMPANY/ LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Carrier-Respondent	)	
	)	
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 and the Supplemental Decision and Order Award Attorney Fees of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

John F. 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.

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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Baton Rouge Marine Contractors and Signal Mutual Indemnity Association, Limited (hereinafter employer) appeal the Decision and Order Awarding Benefits and the Supplemental Decision and Order Award Attorney Fees (2004-LHC-1709) 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed by various maritime employers, including employer and Louisiana Stevedores, as a longshoreman at the Port of Baton Rouge from 1965 until 1976 and from 1992 until his retirement in 1998. Claimant testified that while working in the warehouse at the Port during the 1960's and 1970's he handled, and was exposed to, asbestos cargo. Tr. at 20-23. Bags of raw asbestos were last exported from the Port on July 28, 1974. BRM-F Ex. 4; BRM-S Exs. 6-7, 9; LIGA Ex. 8; Tr. at 76-77. In 1991, claimant was diagnosed with pleural plaques which doctors opined were the result of

asbestos exposure. Cl. Ex. 4. In 1994, claimant was diagnosed with pulmonary asbestosis. Cl. Exs. 1, 4. In 2002, claimant's pulmonary function studies revealed no impairment; however, studies in 2004 revealed mild impairment, and Dr. Gomes assigned an impairment rating of between 10 and 25 percent. Cl. Exs. 3-4, 19. Both he and Dr. Liuzza determined that claimant was at significant risk for developing asbestos-related malignancies, and they recommended medical monitoring. Cl. Exs. 3, 6. Claimant sought benefits under the Act for his lung condition.[1]

In support of his claim for benefits, claimant submitted into evidence the depositions of additional workers at the Port who testified regarding the presence of asbestos cargo in the 1960's and 1970's, as well as the testimony of Mr. Parker, a Board-certified industrial hygienist, who testified regarding the continual exposure to asbestos fibers absent the decontamination of an asbestos-exposed site. In his Decision and Order, the administrative law judge initially determined that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, based upon his findings that claimant suffered from an asbestos-related lung disease and was exposed to asbestos during his employment at the Port. Decision and Order at 25-28. Next, the administrative law judge found that employer produced no evidence to rebut Mr. Parker's testimony that asbestos exposure would have continued indefinitely at the Port's warehouse subsequent to the last shipment of asbestos cargo in 1974 because the warehouse had not undergone asbestos eradication. The administrative law judge therefore concluded that claimant's lung condition is causally related to his continued exposure to asbestos while working at the Port. *Id.* at 29-30. As claimant became aware of the relationship between his lung condition and his work-related asbestos exposure in 1991, the administrative law judge found that the date of claimant's injury was April 22, 1991, *id.* at 32, and although he found that Louisiana Stevedores was the last employer to expose claimant to asbestos *cargo*, he determined that claimant's exposure to asbestos continued until 1976 and then commenced again upon his return to the Port, continuing until his retirement in 1998. The administrative law judge found that employer was the last covered employer to expose claimant to asbestos in 1976, prior to the date of injury in 1991, and determined that employer is responsible for claimant's benefits.[2] *Id.* at 33-

[1]Although claimant initially filed a claim against employer, he subsequently joined Louisiana Stevedores as a party to his claim.

[2]From October 1972 until November 1, 1982, Employer's National Insurance Company (ENIC) provided the insurance coverage for employer, making it the responsible carrier. However, ENIC was rendered insolvent in 1994, and LIGA participated in this case in ENIC's place. Nevertheless, the administrative law judge found that LIGA is not the responsible carrier because claimant's claim was filed with LIGA in 2002, subsequent to the 1995 claims-bar date set by the district court in

35. The administrative law judge awarded claimant permanent partial disability benefits for a 10 percent pulmonary impairment, commencing April 22, 2004, as well as future medical monitoring costs related to claimant's lung condition. 33 U.S.C. §§907, 908(c)(23); Decision and Order at 35-36. In a Supplemental Decision and Order, the administrative law judge awarded claimant's attorney a fee of $19,132.84, representing 62 hours of legal services rendered at an hourly rate of $250, plus costs of $3,632.84.

On appeal, employer contends that the administrative law judge erred in awarding claimant disability benefits and ongoing medical monitoring costs. Alternatively, employer avers that the administrative law judge erred in finding that it is responsible for those benefits. Additionally, employer challenges the attorney's fee awarded. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance.

Employer initially contends 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, a 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, the 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 the 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 this issue, the administrative law judge found that Dr. Jones, who examined claimant's medical records on behalf of employer, opined that claimant suffers from asbestos-related pleural plaques, that Dr. Gomes, claimant's physician, opined that claimant has asbestosis, and that claimant's x-rays revealed bilateral pleural plaque

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liquidating ENIC. Decision and Order at 34. As a result, the administrative law judge held employer, alone, liable for claimant's benefits. *Id.* at 34-35.

formation, interstitial fibrosis, and pleural thickening.[3] As these conditions constitute "harm," the administrative law judge properly found that claimant established the harm element of his *prima facie* case, and that finding, which is supported by substantial evidence, is affirmed. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Additionally, the administrative law judge rationally found credible the 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, absent decontamination, until claimant's retirement in 1998. This testimony is sufficient to establish the existence of working conditions that could have caused claimant's asbestos-related condition, and that finding also is affirmed. *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 conclusion that claimant established both elements of his *prima facie* case, the administrative law judge's 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 rebutting the presumption, and this finding is not appealed. Thus, claimant has established the compensability of his claim, and 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).

[3]Employer challenges the administrative law judge's reliance on Dr. Gomes opinion over that of Dr. Jones, arguing that it was improper to give deference to Dr. Gomes as the "treating physician." The administrative law judge found Dr. Gomes's opinion to be more reliable because he personally talked with, examined, x-rayed, and performed pulmonary function studies on claimant. Additionally, he noted that Dr. Jones did not discuss the interstitial abnormalities found by other doctors. Decision and Order at 19, 25-26. Moreover, he rejected employer's assertion that Dr. Gomes's opinion was internally inconsistent, and, as it is within the administrative law judge's discretion to weigh and credit the medical evidence of record, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), employer has shown no abuse of discretion in crediting Dr. Gomes's opinion over that of Dr. Jones. Although Dr. Jones opined that claimant did not have asbestosis, he stated that claimant has asbestos-related pleural plaques, and this constitutes an injury. *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989).

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).

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 28, 1974. The administrative law judge credited the opinion of Mr. Parker 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 in the Port's warehouse subsequent to 1974 and until claimant left longshore work in 1976. The administrative law judge specifically noted that employer produced no air quality studies to show the absence of asbestos after 1974, nor did employer produce an expert witness to counter Mr. Parker's opinion that exposure to asbestos continued. Decision and Order at 30. 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.[4] *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 in the warehouse subsequent to the last 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

[4]While acknowledging that employer handled asbestos cargo through the mid-1970's, Ms. LeFebvre provided no testimony regarding the actual physical conditions of claimant's employment for employer. *See* Tr. at 76-77.

employer at the Port after that date.[5] 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). As employer has presented no evidence to contradict the testimony of Mr. Parker, it was rational for the administrative law judge to find that, by virtue of the lack of an asbestos eradication process, asbestos remained in the warehouse, and claimant was exposed to asbestos after July 28, 1974, until his departure in 1976. Therefore, we affirm the administrative law judge's finding that claimant was last exposed to asbestos in 1976, prior to the date of injury in 1991, as it is rational and supported by the substantial evidence. Because claimant worked for employer in 1976, we affirm the administrative law judge's determination that employer is the party responsible for claimant's exposure to asbestos and is responsible for the

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[5]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.

payment of the benefits due claimant under the Act.[6] *See McAllister*, 39 BRBS at 37 (burden is on employer to establish that it is not the responsible employer); *see also Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

Employer next challenges the administrative law judge's finding that it is liable for claimant's future medical costs, including x-rays, pulmonary function studies and immunizations, required to monitor claimant's lung condition.[7] Once a claimant has established that his injury is work-related, his 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. An employer is liable for medical monitoring of a work-related condition if the claimant sets forth an evidentiary basis to support a finding that such monitoring is reasonable and necessary. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Romeike*, 22 BRBS 57. In this case, the 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 opinion of Dr. Gomes that claimant undergo annual chest x-rays, pulmonary function

[6]Because the administrative law judge also found that claimant was exposed to asbestos between 1992 and 1998 while working for employer, claimant states in his brief that "the last injurious exposure would fall upon Signal Mutual for BRMC[,]" as Signal was the carrier on the risk from 1989 through claimant's date of retirement in 1998. Cl. Brief at 17. The administrative law judge did not find Signal to be the responsible carrier; therefore, claimant's assertion does not support the administrative law judge's finding and his contention should have been raised in a cross-appeal. *Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Neither employer nor Signal, which participated in employer's appeal even though it is not an aggrieved party in this case, raised this issue on appeal. Therefore, we shall not address it.

[7]The administrative law judge did not, as employer avers, award claimant medical monitoring costs from 1991; rather, the administrative law judge specifically found that "Dr. Gomes' recommendation for annual chest x-rays, pulmonary function studies and immunizations for the remainder of Claimant's life constitute (sic) reasonable and necessary treatment to monitor the progression of Claimant's disease. . . ." Decision and Order at 36. To the extent that the administrative law judge's order to pay "all reasonable medical care and treatment arising out of his work-related injuries[,]" Decision and Order at 38, could be interpreted as holding employer liable for past medical expenses, we note that the administrative law judge did not address reimbursement of any past medical expenses, and we decline to address the issue.

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 lung disease, the administrative law judge's award of medical benefits to claimant is affirmed.[8] 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).

Lastly, employer challenges the attorney's fee awarded to claimant's counsel by the administrative law judge. The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980). In this regard, an attorney's fee must be awarded in accordance with the applicable regulation, 20 C.F.R. §702.132, which provides that any attorney's fee approved shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Parrott v. Seattle Joint Port Labor Relations Committee of the Pacific Maritime Ass'n*, 22 BRBS 434 (1989). In the instant case, claimant's attorney requested a fee of $24,238.84, representing 78.5 hours of services rendered at an hourly rate of $250 plus costs of $4,613.84. In his supplemental decision, the administrative law judge awarded the hourly rate requested, reduced the number of requested hours, and disallowed certain requested expenses. Accordingly, the administrative law judge awarded counsel a fee of $19,132.84, representing 62 hours at $250 per hour, plus costs of $3,632.84. We conclude that the administrative law judge's fee award must be upheld, as employer has failed to show the award to be unreasonable or an abuse of the administrative law judge's discretion.

Initially, we reject employer's assertion that the administrative law judge's award of an attorney's fee is premature. Fee awards do not do not become effective, and thus are not enforceable, until all appeals have been exhausted. *See Thompson v. Potashnick Constr. Co.*, 812 F.2d 574 (9th Cir. 1987); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Mowl v. Ingalls Shipbuilding, Inc.*. 32 BRBS 51 (1998). Therefore, the administrative law judge may enter a fee award while an appeal is pending.

[8]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).

Employer next contends that the administrative law judge erred by failing to consider whether the attorney's fee should be reduced due to claimant's degree of success. Although the administrative law judge did not explicitly address this factor, we hold that any error in this regard is harmless. It is uncontroverted that claimant prevailed on all of the issues that were contested at the hearing before the administrative law judge. Specifically, claimant was successful in establishing a causal relationship between his present medical condition and his employment, the extent of his present medical impairment, his entitlement to ongoing permanent partial disability benefits, and employer's liability for the medical costs of monitoring his lung condition. In light of claimant's complete success in establishing entitlement to these ongoing benefits under the Act,[9] that the potential total benefit to claimant over his lifetime may be relatively small is an insufficient basis, alone, for reducing counsel's requested attorney's fee. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

Employer also contends that the hourly rate awarded is too high and that various itemized entries should be reduced or disallowed. Before the administrative law judge, employer raised many specific objections to time entries, the hourly rate, and the costs sought by claimant's counsel, each of which were addressed by the administrative law judge in reducing counsel's requested time by 16.5 hours and costs by $981. Supp. Decision and Order at 2-4. Employer's assertions on appeal are insufficient to meet its burden of establishing that the administrative law judge abused his discretion in his award of a fee. Thus, we decline to further reduce or disallow the hours approved by the administrative law judge.[10] *See Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989). Moreover, the administrative law judge rationally found that an hourly rate of $250 is warranted based on the complexity of the issues involved and counsel's expertise. Supp. Decision and Order at 2; *see Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996) (*en*

[9]Claimant receives weekly disability benefits of $34.36, as of April 22, 2004.

[10]Employer objects to expense charges of $1,500 for Mr. Parker, $900 for Dr. Liuzza, and $900 for Dr. Gomes, stating that those costs should be pro-rated among the instant case and its sister cases, *Wilkinson v. Baton Rouge Marine Contractors*, BRB No. 05-0853 (June 7, 2006); *Badeaux v. Baton Rouge Marine Contractors*, BRB No. 05-0856; *Genusa v. Baton Rouge Marine Contractors*, BRB No. 05-0855. The administrative law judge found, based on claimant's counsel's representation, that the costs for each expert have been pro-rated among the four cases. Supp. Decision and Order at 4. Employer has not shown that the costs are improper. Any request for or motion to compel claimant to submit an invoice establishing the total expenses for these witnesses should have been filed with the administrative law judge. *See Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

banc) (Brown and McGranery, JJ., concurring and dissenting). Therefore, the administrative law judge's award of an attorney's fee and costs to claimant's attorney is affirmed. *See generally Welch v. Pennzoil Co.*, 23 BRBS 395 (1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Supplemental Decision and Order Award Attorney Fees are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge