MAILED 5/1/98

In the Matter of:	
Roger Jette Claimant	
against	Case Nos.: 98-LHC-434/435/436/437
General Dynamics Corporation Employer/Self-Insurer	OWCP Nos.: 1-133450/130756 136264/135071
and	
Director, Office of Workers' Compensation Programs, United States Department of Labor Party-in-Interest	

Appearances:

David N. Neusner, Esq.
For the Claimant

Lance G. Proctor, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for workers' compensation benefits under the the Longshore and Harbor Workers' Compensation Act as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 23, 1998 in New London, Connecticut at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, and EX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record which was closed on April 1, 1998, upon the filing of the official hearing transcript.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Claimant and the Employer were in an employee-employer relationship at all relevant times.

3. On April 1, 1994, October 4, 1994, April 6, 1995, and September 15, 1995, Claimant suffered injuries to his right shoulder in the course and scope of his employment.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on April 23, 1997.

7. The applicable average weekly wage is $756.91.

8. The Employer voluntarily, and without an award, has paid temporary total compensation from May 20, 1994 through November 11, 1994, and then from May 2, 1995 to September 14, 1995, and then from September 15, 1995 to date, at a compensation rate of $504.61. In addition, Employer has voluntarily paid medical benefits totaling $16,149.16.

The unresolved issues in this proceeding are:

1. Date of Claimant's maximum medical improvement.

2. Application of Section 8(f) Special Fund Relief.

Summary of Evidence

Roger Jette (Claimant), is a fifty-nine (59) year old man, with a limited education. (TR at 19) He reads at approximately a ninth grade level, and does not write well. (TR at 19) Claimant has a varied employment history, including work as a floor boy, shipping room worker, general maintenance worker, machine operator, and landscaper. (TR at 20-22) In August 1976, Claimant began working as an outside machinist at the Groton, Connecticut shipyard of the Electric Boat Company, then a division of and now a wholly-owned subsidiary of the General Dynamics Corporation (Employer), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines. As an outside machinist, Claimant's duties involved installing and

fixing various motors, carrying heavy tools on his shoulder, lifting steel plates of various sizes, and working a grinding machine to smooth over work. (TR 23-25). This position involved heavy lifting, overhead work and kneeling. (TR at 25-26).

As an introductory matter, I note that the main claim before this Court concerns repetitive trauma to Claimant's right shoulder. Claimant's counsel, in his opening statement, noted: "Rather than pay the benefits based on those acute traumas to the shoulder, the claim has been accepted on the repetitive trauma theory with the date of injury of April 1, 1994." (TR at 8-9)

In 1994, Claimant began to experience right shoulder pain. Claimant testified that the pain was not due to any particular event, but rather, repetitive use of his arm while lifting heavy objects at work. (CX 2) Claimant's first complaint was on April 1, 1994, and he was examined by William R. Cambridge, M.D. whose records are in evidence as exhibit CX 1. Dr. Cambridge took Claimant out of work in April of 1994 and on May 26, 1994, he performed neer acromioplasty surgery on Claimant's right shoulder. (CX 1) Following the surgery, Claimant underwent physical therapy for right shoulder decompression. (CX 1)

Claimant returned to work in August, 1994 with some restrictions. (EX 7 at 1; CX 1) Claimant's duties changed so that he was on a half-light duty schedule. Claimant spent a great deal of time working a saw, cutting metal, and he continued to have difficulties with his right shoulder. (TR at 32) In November of 1994, an MMI was performed which showed mild impingement from scar tissue, and showed that there was not any ongoing damage to Claimant's rotator cuff. (CX 1) Claimant, however, continued to experiences pain in his right shoulder despite his treatment, which included Cortisone injections. (CX 1)

In April of 1995, Claimant was taken off work to undergo quadruple bypass heart surgery, which will be discussed in more detail below. Claimant returned to work in August 1995, but only for twelve (12) days before stopping due to right shoulder pain. This pain was due, in part, to using a seventy-five pound hand truck. (EX 7 at 2)

Claimant was again seen by Dr. Cambridge who performed right shoulder decompression surgery in October of 1995. (CX 1) In a March 6, 1996 report, Dr. Cambridge concluded that Claimant had reached maximum medical improvement, and that he had a permanent partial disability rating in his shoulder of fifteen (15%) percent. (CX 1)

Claimant was later examined by Philo F. Willetts, Jr., M.D. on both January 18, 1996 and April 29, 1996, the records of which are in evidence at EX 7. Additionally, Dr. Willetts expanded upon his findings in a deposition that is marked EX 8. After Dr. Willetts

examined Claimant, performed radiological tests, and reviewed Claimant's medical file, he concluded that Claimant was permanently and partially disabled due to his right shoulder condition. (EX 7; EX 8 at 14) Further, Dr. Willetts concurred with Dr. Cambridge's opnion that March 6, 1996 constituted an appropriate date for maximum medical improvement. (EX 7 at 5; EX 8 at 18)

This closed record contains several additional injures and problems, distinct from Claimant's right shoulder difficulties. First, the record contains several instances where Claimant injured his knees, beginning with a right knee injury on or around February 12, 1974. (EX 19 at 20) Claimant has testified that his work-related duties required a great deal of kneeling and squatting which aggravated his knees. Claimant's doctor for his knee problems was James Derby, M.D., whose medical reports are in evidence at EX 19. Additionally, Employer has filed several LS-202s for various knee injuries occurring between 1978 and 1986.

On April 3, 1978, Claimant hit his left knee on an electrical box while going down stairs, an injury which resulted in a contusion. (EX 13; EX 19 at 1) Next, on November 14, 1981, Claimant, while carrying heavy gear up a ladder, hit his knee. Dr. Derby, in a March 20, 1982 report, diagnosed Claimant with a sprained right knee. (EX 19 at 2) On April, 1, 1982, Dr. Derby performed an arthroscopy and partial medial meniscectomy on Claimant's right knee. (EX 19 at 18)

On April 8, 1984, Claimant slipped and injured, among other things, his left knee resulting in a sprain. (EX 15, EX 19 at 2) Claimant also suffered two other left knee injuries on July 22, 1986 and December 15, 1986. (EX 16; EX 17) On December 16, 1986, Dr. Derby placed Claimant on work restrictions, which included a prohibition on climbing and squatting for ten (10) days. (EX 19 at 4) Subsequently, throughout the late 1980s and early 1990s, Claimant has complained of occasional knee and foot pain. (EX 19)

In 1992 Claimant began to experience pain and discomfort in his hands, which was due to using a grinding tool at Employer's facility to cut steel. (TR at 44) Claimant was treated by William A. Wainright, M.D., P.C., whose records are in evidence at CX 2. In an April 14, 1992 progress note, Dr. Wainright diagnosed carpal tunnel syndrome, placed Claimant on anti-inflammatory medication, and provided him with a wrist splint to wear. (CX 2)

Claimant returned to Dr. Wainright on March 11, 1994 with a complaint of pain from his right hand to his right shoulder. (CX 2) Dr. Wainright referred Claimant to Dr. Cambridge in regard to the shoulder injury, the treatment for which has been described above.

On April 6, 1995, Claimant again complained of pain in his hands and arm due to repetitive use of vibratory tools. (EX 1) On

March 28, 1996, Dr. Wainright performed a carpal tunnel release on Claimant's right hand, surgery which did little to improve Claimant's condition. (CX 2) Claimant also complained of problems with his left hand, however, Dr. Wainright, in a May 16, 1996 progress note, stated: "Since he has had little improvement with surgery for his right carpal tunnel, we will hold off on any surgery for the left carpal tunnel." (CX 2)

Claimant continued to see Dr. Wainright for pain in his hands. In an October 22, 1996 report, following a physical examination and motor latency evaluations, Dr. Wainright diagnosed the Claimant's post-carpal tunnel release status as to his right hand at a 5% disability with continued symptoms. (CX 2) To date, Claimant still complains of pain to his hands, especially in colder weather. (TR at 29).

Claimant also has a history of heart problems, the records of which are marked EX 11. Dr. Willetts' reports indicated a past medical history including "4 vessel cardiac bypass, . . . a previous heart attack, angina and congestive heart failure." (EX 7 at 10)

Claimant's heart-related complaints began in 1988, with Claimant having difficulties with shortness of breath. (TR at 34) A thallium stress test revealed evidence of inferior ischemia at a modest work load, and then Claimant was referred for invasive cardiac evaluation. (EX 11 at 8) On or around June 20, 1988, David Gomolin, M.D. performed a left heart catheterization, left ventriculography, and selective coronary cineangiography. Dr. Gomolin concluded:

> 1. There is a 30-40 percent stenosis in the distal left main coronary artery. There is mild-moderate atherosclerosis throughout the left anterior descending coronary system. There is a 40-50 percent stenosis in the proximal left circumflex coronary artery. There is a functional, compete occlusion of the right coronary artery, just prior to the origin of the posterior descending branch. Ell-developed collaterals to the distal RCA are seen to originate from both the LAD and LCX coronary vessels.
>
> 2. Mild generalized left ventricular hypokinesis with a calculated ejection fraction of 51 percent. There is evidence of concentric ventricular hypertrophy. (EX 11 at 9)

Richard P. Shannon, M.D. agreed with Dr. Gomolin's findings in a letter dated July 27, 1988. (EX 11 at 13) Subsequently, a cardiac catheterization performed in 1989 demonstrated a 60-70% complex ulcerated left main lesion. (EX 11 at 37)

Then, in approximately late 1994 or early 1995 Claimant again began to experience difficulty when walking up the hill at Employer's facility and while climbing ladders. (TR at 34-35) In fact, Dr. Dotolo, one of Claimant's coronary physicians, did recommend that Claimant request a pass for riding a van up the steep shipyard hill at the Employer's facility, and the Employer granted that request. (TR at 35)

Subsequently, in April 1995, Claimant was taken off duty due to his heart condition, and on May 8, 1995, Dr. Krukenkap performed quadruple vessel coronary artery bypass. (EX 11 at 39) Following this surgery, Claimant has underwent physical therapy, continued examinations and has been instructed as to exercise programs and routines. (EX 11 at 39)

In addition to Claimant's knee, hand, and heart problems, he has also suffered from diabetes since the early 1990s, and is being treated with oral medications. (EX 7 at 2; TR at 36) Claimant also is currently being treated for hypertension. (TR 36) Further Claimant has been treated for psychiatric problems since the early 1980s, continuing to the present. Since the early 1980s, Claimant has been hospitalized eight time, the records of which are in the record as EX 12.

As noted above, Claimant was examined by Dr. Willetts, who diagnosed the following: "(1) status post decompression right shoulder for chronic impingement syndrome with some residual right shoulder complaints; (2) status post release right carpal tunnel syndrome; (3) left carpal tunnel syndrome; and (4) status post four vessel coronary artery bypass with some residual chest pain." (EX 7 at 12)

Dr. Willetts opined that Claimant was permanently and partially disabled as a result of his right shoulder injury, a disability which was not caused by any one specific incident. (EX 7 at 12) Further, Dr. Willetts noted that Claimant's overall condition [including: right shoulder problems and surgery, heart problems and surgery, bipolar knee difficulties and surgery, bipolar carpal tunnel syndrome and surgery and psychiatric disorders] lead him to the conclusion that Claimant is totally and permanently disabled. (EX 7 at 14; EX 8 at 19) Further, in his deposition, Dr. Willetts testified that this combination of injuries and problems made the April 1994 shoulder injury both materially and substantially greater than would have been the case with the April 1, 1994 injury alone. (EX 8 at 20) Dr. Willetts further opined that the right shoulder injury of April 1, 1994 is not the sole cause of Claimant's current disability. (EX 8 at 20)

Claimant has not worked since September of 1995. (TR at 19) He testified that he still experiences pain and discomfort in both of his hands, especially when it is cold, and in his knees and

back. (TR 29, 31, 47) Further, Claimant is currently on medication for his psychiatric condition.

As for daily activity, Claimant testified that his shoulder does hurt if he engages in any prolong activity. (TR at 39) Claimant states that he can do yard or house work, but must confines his activity to under one-half an hour intervals. (TR at 39)

Claimant has received and continues to receive Social Security disability benefits as that agency has declared him totally disabled for all work.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in

the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his right shoulder, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S. Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszíewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

The closed record conclusively establishes that Claimant’s right shoulder problems have directly resulted from his work at the Employer’s shipyard, that Claimant timely advised the Employer of his work-related injuries, that Employer authorized appropriate medical care and treatment and has paid certain compensation benefits to Claimant while he was unable to return to work and that Claimant timely filed for benefits once a dispute arose between the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d

644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant has established he cannot return to work at Employer’s facility. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternative employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is

of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

On the basis of the totality of the record, I find and conclude that Claimant reached maximum medical improvement on March 6, 1996, and that he has been permanently and totally disabled from March 7, 1996, according to the well-reasoned opinions of Dr. Cambridge and Dr. Willetts. (CX 1; EX 7; EX 8 at 18)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a

disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injuries. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 556 (1978), aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); Santos v. General Dynamics Corp., 22 BRBS 226 (1989); Adams v. Newport News Shipbuilding, 22 BRBS 78 (1989); Smith v. Ingalls Shipbuilding, 22 BRBS 26, 50 (1989); Caudill v. Sea Tac Alaska Shipbuilding, 22 BRBS 10 (1988); Perry v. Carolina Shipping, 20 BRBS 90 (1987); Hoey v. General Dynamics Corp., 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." Grant v. Portland Stevedoring Company, 16 BRBS 267, 270 (1984), modified on reconsideration, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer has accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits to Claimant while he has been unable to return to work. **Ramos v.**

Universal Dredging Corporation, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 118523 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT)

(5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

On the basis of the totality of the record, I find and conclude that the Employer has satisfied these requirements. The record reflects (1) that Claimant has worked for the employer since August, 1976, (2) that Claimant has suffered from bilateral knee injuries since the early 1970s (EX 19), (3) that Claimant underwent right knee surgery on April 1, 1982 (EX 19), (4) that thereafter Claimant was place on some temporary work restrictions, (5) that Claimant has suffered from psychological problems since the early 1980s (EX 12), (6) that Claimant’s psychological problems have required at least eight hospital admissions since the early 1980s, (7) that Claimant has suffered cardiac problems since the mid-1980s (EX 11), (8) requiring quadruple by-pass surgery, for which Claimant was taken off work, and (9) resulting in further work restrictions and accommodations, (10) that Claimant has been treated for hypertension (EX 7), (11) that Claimant has suffered from diabetes since the early 1990s (EX 7), (12) that Claimant has

had and continues to have bilateral carpal tunnel syndrome of his hands, (13) due to his use of vibratory tools at Employer's facilities, (14) and that a right hand carpal tunnel release did not alleviate this problem, (15) that the Employer retained Claimant as a valued employee even with knowledge of his multiple medical problem, (16) that the Employer has accepted Claimant's return to work after this several surgeries, (17) provided light duty work for Claimant and also (18) provided him with a van pass to ride the bus up the steep shipyard hill, (19) and, finally, that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability (**i.e.**, the aforementioned medical problems) and his April 1, 1994 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, and that the April 1, 1994 injury is not the sole cause of Claimant's current disability, according to the well-reasoned report and deposition of Dr. Willetts. (EX 6; EX 8); **see also Luccitelli v. General Dynamics**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to his April 1, 1994 repetitive trauma injury, was the classic condition of a high-risk employee whom a cautious employer would neither have hired nor rehired nor retained in employment due to the increased likelihood that such an employee would sustain another occupational injury. **C&P Telephone Co. v. Director, OWCP**, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977), **rev'g in part**, 4 BRBS 23 (1976); **Preziosi v. Controlled Industr.**, 22 BRBS 468 (1989); **Hallford v. Ingalls Shipbuilding**, 15 BRBS 112 (1982).

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

The Board has held that an employer is entitled to interest, payable by the Special Fund, on monies paid in excess of its liability under Section 8(f). **Campbell v. Lykes Brothers Steamship Co., Inc.**, 15 BRBS 380 (1983); **Lewis v. American Marine Corp.**, 13 BRBS 637 (1981).

Attorney Fee

Claimant's attorney, having successfully prosecuted this claim by obtaining additional benefits as a result of a successful appeal to the Board, is entitled to a fee to be assessed against Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of this receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application,

sending a copy thereof to the Employer’s Respondents’ counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after April 23, 1997, the date of the informal conferences. Services performed prior to that date should be submitted to the District Director for her consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer, General Dynamics Corporation, as a self-insurer, shall pay to the Claimant compensation for his temporary total disability from May 20, 1994 through September 11, 1994, and then from May 2, 1995 to September 14, 1995, and then from September 15, 1995 through March 6, 1996, based upon an average weekly wage of $756.91, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on March 7, 1996, and continuing thereafter for 104 weeks, the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $756.91, such compensation to be computed in accordance with Section 8(a) of the Act.

3. After the cessation of payments by the Employer, continuing benefits shall be paid, pursuant to Section 8(f) of the Act, from the Special Fund established in Section 44 of the Act until further Order.

4. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his repetitive trauma, right shoulder injuries. The Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the time period specified in the second Order provision above, subject to the provisions of Section 7 of the Act.

6. Interest shall be paid by the Employer and Special Fund on all accrued benefits at the T-bill rate applicable under 28 U.S.C.

§ 1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

7. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on April 23, 1997.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts
DWD:las