BRB Nos. 99-0410
and 99-0410A

WILLIAM PARKER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
BATON ROUGE MARINE CONTRACTORS	)	DATE ISSUED:
	)	
and	)	
	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Order Denying Motions for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John F. Dillon (John F. Dillon, PLC), New Orleans, Louisiana, for claimant.

B. Ralph Bailey and Frederick H. N. Dwyer (Bailey & Dwyer), Mandeville, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits and Order Denying Motions for Reconsideration (97-LHC-2812) of Administrative Law Judge James W. Kerr, Jr., 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 if they 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 exposed to asbestos in connection with his work as a longshoreman for several employers[1] at the Port of Baton Rouge, Louisiana. He was diagnosed with pulmonary asbestosis by Dr. Gomes on November 21, 1997. Claimant, whose employment at that facility spanned from the early 1950s until his retirement in 1976, stated that his last exposure to asbestos occurred while he was working for employer, Baton Rouge Marine Contractors (BRM). Claimant therefore listed BRM as the responsible employer upon filing his claim for benefits.

In his decision, the administrative law judge initially found that claimant's notice and claim were timely filed pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, and that BRM, as the employer at the time of claimant's last injurious exposure, is the responsible employer. He then determined that claimant is entitled to permanent total disability benefits commencing May 12, 1998, as well as to medical benefits pursuant to Section 7, 33 U.S.C. §907, as a result of his occupational pulmonary asbestosis. Employer and claimant each filed motions for reconsideration which were summarily denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's findings that it is the responsible employer and, alternatively, that claimant is entitled to reimbursement of medical expenses. In his cross-appeal, claimant challenges the administrative law judge's finding regarding the date of the commencement of benefits. Employer and claimant respond to the other's appeal, urging affirmance on the issues raised therein.

Employer initially contends that the administrative law judge erred in concluding that it is the responsible employer in this case, arguing that the record establishes that claimant last worked with asbestos for Louisiana Stevedores. Specifically, employer maintains that its Comparative Loading Statements,[2] in conjunction with the testimony of its president, Ralph Hill, conclusively show that only Louisiana Stevedores handled asbestos on July 28, 1974, long after BRM's last work with asbestos which allegedly occurred on June 22, 1973, and that claimant admitted that he handled asbestos for Louisiana Stevedores.

The standard for determining the responsible employer was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), which held that the last employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation. Employer bears the burden of demonstrating it is not the responsible employer, which it can do by establishing that

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[1]Claimant testified that during his longshore employment at the Port of Baton Rouge, he worked for Rogers Terminals, Southeastern Stevedoring, Louisiana Stevedores and Ramsay-Scarlett, in addition to his work for employer, Baton Rouge Marine Contractors.

[2]Employer states that these documents identify all vessels in the Port of Baton Rouge, the cargo on the vessels, and the stevedore working the cargo during the period in dispute.

claimant was exposed to injurious stimuli while performing work covered under the Act for a subsequent employer. *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986).

Contrary to employer's contention, the administrative law judge, in discussing the evidence regarding claimant's work-related exposure to asbestos, acknowledged employer's evidence that claimant was employed by Louisiana Stevedores in the third quarter of 1974 while it was still handling asbestos, and that BRM ceased working with asbestos on June 22, 1973. The administrative law judge, however, found that there was no credible evidence offered to prove that asbestos handling by BRM actually ceased in 1973. In addition, the administrative law judge determined that employer submitted no evidence indicating what cargoes claimant handled or any records to show that claimant was exposed to asbestos subsequent to his employment with BRM.

The administrative law judge found, based on the testimony of Mr. Doiron, that during claimant's tenure asbestos was handled at the warehouse in which claimant worked, that the bags were "dusty" and at times torn bags had to be repaired by employees. In addition, the administrative law judge determined, relying on the testimony of Curless McGee, a fellow longshoreman employed by BRM during claimant's tenure, that BRM handled all of the asbestos shipped by truck to Sharp Station irrespective of who unloaded the asbestos from the ship, and thus, found that as claimant worked for employer at the warehouse, he would have been exposed to asbestos even if employer itself was not offloading asbestos at that time. In light of the credible testimony provided by claimant and Mr. McGee, the administrative law judge concluded that claimant was exposed to asbestos in the workplace with employer until he retired in 1976, and that employer did not present credible evidence to show that claimant was exposed to asbestos while performing work covered under the Act for a subsequent employer. *See generally Cuevas*, 977 F.2d at 186, 26 BRBS at 111 (CRT). The administrative law judge's finding that BRM is the responsible employer in this case is therefore affirmed as it is rational based on the credited evidence. *See generally Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 157 (1996).

Employer next argues that the administrative law judge's award of medical expenses for treatment rendered by Drs. Hackly and Gomes, and for treatment at Our Lady of the Lake Hospital, is in error because no claim for reimbursement of medical expenses was ever made, and there are no medical bills in evidence to show the amount of these expenses. In addition, employer asserts that the administrative law judge's award of medical expenses in this case is not in accordance with law because it does not specify the amount owed.

First, contrary to employer's contention, it is clear from the record that claimant's claim necessarily included medical benefits as is evidenced by claimant's request, dated July 9, 1996, for authorization of medical treatment pursuant to Section 7, EX 4, and employer's subsequent notation, on its Notice of Controversion, that it would dispute "unauthorized

medicals." EX 2. Additionally, the fact that the record does not contain documentation of the actual medical fees is not controlling, as the issue in this case pertains to whether the medical treatment is necessary for the work injury. *See generally Turner v. The Chesapeake & Potomac Telephone Co.*, 16 BRBS 255 (1984). The administrative law judge found that the medical treatment in question is causally related to,[3] reasonable for and necessary to treat claimant's occupational disease and therefore awarded reimbursement of the expenses for this treatment. *See generally Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981). As employer does not otherwise contest the administrative law judge's award of medical benefits, it is affirmed.[4]

In his cross-appeal, claimant contends that the administrative law judge erroneously determined that the onset of his disability occurred on May 8, 1998, since the record contains evidence that he was disabled at some point in January 1997. In support of his assertion, claimant argues that the pulmonary function studies administered by Dr. Gomes on January 15, 1997, demonstrate a Class IV respiratory impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*). In addition, claimant avers that the opinions of Drs. Gomes, Kerley and Hackley all indicate that claimant was totally disabled by his asbestosis prior to May 8, 1998.

In the instant case, the administrative law judge found, based on Dr. Gomes's credible finding of a Class IV impairment, that claimant is 100 percent disabled, and he awarded claimant's benefits for permanent total disability. He concluded that as claimant became disabled due to asbestosis more than one year after his voluntary retirement, his compensation is based on the National Average Weekly Wage (NAWW) on May 8, 1998, the date the administrative law judge found claimant was first determined to be disabled due to asbestosis, apparently based on Dr. Gomes's opinion of that date.

[3]The administrative law judge found, however, that claimant did not prove the necessary nexus for the February 23, 1998, hospital admission for thrombophlebitis, and thus concluded that this treatment is not reimbursable.

[4] If a disagreement arises over the reasonableness of the fees, the regulations at 20 C.F.R. §§702.413-702.417 provide the method of resolving the dispute.

Pursuant to Section 2(10) of the Act, 33 U.S.C. §902(10), "disability" in the case of voluntary retiree such as claimant is defined as a permanent impairment under the AMA *Guides.* Benefits for such disabilities are "payable during continuance of such impairment." 33 U.S.C. §908(c)(23). The Board thus has held that the onset date for such benefits necessarily is the date the impairment became permanent.[5] *Barlow v. Western Asbestos Co.*, 20 BRBS 179 (1988); 33 U.S.C. §906. Thus, inasmuch as the administrative law judge applied an improper standard in discerning the commencement date for benefits in this case, and as the record contains evidence that claimant may have had a permanent respiratory impairment as a result of his occupational disease prior to May 8, 1998, we must vacate the administrative law judge's finding on this issue and remand for a consideration of all of the relevant evidence regarding the onset date, as well as the extent of claimant's impairment, which may increase over time. *See generally Alexander v. Triple A Machine Shop*, 32 BRBS 40 (1998); *Barlow*, 20 BRBS at 183. Additionally, we must vacate the administrative law judge's award of permanent total disability benefits as claimant's status as a voluntary retiree limits him to a permanent partial disability award based on the degree of his pulmonary impairment, *see* 33 U.S.C. §§902(10), 908(c)(23), although claimant may have a 100 percent impairment. *Donnell v. Bath Iron Works Corp.*, 22 BRBS 136 (1989).

Accordingly, the administrative law judge's award of permanent total disability benefits commencing May 8, 1998, is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5]In contrast, the average weekly wage of a voluntary retiree is determined as of the date of awareness of the relationship between the employment, the disease and the disability. 33 U.S.C. §910(d)(2), (i). *See Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). The administrative law judge's average weekly wage finding is not challenged on appeal.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge