BRB Nos. 14-0031
and 14-0070

FERDINAND J. FABRE, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAMSEY SCARLETT & COMPANY	)	
	)	DATE ISSUED: Sept. 25, 2014
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and the Decision and Order Awarding Attorney's Fees of Larry W. Price, Administrative Law Judge, United States Department of Labor.

John F. Dillon, Folsom, Louisiana, for claimant.

Scott B. Kiefer and Jeffrey M. Burg (Courington, Kiefer & Sommers, L.L.C.), New Orleans, Louisiana, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order and the Decision and Order Awarding Attorney's Fees (2012-LHC-01972) of Administrative Law Judge Larry W. Price 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, rational, 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). 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 Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

Claimant filed a claim for medical benefits on December 28, 2011, alleging he contracted asbestosis due to his work-related exposure to asbestos at employer's facility at the Port of Baton Rouge. Claimant, who worked for employer from 1969 to 1991, also worked at an inland facility; he has worked for another covered longshore employer, Westway, since 1991. Employer controverted the claim, contending that claimant was not exposed to asbestos at its Port facility and that he was subsequently exposed to asbestos at Westway.

In his decision, the administrative law judge found claimant entitled to the presumption that his asbestosis is related to exposure to asbestos at employer's Port facility, and that employer did not rebut the presumption. 33 U.S.C. §920(a); Decision and Order at 13-15. Alternatively, the administrative law judge found that, assuming employer rebutted the Section 20(a) presumption, claimant established, based on the record as a whole, that his asbestosis is related to his employment with employer at the Port. *Id*. at 15-16. The administrative law judge found that employer is the responsible employer as it did not establish that claimant was exposed to asbestos in his subsequent longshore employment with Westway. *Id*. at 13-14. With respect to his claim for medical benefits, the administrative law judge found that claimant is entitled to future monitoring and treatment, as recommended by his pulmonologist, Dr. Gomes, as well as to reimbursement for past expenses incurred for monitoring and treatment of claimant's bronchitis and pneumonia. *Id*. at 16-17.

Claimant's counsel subsequently filed a fee petition with the administrative law judge for work performed before the Office of Administrative Law Judges. Specifically, counsel sought a fee of $23,479.30, representing 62.375 hours of attorney services at an hourly rate of $300, 3.625 hours of support services at an hourly rate of $90, plus $4,440.55 in costs. Employer filed objections to the fee petition.

In his supplemental decision, the administrative law judge reduced the hourly rate to $285, disallowed as clerical the time requested for support services, denied one hour expended on an unsuccessful pre-hearing motion for reconsideration, and reduced from $1,742.69 to $800 costs associated with travel and lodging in Baltimore for an in-person deposition. The administrative law judge rejected employer's contention that the fee should be reduced because claimant's recovery of past medical expenses amounted to only $6,214. Accordingly, the administrative law judge awarded claimant's counsel a fee and costs of $20,989.74.

On appeal, employer challenges the administrative law judge findings: that claimant was exposed to asbestos at its Port facility and is entitled to the Section 20(a) presumption; that it is the responsible employer; and that claimant is entitled to certain

medical benefits. BRB No. 14-0031. Employer also appeals the administrative law judge's attorney's fee award. BRB No. 14-0070. Claimant responds to both appeals, urging affirmance of the administrative law judge's decisions.

Employer challenges the administrative law judge's finding that claimant established a prima facie case of a work-related injury. Employer contends that claimant was not exposed to asbestos at its Port facility, but only at its inland facility, which is not a covered situs. In invoking the Section 20(a) presumption, the administrative law judge credited the asbestosis diagnosis of Dr. Gomes as to the harm element. With regard to the working conditions element, the administrative law judge relied on the statement of Frank Parker, an industrial hygienist, that the repair of asbestos-containing brakes and clutches exposes workers to significant concentrations of asbestos and that claimant was exposed to asbestos-containing material between 1979 and 1991 at the Port, and claimant's deposition testimony that he replaced asbestos-containing brakes and clutches at employer's Port facility. Decision and Order at 13; *see* CXs 2 at 43-45; 3 at 3; 9 at 2; 10 at 9-12.

Claimant does not have to prove that his asbestosis was in fact caused or contributed to by his working conditions at employer's Port facility in order to be entitled to the Section 20(a) presumption, but only that it could have been caused thereby. *See Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998). Dr. Gomes's asbestosis diagnosis is undisputed. CX 3 at 3. Claimant testified at his deposition that his job duties at the Port included changing brakes and clutches on forklifts, Bobcats, and cranes, and that he believed he was exposed to asbestos in this work. CX 2 at 43-45. Mr. Parker reported that the maintenance of asbestos-containing brakes and clutches is a well-documented source of exposure to asbestos. Mr. Parker also stated that claimant was most likely exposed to asbestos between 1979 and 1991 at the Port during his repair of asbestos-containing brakes. CX 9 at 2. As substantial evidence supports the administrative law judge's finding that claimant was exposed to asbestos at employer's Port facility, a covered longshore situs, and that such exposures could have caused claimant's disease, we affirm his conclusion that claimant is entitled to the benefit of the Section 20(a) presumption. *Port Cooper/T. Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Richardson v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 74 (2005), *aff'd mem. sub nom. Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 245 F.App'x 249 (4th Cir. 2007); *Jones v. Aluminum Co. of N. America*, 35 BRBS 37 (2001).

Employer also challenges the administrative law judge's finding that it did not rebut the Section 20(a) presumption. Employer contended below, as it does on appeal, that claimant's alleged exposure would have occurred subsequent to the promulgation by the Occupational Safety and Health Administration (OSHA) of regulations regarding the use of asbestos-containing materials, such that any asbestos exposure would have been de minimis. Employer avers that claimant's lack of awareness of such regulations indicates

that he likely was not exposed to asbestos at its Port facility.[1] The administrative law judge found that claimant's lack of awareness "does nothing to rebut the presumption, but suggests that perhaps no OSHA precautions were implemented." Decision and Order at 15. The administrative law judge noted that depositions of employer's corporate officers do not establish how worker safety monitoring was implemented at employer's facility. *Id.* at 16.

Once the Section 20(a) presumption is invoked, the burden shifts to employer to rebut it with substantial evidence that claimant's condition was not caused by his employment. *See Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 37 BRBS 35(CRT) (5th Cir.), *cert. denied*, 540 U.S. 1056 (2003); *Conoco, Inc.*, 194 F.3d 684, 33 BRBS 187(CRT). There are no medical opinions of record stating that claimant's asbestosis was not caused or contributed to by his working conditions at employer's Port facility. Moreover, the administrative law judge acted within his discretion in finding that employer did not produce substantial evidence of the absence of asbestos exposure at its Port facility. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS 25(CRT) (5th Cir. 2012). Furthermore, a claimant's limited exposure does not necessarily defeat the claim. *See Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir.), *cert. denied*, 454 U.S. 1080 (1981) Therefore, we affirm the administrative law judge's findings that employer did not rebut the Section 20(a) presumption and that claimant's asbestosis is work-related. *See Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011).

Employer next contends the administrative law judge erred in finding that it is the responsible employer, averring that claimant worked around the same asbestos-containing equipment during his subsequent employment with Westway as he did at employer's Port facility. In his decision, the administrative law judge credited claimant's testimony that Westway is a liquid bulk facility, that he was not exposed to asbestos at Westway, and that he did not handle brake and clutch materials during the course of his employment there as a crane operator.[2] Decision and Order at 14; CX 2 at 51-57. The administrative law judge thus concluded that employer failed to present "any evidence to prove that claimant was exposed to asbestos at Westway." *Id*.

[1] As an example, employer notes that claimant testified that he wore a dust mask at the inland facility, but did not do so at the Port facility. CX 2 at 95.

[2] Claimant is also the terminal supervisor for Westway. CX 2 at 52-53. He further testified that the only gaskets at Westway of which he is aware are those for hoses, which are made of vinyl, rather than asbestos. *Id*. at 56.

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, as in this asbestosis 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. Employer bears the burden of establishing that it is not the responsible employer. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998). This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has stated that, in order to meet its burden of establishing that it is not the responsible employer in an occupational disease case, an employer must prove either: (1) that exposure to injurious stimuli did not cause the employee's occupational disease; or (2) that the employee was performing work covered by the Act for a subsequent employer where he was exposed to injurious stimuli. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *see also 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 v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

In this case, the administrative law judge found that employer did not rebut the Section 20(a) presumption that claimant exposure to asbestos caused or contributed to his asbestosis. Accordingly, employer did not establish it is not the responsible employer on this basis. Moreover, substantial evidence supports the administrative law judge's finding that claimant was not exposed to asbestos during the course of his subsequent longshore employment with Westway. In this regard, we note, contrary to employer's contention, that the administrative law judge's finding regarding claimant's asbestos exposure is not based on claimant's proximity to equipment containing asbestos, but on claimant's actual handling of brake and clutch products during the course of his employment for employer. Decision and Order at 13. Given claimant's testimony that Westway is a liquid bulk facility, that he does not repair or replace brakes and clutches at that facility, and that he was unaware of any asbestos exposure at Westway, we affirm the administrative law judge's finding employer did not establish that claimant was exposed to asbestos there. *See Cuevas*, 977 F.2d 186, 26 BRBS 111(CRT). Accordingly, we affirm the administrative law judge's finding that employer is the responsible employer.

Employer challenges the administrative law judge's finding that claimant is entitled to annual influenza and pneumonia vaccinations and to treatment for pneumonia, bronchitis and other respiratory conditions because claimant did not establish that such conditions are related to asbestosis. Specifically, employer argues that, pursuant to *Amerada Hess Corp. v. Director, OWCP*, 543 F.3d 755, 42 BRBS 41(CRT) (5th Cir.

2008), the administrative law judge erred by failing to require that claimant establish that such maladies are the natural or unavoidable results of asbestosis.[3]

Section 7(a) of the Act requires an employer to furnish all reasonable and necessary medical expenses arising from a work-related injury. 33 U.S.C. §907(a). In order for medical care to be compensable, it must be appropriate for the injury. *See* 20 C.F.R. §702.402. The administrative law judge has the authority to determine the reasonableness and necessity of medical treatment. *Weikert v. Universal Maritime Service Corp.*, 36 BRBS 38 (2002).

The administrative law judge found that claimant is entitled to medical monitoring and treatment recommended by Dr. Gomes, claimant's pulmonologist. Decision and Order at 17. Specifically, Dr. Gomes recommended yearly chest x-rays, evaluations, and pulmonary function studies, as well as influenza and pneumonia vaccinations to prevent chest infections. CX 10 at 16. The administrative law judge also found that claimant is entitled to medical benefits for "related medical conditions," such as bronchitis and pneumonia. Decision and Order at 17. Dr. Gomes stated that patients with asbestosis are more likely to develop respiratory infections, such as bronchitis and pneumonia, and to have a more difficult time recovering from such conditions. *Id.* at 11, 17, 27. Dr. McClemore also stated that persons with asbestosis have greater and more severe incidences of pneumonia and bronchitis, as their lungs are already damaged. CX 12 at 37, 44-45. Claimant has had several bouts of pneumonia and bronchitis since 1998.

We reject employer's contention of error. Dr. Gomes's opinion establishes that medical monitoring and vaccinations are necessary treatment for claimant's work-related asbestosis. Thus, we affirm the award of medical benefits for these services. *Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14(CRT) (5th Cir. 1993); *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). Moreover, contrary to employer's contention, the administrative law judge did not apply Section 20(a) to presume that bronchitis and pneumonia result from asbestosis. Rather, claimant submitted, and the administrative law judge relied on, substantial evidence showing that persons with asbestosis are more susceptible to bronchitis and pneumonia due to their damaged lungs, and that such lung infections are often more severe. Thus, claimant established a causal relationship between his work-related disease and bronchitis and pneumonia. 33 U.S.C. §902(a); *see Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14

[3] Contrary to employer's assertion, Section 2(2) of the Act, 33 U.S.C. §902(2), states that the term "injury" covers the natural *or* unavoidable results of the work injury, not the natural *and* unavoidable results.

BRBS 63 (5th Cir. 1981). Therefore, we affirm the award of medical benefits for respiratory conditions such as pneumonia and bronchitis.[4] 33 U.S.C. §907(a).

Employer also appeals the administrative law judge's fee award to claimant's counsel, challenging the hourly rate awarded, some of the entries for which a fee was awarded, and the administrative law judge's finding that the award should not be reduced based on claimant's alleged limited success.

The administrative law judge evaluated counsel's fee petition and hourly rate pursuant to the factors enumerated in Section 702.132(a), 20 C.F.R. §702.132(a), and *Johnson v. Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974).[5] The administrative law judge stated that the hourly rate "should be commensurate with the prevailing hourly rates in the same geographic location at the time the services were rendered." Decision and Order Awarding Attorney's Fees at 2. The administrative law judge found that, "[C]ounsel has demonstrated an experienced practice, a high quality of representation, and an established reputation," and "based upon awards in similar cases, the time and labor required for this particular case, and the novelty and difficulty of questions involved in the case at hand, I [award] $285/hour." *Id*. We affirm the awarded hourly rate of $285 as employer has not established that the administrative law judge abused his discretion in this regard. The administrative law judge rationally applied the *Johnson* and regulatory criteria, and considered the prevailing hourly rates in counsel's geographic area.

Employer further contends that the overall fee should be reduced because claimant recovered only $6,214 in past medical expenses. The administrative law judge did not abuse his discretion in rejecting this contention. Decision and Order Awarding Attorney's Fees at 3. In light of claimant's complete success on all issues contested

[4] Employer retains the ability to challenge the necessity and reasonableness of any particular medical treatment. *See generally Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 38 BRBS 60(CRT) (1st Cir. 2004).

[5] The *Johnson* factors are: 1) the time and labor required; 2) the novelty and difficulty of the questions; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorney; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. *Johnson*, 488 F.2d at 718; *see also Blanchard v. Bergeron*, 489 U.S. 87, 92 n.5 (1989).

before the administrative law judge and the current and potential future dollar amount of claimant's medical benefits, the amount of past-due medical benefits owed claimant through June 2013 as a result of the administrative law judge's decision is an insufficient basis 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 objects to 14 entries in counsel's fee petition totaling 28.5 hours on the ground that the entries are vague and/or excessive. The administrative law judge acknowledged employer's objections to itemized entries, and disallowed one hour. Employer contends that "this case involved only a claim for medical benefits" and thus, that counsel billed excessive hours. Employer contested the case on several bases and it has not established on appeal that the administrative law judge abused his discretion in awarding a fee for the hours itemized in counsel's fee petition. *See Obadiaru*, 45 BRBS 17; *Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995). Therefore, we affirm the administrative law judge's fee award.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the administrative law judge's finding that claimant established he was exposed to asbestos at employer's Port facility. As employer correctly contends, substantial evidence of record does not support this finding. I would remand the case for the administrative law judge to further address this issue, and to explain his inferences and any conclusions based thereon.

It is claimant's burden to establish both elements of his prima facie case: (1) that he actually has the harm alleged; and (2) that the working conditions that are alleged to be the cause of the harm actually existed. *Port Cooper/T. Smith Stevedoring Co. v.*

Hunter, 227 F.3d 285, 34 BRBS 96(CRT) (5th Cir. 2000); *Brown v. Pacific Dry Dock*, 22 BRBS 294 (1989); *see generally U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). The evidence on which the administrative law judge relied is insufficient to support the conclusion that claimant actually was exposed to asbestos. Claimant's deposition testimony is that the brakes and clutches on which he worked were dusty and that he believed they "probably" had asbestos in them, but that he did not know this for certain. Claimant's belief was formed after the fact, when he read in the newspaper about asbestos-containing brakes. CX 2 at 42-45. Claimant stated he was not otherwise exposed to asbestos at the Port. *Id.* at 47. The opinion of Frank Parker, an industrial hygienist, is based "on the information provided by [claimant's counsel], the scientific literature, my education and experience, and information generally relied upon by members of my profession." CX 9 at 1. The information provided to Mr. Parker by claimant's counsel has not been identified or made part of the record, nor has the scientific literature and information relied on by members of Mr. Parker's profession. Mr. Parker stated that, "The repair and maintenance of asbestos containing brakes and clutches has been well documented to occupationally expose maintenance workers to significant concentrations of asbestos. . . ." He stated claimant was "most likely" occupationally exposed to asbestos at the Port from brakes, gaskets, talc (Tremolite), and raw-facility contamination." He concluded that claimant's last injurious exposures "most likely occurred whenever he repaired asbestos containing brakes, if he did so after the mid to late 1970s." *Id.* at 2.

The administrative law judge's conclusion that claimant was exposed to asbestos is based on a faulty inference: (1) the repair of asbestos-containing brakes and clutches exposes workers to asbestos; (2) claimant repaired brakes and clutches; (3) therefore, claimant was exposed to asbestos. The missing link in this case is evidence, whether circumstantial, direct, or judicially noticed, that the brakes and clutches on which claimant worked contained asbestos. Claimant's belief that he "probably" was exposed to asbestos in brakes, premised on unidentified, later newspaper articles, is too speculative to constitute substantial evidence of actual exposure to asbestos. Similarly, Mr. Parker's statement, which is not based on personal knowledge of claimant's exposure, cannot provide this evidence, as the basis for his statement cannot be ascertained from this record. Because the "evidence" on which Mr. Parker based his conclusion is not divulged, the administrative law judge cannot ascertain whether Mr. Parker's statement is "creditable" as to claimant's likely exposure to asbestos. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280, 28 BRBS 43, 47(CRT) (1994) (when "the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true").

Thus, I would remand the case for the administrative law judge to further address whether claimant was exposed to asbestos during his employment for employer at the Port of Baton Rouge and to explain how any inferences he draws are supported by the evidence of record. Therefore, I dissent.

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JUDITH S. BOGGS
Administrative Appeals Judge