BRB Nos. 98-0550
and 98-0550A

ROBERT D. ADAMS, JR.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
METRO MACHINE CORPORATION	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
and	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
and	)	
	)	
BROWN & ROOT, INCORPORATED	)	
	)	
Employer-Respondent	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Hugh B. McCormick, III (Patterson, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black LLP), Norfolk, Virginia, for Metro Machine Corporation.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for Newport News Shipbuilding and Dry Dock Company.

Patrick J. Hanna (Rabalais, Hanna & Hebert), Lafayette, Louisiana, for Brown & Root, Incorporated.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

SMITH, Administrative Appeals Judge:

Claimant appeals and Metro Machine Corporation cross-appeals the Decision and Order (96-LHC-892, 97-LHC-292, and 97-LHC-1181) of Administrative Law Judge Fletcher E. Campbell, 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 Longshore 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 worked for various employers between 1966 and 1984, during which time he was allegedly exposed to asbestos fibers. Specifically, claimant worked for Newport News Shipbuilding and Dry Dock Co. (Newport News) from 1966 to 1969 and from 1977 to 1979, during which time he testified that he was exposed to asbestos, specifically a material called kaylo, while working in the vicinity of boilers and with insulation on piping, gasket material, packing and sealing materials. *See* Tr. 57-62. Claimant also worked as a pipefitter for Brown and Root from November 1973 to January 1974, from September 1975 to June 1976, and in 1981 and 1982, where he allegedly came in contact with asbestos- containing gasket material. *See id.* at 66-67. Lastly, claimant worked for Metro Machine Corporation (employer) from 1983 to 1984. While working for employer, claimant testified that he was exposed to asbestos materials when he worked with pipe insulation containing asbestos, boilermakers with asbestos containing fire brick, and with valves and pipe fittings. *See id.* at 72-75, 138-141.

On May 4, 1995, Dr. Foreman diagnosed claimant's respiratory symptoms as chronic bronchitis with mild emphysema; Dr. Foreman noted that claimant had calcified pleural plaques related to his remote occupational asbestos exposure, but that he saw no evidence of pulmonary fibrosis or other complications. CX-1. In a report dated August 29, 1995, Dr. Shaw noted pleural plaques and calcifications, secondary to asbestos exposure, and chronic bronchitis by history. CX-2. Following

the diagnosis of an asbestos-related condition, claimant filed a claim under the Act seeking entitlement to asbestos-related medical monitoring expenses.

In his Decision and Order, the administrative law judge initially found that claimant suffered from pleural plaques which were caused by his work-related exposure to asbestos. Next, the administrative law judge denied claimant's request for reimbursement of future medical monitoring expenses related to his medical condition. Finally, the administrative law judge determined that employer was the last longshore employer to expose claimant to asbestos.

On appeal, claimant asserts that the administrative law judge erred in denying his claim for future medical benefits in the form of asbestos-related medical monitoring expenses. Employer, Newport News and Brown and Root have filed briefs in response to claimant's appeal, urging affirmance of the denial of medical expenses. BRB No. 98-0550. Employer, in its a cross-appeal, alleges that claimant has failed to establish the existence of an injury under the Act; employer additionally challenges the administrative law judge's determination that it was the last maritime employer to expose claimant to asbestos. Newport News, Brown and Root, and claimant have filed briefs in response, urging affirmance of the administrative law judge's finding that employer is the responsible employer. BRB No. 98-0550A.

Initially, we reject employer's assertion that claimant has failed to establish the existence of an injury under the Act. Claimant need not show that he has a specific illness or disease in order to establish that he has suffered an injury under the Act; rather, claimant need only establish that he has sustained some physical harm, *i.e.*, that something has gone wrong with the human frame. *See Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968)(*en banc)*; *Romeike v. Kaiser Shipyards*, 22 BRBS 57 (1989). In the instant case, the uncontroverted diagnoses of Drs. Foreman and Shaw establish that claimant has chronic bronchitis, along with pleural plaques and calcifications. Thus, something has gone wrong within the human frame. Accordingly, we affirm the administrative law judge's finding that claimant has established an injury under the Act.[1] *See Romeike*, 22 BRBS at 57.

[1]Once claimant establishes the existence of a harm and of working conditions which could

have caused it, in this case, asbestos exposure, Section 20(a) is invoked, shifting the burden to employer to prove that claimant's condition was not caused or aggravated by his work environment. In this case, both doctors attributed claimant's pleural plaques and calcifications to his asbestos exposure; thus, claimant's injury is indisputably work-related. Under the aggravation rule, moreover, the relative contributions of work-related and non work-related conditions are not apportioned; thus, if a work-related condition combines with a prior disease, the entire resulting condition is compensable. *See, e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. Fishel*, 694 F.2d 327, 15 BRBS 52 (CRT)(4th Cir. 1982).

We next address claimant's challenge to the administrative law judge's decision to deny him reimbursement for the cost of periodic future medical monitoring of his asbestos-related lung condition. In his decision, the administrative law judge, relying on the decision of the United States Supreme Court in *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424 (1997), determined that claimant was not legally entitled to recover such monitoring costs under the Longshore Act. In *Buckley*, the Supreme Court held that an employee who was exposed to asbestos, but was disease and symptom-free, could not recover under the Federal Employees Liability Act (FELA) for negligently inflicted emotional distress, as the statute permits plaintiffs to recover for emotional injury only if they sustain a "physical impact" as a result of defendant's negligence. As contact with a substance which can potentially cause disease at a substantially later time does not meet this test, the Court held the employee could not recover damages for his emotional distress and similarly could not recover a lump sum for medical monitoring costs that he expected to incur in the future.[2] In rendering its decision, however, the Court specifically noted that the parties did not dispute that an exposed employee could recover related reasonable medical monitoring costs if and when he developed symptoms. 521 U.S. at 438. After citing to *Buckley*, the administrative law judge concluded that he could "see no distinction whatever between the FELA and the [Longshore Act] that would justify a different holding in this case," and he therefore denied claimant's request for future medical monitoring. *See* Decision and Order at 4. For the reasons that follow, we vacate the administrative law judge's decision on this issue, and we remand the case for further consideration.

As the case at bar arises under the Longshore Act, rather than FELA, there are significant distinctions. Initially, this case does not involve issues of negligence or recovery in tort for alleged emotional distress. Most significantly, the administrative law judge here found claimant sustained physical injury from his exposure to asbestos, unlike *Buckley* where the plaintiff sustained only exposure to a substance he feared would result in physical harm. With regard to medical monitoring, the Court in *Buckley* held a lump sum tort recovery was unavailable, and this remedy is similarly unavailable here. The issue here is whether claimant can be reimbursed for the actual costs of medical monitoring for a demonstrated injury.

[2]The Court noted that cases authorizing payment for medical monitoring in the absence of physical injury did not endorse a traditional tort remedy of lump-sum damages, but imposed limitations on the recovery. Thus, the Court concluded that FELA did not contain an unqualified right to a tort recovery based on medical monitoring.

The Longshore Act sets forth specific provisions regarding a claimant's entitlement to medical benefits. Specifically, Section 7, 33 U.S.C. §907, of the Longshore Act generally describes an employer's duty to provide medical and related services and costs necessitated by its employee's work-related injury, employer's rights regarding control of those services, and the Secretary's duty to oversee them. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). In this regard, Section 7(a) of the Act states that

> [t]he employer shall furnish such medical, surgical, and other attendance or treatment ... for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a); *see Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Section 7 does not require that an injury be economically disabling in order for claimant to be entitled to medical expenses, but requires only that the injury be work-related, and that the medical expenses be appropriate for the injury. Thus, in order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary and must be related to the injury at hand. *See Pardee v. Army & Air Force Exchange Service*, 13 BRBS 1130 (1981); 20 C.F.R. §702.402. Whether a particular medical expense is necessary is a factual issue within the administrative law judge's authority to resolve.[3] *See Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Based upon the foregoing, we hold that the administrative law judge erred in concluding that the Longshore Act does not provide for the possible entitlement by a claimant to reimbursement for the cost of future medical monitoring for a proven physical harm; rather, such entitlement may be established 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 at 57. In the instant case, Dr. Shaw recommended that claimant have a follow-up examination in approximately five years, *see* CX-2; in contrast, Dr.

[3]In order for treatment costs to be paid by employer, the treatment must also be authorized. 33 U.S.C. §907(d). Where employer refuses authorization, however, treatment procured thereafter need only be reasonable and necessary for employer to be liable. *See Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Foreman indicated that monitoring for asbestosis was not necessary. *See* Foreman depo. at 9. We therefore reverse the administrative law judge's finding that a claimant may not recover medical monitoring costs under the Longshore Act, and we remand the case for the administrative law judge to address the totality of the evidence regarding this issue pursuant to the specific provisions of Section 7 of the Longshore Act.

Lastly, employer, in its cross-appeal, challenges the administrative law judge's determination that it is the responsible employer. The standard for determining the responsible employer was enunciated in *Travelers Ins. 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. *See Lewis v. Todd Pacific Shipyards Corp.,* 30 BRBS 154 (1996). In the instant case, the administrative law judge found that employer was the last maritime employer to expose claimant to asbestos, noting that Mr. Fisher, employer's director of personnel, acknowledged that employer's employees were exposed to asbestos fibers during 1983-1984. As argued by employer on appeal, however, the administrative law judge did not discuss the testimony of Mr. Crosby, a foreman for employer, who testified that although there was asbestos on the vessels where employer performed work, the pipefitters would not work on asbestos removal. CX-5. In this regard, Mr. Crosby further testified that subcontractors would set up zones, seal off the zones, and that asbestos removals were done mainly on the back shift. *Id.* at 4. Although employer's employees were aboard ships during this period of time, Mr. Crosby stated that they were not allowed back into the area where the asbestos was being removed until air samples were taken.[4] *Id*. at 16.

Decisions under the Act must comply with the Administrative Procedure Act (APA), which requires that the administrative law judge adequately detail the rationale behind his decision, analyze and discuss the medical evidence of record, and explicitly set forth the reasons for his acceptance or rejection of such evidence, in his decision. *See* 5 U.S.C. §557(c)(3)(A); *see also* 33 U.S.C. §919(d). In light of the administrative law judge's failure to address and analyze all of the evidence regarding the issue of responsible employer, we vacate his determination that employer was the last maritime employer to expose claimant to asbestos; on remand, the administrative law judge must reconsider this issue in light of all the

[4]The administrative law judge also failed to discuss that portion of Mr. Fisher's testimony that would support Mr. Crosby. Mr. Fisher gave a similar accounting of how employer "contracted-out" asbestos removal projects, and that the areas where the work was being done were sealed off. CX-6 at 27.

relevant evidence in accordance with the applicable legal standards and the requirements of the APA. *See, e.g., Cotton v. Newport News Shipbuilding & Dry* Dock Co., 23 BRBS 380 (1990); *Ballesteros,* 20 BRBS at 184.

Accordingly, the administrative law judge's determination that claimant has sustained an injury under the Act is affirmed. The administrative law judge's denial of medical benefits to claimant, and his finding regarding the last employer to expose claimant to asbestos, are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the Board's decision vacating both the administrative law judge's denial of medical monitoring expenses and the administrative law judge's determination that employer was the last longshore employer to expose claimant to asbestos. I also concur in the Board analysis of the last employer issue. I write separately, however, because I view differently the import of the Supreme Court's decision in *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424 (1997).

In *Buckley*, the Supreme Court did not purport to provide a definitive statement on the circumstances under which an employer which had exposed an employee to asbestos would be held liable for medical monitoring for asbestosis. The High Court addressed only the issue of whether a lump sum payment for medical monitoring expenses could be required of an employer under the FELA, solely because it had exposed the employee to asbestos. The Court held that exposure alone provided an insufficient basis to require from employer a payment for medical monitoring expenses.[5]

[5]As Justice Ginsburg points out in her dissent, the majority's discussion of its holding on this issue is not clear. We need not, however, address the nuances of the majority's opinion

In the instant case, claimant seeks medical monitoring for asbestosis, not just because he was exposed to asbestos, but because as a result of that exposure he developed pleural plaques and calcification.[6] It is well established, as the majority asserts, that pleural plaques can constitute an injury under the Longshore Act. *See Romeike v. Kaiser Shipyards,* 22 BRBS 57 (1989). Since the evidence is uncontradicted that pleural plaques result from asbestos exposure, the Longshore Act imposes liability upon the responsible employer to pay for all medical treatment reasonable and necessary for this condition. 33 U.S.C. §907(a). Hence, if claimant ever develops persuasive evidence that medical monitoring for asbestosis is reasonable and necessary for his treatment in connection with this condition, he is entitled to payment for those expenses.

Claimant's right to reasonable and necessary medical expenses is not affected by the Court's decision in *Buckley.* The Supreme Court vacated the Second Circuit's decision establishing claimant's right to employer's payment for medical monitoring because the High Court was concerned about judicial creation of a legal right which did not otherwise exist; the Court did not seek to limit any right to medical monitoring currently provided by law or contract. Although the record contains meager evidence on the reasonableness and necessity of monitoring claimant for asbestosis, I agree with the majority that the case must be remanded for the administrative law judge to consider the evidence. The administrative law judge should direct the responsible employer to pay for all medical expenses which claimant proves are reasonable and necessary for treatment relating to claimant's pleural plaques.

In sum, I agree with the majority's decision to vacate the administrative law judge's Decision and Order and to remand the case for consideration of all relevant evidence on both the issues of claimant's right to medical monitoring and the proper designation of the responsible employer.

REGINA C. McGRANERY
Administrative Appeals Judge

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because they are not relevant to the issue presented in the case above.

[6]The medical evidence did not attribute claimant's chronic bronchitis to asbestos exposure. *See* Cl.'s Exs. 1, 2.