BRB No. 05-0855

LOUIS GENUSA, JR. Claimant-Respondent v. BATON ROUGE MARINE CONTRACTORS and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED Employer/Carrier-Petitioners LOUISIANA STEVEDORES and EMPLOYERS NATIONAL INSURANCE CORPORATION c/o LOUISIANA INSURANCE GUARANTY ASSOCIATION Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: 06/22/2006 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 (John F. Dillon, PLC), Folsom, Louisiana, for claimant.

Traci 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.

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

PER CURIAM:

Baton Rouge Marine Contractors (employer) appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Award Attorney Fees (2004-LHC-1745) 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 exposed to asbestos during the course of his employment as a longshoreman at the Port of Baton Rouge from 1964 until 1999, when he voluntarily retired.[1] He was diagnosed in 1994 with asbestos-related pleural scarring. Claimant does not have any disability related to his asbestos exposure. He filed a claim under the Act against his longshore employers at the Port of Baton Rouge, in which he sought medical monitoring of his pulmonary condition. *See* 33 U.S.C. §907(a).

[1] In its brief in Rebuttal in Support of (and Amendment to) Petition for Review, employer states it acquired information subsequent to the closing of the record that claimant's last day of actual employment at the Port was in September 1998. Rebuttal Br. at 2; *see* n. 2, *infra*.

In his decision, the administrative law judge found that claimant established a *prima facie* case entitling him to the Section 20(a) presumption, 33 U.S.C. §920(a), linking his pulmonary condition to asbestos exposure while working at the Port. The administrative law judge found that there was no evidence sufficient to rebut the presumption. The administrative law judge therefore concluded that claimant's pulmonary condition is casually related to his longshore employment. The administrative law judge rejected employer's contention that claimant was not exposed to asbestos at work after the last shipment of asbestos was exported from the Port on July 28, 1974, inasmuch as claimant was subsequently exposed to asbestos residue inside the only warehouse at the Port. The administrative law judge found that claimant last worked for employer prior to September 16, 1994, the date he underwent an asbestos screening that revealed asbestos-related pleural scarring, and that employer, therefore, is responsible for providing claimant medical benefits under the Act. Based on the medical recommendations of Drs. Liuzza and Gomes, the administrative law judge found employer liable for annual chest x-rays, pulmonary function studies, and immunizations to monitor any progression of claimant's pulmonary condition. In his supplemental decision, the administrative law judge awarded claimant's counsel a fee of $12,281.25, representing 49.125 hours of work at an hourly rate of $250, plus $3,181.57 in costs.

On appeal, employer challenges the administrative law judge's finding that claimant invoked the Section 20(a) presumption, his responsible employer determination, and his finding that medical monitoring of claimant's pulmonary condition is a reasonable and necessary medical expense.[2] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance. Employer also challenges the administrative law judge's attorney's fee award. Claimant responds, urging affirmance.

Employer first contends that the administrative law judge erred in finding that claimant sustained a compensable injury. We disagree. In determining whether an injury is work-related, claimant is aided by the Section 20(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

[2] In its brief in Rebuttal in Support of (and Amendment to) Petition for Review, employer withdrew its contention that, should the Board affirm the administrative law judge's responsible employer finding, the administrative law judge erred by finding that Signal Mutual Indemnity Association, Limited, is the carrier responsible for claimant's medical benefits. This withdrawal is based on employer's discovery that claimant's last actual employment occurred while Signal was on the risk. *See* n. 1, *supra.*

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).

In addressing this issue, the administrative law judge credited claimant's medical records diagnosing on September 16, 1994, asbestos-related scarring of the pleura, and the deposition testimony of Dr. Gomes, who diagnosed claimant as having asbestos-related pleura disease. Decision and Order at 24; *see* CXs 1 at 3; 3 at 2; 19A at 24-27, 30-32. Thus, as the administrative law judge's finding that claimant established the harm element of his *prima facie* case, specifically asbestos-related pleura disease, is supported by substantial evidence, it is affirmed. *See Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). 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 Frank Parker, a Board-certified industrial hygienist, that asbestos exposure likely continued at the Port's warehouse through claimant's last day of employment at the Port absent decontamination of that site, sufficient to establish the existence of working conditions through the date of claimant's retirement that could have caused his asbestos-related condition. *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).

Employer contends that claimant was last exposed to asbestos on July 28, 1974, when he unloaded asbestos cargo during the course of his employment for Louisiana Stevedores. 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).

In addressing the issue of the responsible employer, the administrative law judge found that Louisiana Stevedores was responsible on July 28, 1974, for loading the last ship to export asbestos from the Port, and that claimant worked that day for Louisiana Stevedores. Decision and Order at 29. However, the administrative law judge determined that the date of injury in this case is September 16, 1994, when claimant was first diagnosed with asbestos-related pleural disease, and that claimant was continuously exposed to asbestos inside the warehouse at the Port throughout the course of his employment with employer. Claimant was employed at the Port exclusively by employer from 1988 until his last day of work prior to his retirement. Tr. at 39; *see also* CX 5. 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 July 1974 and that, consequently, claimant would have been exposed to asbestos fibers through his last day of employment. Thus, the administrative law judge concluded that employer is the responsible employer as it last exposed claimant to asbestos prior to the date of injury on September 16, 1994.

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, and by instead finding that claimant was last exposed to asbestos during the course of his employment with employer prior to the date of injury on September 16, 1994. While employer posits that claimant did not establish his actual 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 v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *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.[3] *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 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.[4] In finding that claimant was exposed to 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

[3] Emma Lee LeFebvre, the person responsible for employer's human resource department, provided no testimony regarding the actual physical conditions of claimant's employment for employer. *See* Tr. at 76-77.

[4] 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.

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 v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963). Accordingly, as substantial evidence supports the administrative law judge's finding that claimant's last exposure to asbestos was during his employment with employer, we affirm the administrative law judge's finding that employer and Signal are responsible for this claim. *See Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT); *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

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.[5] 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. *See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Romeike*, 22 BRBS 57. 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 opinions of Dr. Gomes and Dr. 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 any progression of claimant's asbestos-related 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.[6] 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).

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[5] Employer has misinterpreted the administrative law judge's award of medical benefits to claimant. The administrative law judge did not, as employer avers, award claimant medical monitoring costs from September 1994; rather, the administrative law judge specifically held employer liable for claimant's *future* reasonable medical care and treatment. *See* Decision and Order at 31-32. Accordingly, we need not address employer's contention that the administrative law judge erred in awarding claimant medical benefits prior to the filing of his claim.

[6] 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).

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, Section 702.132, 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 this case, claimant's counsel filed an attorney's fee petition with the administrative law judge, requesting a fee of $12,906.25 representing 51.625 hours of work at an hourly rate of $250, plus $4,166.57 in costs. Employer filed objections to the fee petition. In his supplemental decision, the administrative law judge awarded the hourly rate requested, reduced the number of requested hours by 2.5, and disallowed $985 in requested expenses. Thus, the administrative law judge awarded counsel a fee of $12,281.25, representing 49.125 hours at $250 per hour, plus costs of $3,181.57. 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); *Thompson v. Potashnik Constr. Co.*, 21 BRBS 59, *on recon.*, 21 BRBS 63 (1988); *see also Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47(CRT) (7th Cir. 1982); *Williams v. Halter Marine Serv., Inc.* 19 BRBS 248 (1987). Thus, the administrative law judge may enter a fee award while an appeal is pending.

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. Employer's argument below was limited to the statement that, "Any fee should be based upon/tailored to the degree of Claimant's success. . . ," with supporting case citations. In this case, claimant prevailed on all issues 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, and consequently, employer's liability for the medical monitoring costs of his lung condition. In light of claimant's complete success in establishing entitlement to these medical benefits under the Act, that the potential monetary benefit to claimant over his lifetime may ultimately 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 over twenty specific objections to time entries, the hourly rate, and the costs sought by claimant's counsel, each of which was addressed by the administrative law judge in reducing counsel's requested time by 2.5 hours and costs by $985. Supp. Decision and Order at 2-3. 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. *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; *Brown v. Marine Terminals Corp.*, 30 BRBS 29 (1996)(*en banc*) (Brown and McGranery, JJ., concurring and dissenting). With regard to the award of costs, the administrative law judge did not err in relying on claimant's counsel's representation that the costs were pro-rated among the four cases in which the experts' opinions were utilized. 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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BETTY JEAN HALL
Administrative Appeals Judge