MAILED 3/3/2000

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In the MATTER OF:            *
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Barbara S. Gomes             *
(Widow of Joseph A. Gomes)   *
     Claimant                *
                             *   Case No.: 1999-LHC-1413
     v.                      *
                             *   OWCP No.: 1-144007
Electric Boat Corporation    *
     Employer/Self-Insurer   *
                             *
     and                     *
                             *
Director, Office of Workers' *
Compensation, Programs, United*
States Department of Labor   *
     Party-in-Interest       *
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Appearances:

Carolyn P. Kelly, Esq.
For the Claimant

Peter D. Quay, 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 September 14, 1999 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, DX for a Director's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.[1]

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
RX 7	Attorney Quay's letter requesting a copy of RX 6, a document admitted into evidence at the hearing	09/23/99
CX 21A	Attorney Kelly's letter filing	09/23/99
CX 22	Decedent's wages at M.J. Sullivan Automotive, as well as	09/23/99
CX 23	Decedent's wages for his last 52 weeks at the Employer's shipyard	09/23/99
ALJ EX 9	This Court's **ORDER** sending a copy of RX 6 to Attorney Quay	09/28/99
RX 8	Notice relating to the taking of the deposition of J. Bernard L. Gee, M.D.	09/28/99
CX 23A	Attorney Kelly's letter filing the	10/25/99

[1] Immediately prior to the issuance of this Decision and Order-Awarding Benefits, the parties filed a Stipulation of Facts and Proposed Order. This Decision and Order is therefore issued in accord with the parties' intentions.

CX 24	Deposition Testimony of Michael J. Haney, as well as the	10/25/99
CX 25	Deposition Testimony of Robert B. Stanton	10/25/99
ALJ EX 10	This Court's **ORDER** relating to additional post-hearing evidence	12/06/99
RX 9	Attorney Quay's letter filing the parties' additional stipulations	12/15/99
CX 26	Attorney Kelly's letter filing her	01/10/00
CX 27	Fee Petition	01/10/00
RX 10	Employer's comments thereon	01/20/00

The record was closed on January 20, 2000 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

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

3. Claimant alleges that her husband suffered an injury in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the alleged injury in a timely fashion.

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

6. The parties attended an informal conference on November 18, 1998.

7. The applicable average weekly wage is in dispute.

8. The Employer has paid no benefits herein.

9. Section 8(f) has been withdrawn as an issue.

10. Compensation benefits due the Decedent will be based upon the National Average Weekly Wage as of the date of injury, or $400.53.

11. Decedent's injury has resulted in a permanent partial impairment of one hundred (100%) percent of the whole person, pursuant to Section 8(c)(23) of the Act, from August 15, 1997 through November 16, 1997.

12. Funeral expenses exceeded $3,000.00

13. Death Benefits shall commence on November 11, 1997 and shall be based upon the National Average Weekly Wage as of the date of death, or $417.87.

14. The Employer is entitled to certain third party credits and the parties shall resolve the amounts thereof.

The unresolved issues in this proceeding are:

1. Whether Decedent's lung cancer is causally related to his maritime employment.

2. If so, the nature and extent of his disability.

3. Claimant's entitlement to Death Benefits.

Summary of the Evidence

Joseph A. Gomes ("Decedent," herein), who was born on October 25, 1935, had a tenth grade formal education and an employment history of manual labor. He began working on September 15, 1961 as a welder at the Groton, Connecticut shipyard of the Electric Boat Company, then a division 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. He left the shipyard on June 17, 1966 to work elsewhere, returning to the shipyard on May 24, 1971 as a welder. He left the shipyard on June 18, 1971, again to work elsewhere. (CX 2) He again returned to the shipyard on October 17, 1991, became a foreman in the welding department on March 13, 1977 and remained in that job classification until he took an "early retirement" on March 31, 1996. (RX 3; CX 20)

According to Barbara S. Gomes ("Claimant" herein), Decedent's surviving widow (TR 15-16), Decedent was in good health at the time of his retirement and on June 10, 1996 he went to work as a maintenance person at a local automobile dealer, working part-time and earning $10.00 per hour. Decedent's earnings with that employer, in evidence as CX 22, reflect gross wages of $7,849.00 in 1996 and $8,852.00 for 1997. That exhibit reflects he left that company in October 20, 1997. (**Id.**) Decedent worked just to keep busy as he had worked all of his adult life. Decedent smoked cigarettes and he stopped in 1991 as he was about to undergo open heart surgery. In May of 1997 he developed a cough and Dr. Feldman, Decedent's family physician, suspected an allergy problem and treated him accordingly. However, the symptoms continued and the doctor treated it as pneumonia. The symptoms continued through the summer and finally the PSA test led to a diagnosis of prostate cancer. Various options were discussed and Decedent agreed to undergo a course of radiation seed therapy. Shortly thereafter Decedent was diagnosed with lung cancer and he passed away on November 16, 1997. (CX 16; TR 15-18)

Claimant testified that her husband directly worked with asbestos and he even covered himself with so-called asbestos blankets to protect himself from welding sparks. Decedent knew that someday he would be diagnosed with an asbestos-related disease, just like many of his co-workers. Decedent's welding work was "very dirty work" and his work clothes reflected that aspect of his work, Claimant remarking that she washed his clothes separately from those of their children. Decedent really liked his shipyard work and he worked all of the overtime possible to support his family. He did much repair and overhaul work at the shipyard but once he became a foreman, he did not work as many hours. He continued to work at the dealership until the end of July of 1997 (TR 19-22) or on October 20, 1997. (CX 22-2)

Decedent's August 7, 1997 chest x-ray was read by Dr. Robert R. Cross as follows (CX 1):

HISTORY: Cough and hemoptysis.

No previous study is available for comparison.

A PA and lateral film of the chest showed there to be postoperative changes from a previous coronary artery bypass procedure. There are infiltrates seen in the lower lobes bilaterally. The infiltrate in the right lower lobe is larger. The findings could

be related to bibasilar pneumonia. The density at the right lung base is relatively confluent and dense. I suggest a follow up study to show clearing of this infiltrate to help be certain that there is not an underlaying mass, according to the doctor.

Decedent went to the Emergency Room at Lawrence and Memorial Hospital (L&M) on August 10, 1997 and Dr. Wendy A. Witt reported as follows (CX 2):

This patient is a 61-year old male who presents to the Emergency Department with right flank pain which has gotten progressively worse over the last 12 hours. The patient was seen last night and had a negative urinalyses and had some flank discomfort. He got a shot of Toradol. This patient states he slept all night without any discomfort. Today he had increasing discomfort and vomited times two prior to admission. He did call his doctor, who referred him to the Emergency Department. The patient is on Biaxin, which is treatment for pneumonia. He was thought to have bilateral basilar infiltrates and has been on that for the last three days. The patient also takes Proventil and Percocet as needed, which was given to him from last night. . .

TREATMENT: The patient received normal saline intravenously and Toradol 30 mg intravenously. He continued to complain of pain, unrelieved by the Toradol; so he was given morphine, a total of 16 mg over a period of one-half hour with final pain relief. He was still unable to urinate prior to discharge. He was feeling good enough to go home.

DIAGNOSIS: Right ureteral colic.

DISPOSITION: The patient was advised to strain all urine and take his Percocet as needed. Return if worse. He was advised to return for an intravenous polygram tomorrow. He will be called. Otherwise he should call her in the Emergency Department. He was given kidney stone instructions. He should also follow-up with Dr. Steven H. Schoenberger as scheduled tomorrow.

Dr. Schoenberger examined Decedent on August 11, 1997 and reported as follows (CX 3):

“He presents with three urologic problems. Acutely, he has suffered over the past two days acute renal colic and an IVP strongly suggests a distal right ureteral calculus, causing obstruction. We will be managing this with oral analgesic as well

as a urinary stone strainer and follow-up films. He understands that should he get an acute flare-up he can report to the ER and call me.

"His second problem is an elevated PSA over 15 at present. Although his rectal exam reveals a benign feeling prostate, I do feel we should pursue further evaluation as there appears to be an upward trend in this PSA. He will be undergoing a transrectal ultrasound and prostate biopsy in the near future...

Decedent's August 21, 1997 chest x-ray was read by Dr. Leonard A. Copertino as follows (CX 4):

HISTORY: Pneumonia

Comparison is made with the study from August 9th. Post operative changes are noted. Abnormal densities are seen in the mid and lower lung zones bilaterally. There is more focal density posteriorly and inferiorly in the chest, probably on the right. The amount of abnormal density is about the same as it was on the previous study. **We could be dealing with pneumonia.** I do not feel that I can exclude the presence of underlying neoplasm. Follow up studies are definitely recommended and/or a CT scan of the chest.

Additional testing led to a diagnosis on September 5, 1997 of prostate cancer and various options were discussed with Decedent and Claimant by Dr. Schoenberger. Decedent agreed to "external beam radiotherapy" (CX 5-1) and the treatment protocol was then implemented. (CX 5-2)

Decedent's September 2, 1997 chest x-ray was read by Dr. Cross as showing increased infiltrates at the right lower lobe. (CX 6)

Decedent's coughing and lower respiratory tract infection persisted and Dr. Feldman referred Decedent to Dr. Robert J. Keltner, a pulmonary specialist, for further evaluation and the doctor concludes as follows in his September 22, 1997 report (CX 7):

Recent x-rays are reviewed. These are from August 7-September, 1997. There is an infiltrate in the right lower lung field, which appears to be compatible with pneumonitis, without any obvious mass effect. There is probably also some volume loss in the right lower lung field, and a small pleural effusion cannot be ruled-out. The

left lung appears to be clear, except for slight basilar atelectasis, which is intermittent. The heart is not enlarged. There is evidence of previous open-heart surgery.

IMPRESSION: Persistent lower respiratory tract infection, with pneumonia and exacerbation of underlying chronic obstructive airways disease. The pneumonia may be very slow healing because of the underlying hyperactive airways disease. Certainly, an endobronchial lesion, with an obstructive pneumonitis is also possible in this setting. The patient has enough residual broncho spasm that by itself this could impede healing and clearance of sputum.

PLAN:

1. Begin Cipro, 500 mg, b.i.d., and Biaxin, 500 mg, b.i.d., for 1 week, and if the patient is improving, he will take these antibotics for another week for a total of 14 days.

2. Restart Proventil and Azmacort 2 puffs, q.i.d.

3. Restart Prednisone, 40 mg, today, tapering very slowly over the next 12 days to 0.

4. Follow-up in 2 weeks with a chest X-ray at that time. The patient will call me next week if he does not feel better after a week of the antibiotics.

5. If there has been no improvement in his chest X-ray after 2 weeks, the patient should have a CT scan of the chest and consider bronchoscopy if there is any indication of endobronchial narrowing or a question of a mass lesion/bronchial obstruction, according to the doctor.

Decedent returned to Dr. Schoenberger on September 29, 1997 for followup and the doctor prescribed additional tests. (CX 8) Dr. Keltner saw Decedent on October 7, 1997 and the doctor reports as follows (CX 9):

Chest X-ray today still shows a persistent opacification in the right lower lung field, with probably a pleural effusion as well. The heart border is not seen suggesting the right middle lobe is also involved. The mediastinium is not shifted.

IMPRESSION: Persistent right lower lobe/right middle infiltrate with probably volume loss and very likely pleural effusion, symptomatically improved with antibiotics. However, I am concerned about the possibility of obstructive lesion here.

PLAN:

1. The patient will have CT scanning done, with further discussion after regarding further work-up, which may involve thoracentesis and/or bronchoscopy.

2. Continue Cipro and Biaxin as above for another 10 days.

PRINCIPLE (sic) DIAGNOSIS: BRONCHOGENIC CARCINOMA, PROBABLY ADENOCARCINOMA, INVOLVING THE RIGHT LOWER LOBE.

OTHER DIAGNOSIS:
MALIGNANT PLEURAL EFFUSION.
CHRONIC OBSTRUCTIVE AIRWAY DISEASE.
ATELECTASIS SECONDARY TO ABOVE.
HISTORY OF RENAL CALCULUS.
ADENOCARCINOMA OF THE PROSTATE METASTATIC TO BONE.
ESSENTIAL HYPERTENSION.

OPERATIONS/PROCEDURES:
THORACENTESIS.
CLOSED CHEST THORACOSTOMY TUBE DRAINAGE.
RETROGRADE PYELOGRAPHY.
URETEROSCOPY.
BRONCHOSCOPY WITH BRONCHIAL BIOPSY.

According to Dr. Keltner (CX 10-4):

Final impression therefore was that of adenocarcinoma of the lung metastatic to the contralateral lung and the right pleura with probably obstructive *pneumonia and* atelectasis as a second primary with no relationship to the prostatic cancer previously diagnosed.

After a prolonged discussion with the patient and his family, he decided he wanted a second Oncology opinion and arrangements were made for him to see Dr. Carey at Massachusetts General Hospital. Tentative chemotherapy with Taxol and Carboplatin was planned. The patient was treated with Imipenem for five days and his fever went away. The patient's respiratory status improved enough so that he was able to ambulate without too much difficulty.

His p02 was 70 on four liters before discharge and this was considered adequate enough for him to go home. The patient was therefore discharged on 10/31/97. He will continue on oxygen at 4 liters via nasal prongs at home. Medicines include Proventil and Azmacort inhalers 2 inhalations four times a day, Axid 150 mg twice a day, aspirin 325 mg once a day, Ativan 0.5 mg every 6 hours p.r.n. for anxiety and Roxicet I tablet every three hours for pain. He will be followed-up by Dr. Fenton and her associates next week to arrange for chemotherapy.

Decedent was also examined by Dr. Joseph J. Gadbow, Jr., in consultation and the doctor concludes as follows in his October 28, 1997 report (CX 10-8):

IMPRESSION:

This is a 61 year old white male who presents with adenocarcinoma from a malignant pleural effusion on the right side with a history of prostate CA on hormonal therapy. The patient also has a kidney stone with a right ureteral obstruction which is partial and no symptoms. The patient has complained of some sweats and fatigue with some jitteriness since the summer time and I think he has some systemic symptoms associated with his adenocarcinoma, presumably pulmonary.

He had some minimal symptoms on the 25th with an increase in his white blood cell count. One could question whether this was at all related to the Decadron. Over the past two to three days, the patient has noted some reduction in his cough and again one could question whether this was also related to the Decadron or his antibiotic therapy.

I find no obvious source of infection. If the patient is being treated with the Primaxin to a subclinical site of infection, I would suspect that five days of therapy should adequately eradicate this. I would consider completing five days of therapy and then discontinuing the antibiotic and observing the patient. If he has no change in his white blood cell count or change clinically, then the patient would be a candidate for chemotherapy, i.e., the Carboplatin and Taxol.

Dr. Keltner gave the following impressions in his October 17, 1997 admitting report (CX 10-34):

IMPRESSION:

1. Large right pleural effusion with right lower lung field infiltrate, rule out endobronchial mass/obstructive pneumonia secondary to BRONCHOGENIC carcinoma and would even have to consider possibility of mesothelioma in this setting. The bloody pleural fluid (note results of thoracentesis) makes the possibility of a parapneumonic effusion much less likely here.

2. Chronic obstructive airway disease secondary to cigarette smoking.

3. Coronary artery disease by history, status post coronary artery bypass graft surgery without evidence of congestive heart failure, angina pectoris.

4. Hypertension, labile.

5. History of prostate cancer.

6. Right ureteral calculus.

PLAN: The patient underwent thoracentesis shortly after admission which revealed grossly bloody fluid, which was not clotting. He will have CT of the chest done as soon as possible.

Dr. Deren of thoracic surgery service is consulted for possibility of placement of chest tube and further investigations to determine the etiology of these problems. He may require bronchoscopy or video-assisted thoracic surgery with pleural biopsy. The patient will be given sublingual Nifedipine for hypertension and begun on oral Vasotec. He will be weaned off Prednisone with continuation of inhaled Albuterol and inhaled corticosteroids to maintain airway tone. Antibiotics will not be given at this time. He is maintained on nasal oxygen.

Decedent was also examined by Dr. Robert Carey at the Mass. General Hospital and the doctor suggested various options to Dr. Keltner (CX 11) and Dr. Schoenberger reported as follows on November 10, 1997 (CX 12):

A 62-year-old, white male with newly diagnosed carcinoma of the prostate and a history of a right ureteral calculus. He underwent cystoscopy and right retrograde polygram as well as ureteroscopy which failed to reveal any evidence of this calculus.

At this time, he is doing well with regard to his recent procedure and has no complaints.

He recently went for a second oncologic opinion to Massachusetts General Hospital, and the doctor there feels strongly that his neoplasm in the chest is also metastatic from his prostatic disease. I told him that I strongly doubt this given his PSA of 15. Apparently, he discussed with them initiating some fairly toxic chemotherapy at this time following review of the pathology from his lung. Apparently, he also did have a bone scan performed which is not available to us either.

Impression: 1) Newly diagnosed adenocarcinoma of the prostate. 2) Newly diagnosed neoplasm of the lung.

Plan: 1) Request copy of bone scan report 2) Request copy of notes from Dr. Jagathambal. 3) Continue Zoladex monthly. 4) The patient has also been initiated on Casodex 50 mg daily by the doctor at Massachusetts General which they will continue as well. 5) We will initiate a Visiting Nurse Association connection for the patient if he is unable to return for his monthly Zoladex injection next month.

Decedent was hospitalized for six days at L&M and Dr. John S. Urbanetti reported as follows (CX 13):

DISCHARGE DIAGNOSIS: CHRONIC OBSTRUCTIVE AIRWAY DISEASE.
CARCINOMA, LUNG.
PNEUMONIA.
RESPIRATORY FAILURE.
HYPERTENSION.

HISTORY OF PRESENT ILLNESS:

This 61 year old gentleman was admitted to the hospital for increasing respiratory distress of two to four days duration. He has a long-standing history of cigarette smoking and exposure to asbestos. This patient had medical status complicated by hypertension and coronary artery disease, with a distant inferior wall myocardial infarction in 1991. A recent evaluation demonstrated an elevated prostate specific antigen with ultrasound guided biopsies of the prostate, revealing adenocarcinoma in both lobes in 8/97.

Later that month, the patient had developed a cough with radiologic investigation showing a possible pneumonitis. Aggressive antibiotics did not clear the area of infiltrate and accordingly, in 10/97, the patient underwent CT scan demonstrating a large right pleural effusion and multiple pulmonary nodules. Closed thoracostomy demonstrated poorly differentiated adenocarcinoma. Bronchoscopic assessment on 10/27/97 also demonstrated poorly differentiated adenocarcinoma.

The patient consulted Dr. Robert Carey at Massachusetts General Hospital, who suspected metastatic prostatic carcinoma with pleural pulmonary metastases. An oncologic regimen was recommended. Over the ensuing days, however, the patient became substantially more dyspneic and presented to the Emergency Room for evaluation with a severely widened AE gradient.

HOSPITAL COURSE:

On admission, the patient was provided with aggressive parental and inhaled bronchodilator therapy. He was seen in consultation by Dr. Slater, an oncologic regimen is recommended. Over the ensuing days of the hospitalization, temperature elevation with presumptive pneumonetic cause was treated with antibiotic therapy, with stabilization of the

patient's respiratory status for a brief period. Further increases in respiratory distress were identified.

Discussion with the patient and family, determined that a No Code status was to be entertained. On 11/16/97, the patient was found to be absent of spontaneous blood pressure, pulse and respiration and death was pronounced at 06:05. Postmortem examination was obtained of the chest and abdomen.

Dr. Curtis A. Johnston, the pathologist, issued te following (CX 14-2):

FINAL ANATOMICAL DIAGNOSIS

1. Papillary adenocarcinoma, poorly differentiated, of lung.

2. Extensive metastatic lung adenocarcinoma in lungs, liver, vertebrae, adrenals, left ureter, stomach, appendix, heart, kidneys, omentum.

3. Prostatic adenocarcinoma, Gleason's grade 3+3=6.

4. Pulmonary edema.

5. Extensive pericardial adhesions.

6. Coronary artery bypass grafting, right coronary artery.

7. Aneurysm of right coronary bypass graft.

8. Old myocardial infarction, posterior wall.

9. Mild left hydronephrosis.

10. Bilateral pleural plaques.

11. Rare ferruginous bodies in lungs.

Decedent was also examined by Dr. Dennis E. Slater and the doctor states as follows in his November 11, 1997 follow-up oncology consultation (CX 13-4,5):

Chest x-ray-bilateral interstitial infiltrates in a perihilar pattern extending to the central lung fields. Mild, right pleural effusion and/or elevated hemidiaphragm

ASSESSMENT: Metastatic, poorly-differentiated adenocarcinoma involving the pleura and lung. Primary prostate carcinoma versus primary lung carcinoma or unknown primary. The patient has clearly

responded to monthly Lupron since September 1997 with a drop in the PSA from 30 to 0.58. Nevertheless, the pleural pulmonary disease has progressed. This suggests a hormone-refractory metastatic prostatic carcinoma or another primary site (such as lung). Casodex was started last week, but the combination of Casodex and Lupron is unlikely to cause rapid regression of lymphangitic lung metastasis. If the pleural pulmonary metastatic disease proves to be metastatic, prostatic carcinoma, it is likely that systemic chemotherapy may be necessary to "buy time' to test for responsiveness to additional hormonal therapy (adding Casodex to Lupron). Metastatic, prostatic carcinoma may actually respond to steroids, as the patient is now on high-dose Solu-Medrol. A repeat bronchoscopy is scheduled, to exclude a new, endobronchial lesion or site of hemoptysis and to obtain additional tissue for culture and immunohistic chemistry. Less-likely causes of worsening lymphangitic lung disease include viral, parasitic, and mycobacterial infections.

PLAN: The cell block of the transbronchial lung biopsy from October 27, 1997 was submitted for immunohistic chemistry, including intracellular PSA. Await results of today's lung biopsy. Abdominal/pelvic CT scan to complete metastatic survey and rule out an infra diaphragmatic primary site. Defer radiologic or endoscopic gastrointestinal series at present. Repeat CEA, PSA, and PAP. Also, CA 19-9. Continue Casodex 50 mg q.d., monthly Lupron,, and steroids. Final recommendations regarding systemic chemotherapy to follow. If the immunohistic chemistry favors metastatic, prostatic carcinoma, treatment with mitozantrone plus/minus suramin is very reasonable. A non-small-cell lung carcinoma or metastatic adenocarcinoma of uncertain primary should be treated with a platinum-based chemotherapy regimen, according to the doctor.

Dr. Keltner states as follows in his July 28, 1998 letter to Claimant’s attorney (CX 15):

I am happy to respond to your letter of July 20th regarding Mr. Joseph Gcmes. As we had discussed over the telephone, in reviewing the clinical record of Mr. Comes, and in particular, his autopsy report, it is my opinion that Mr. Gomes, unfortunately, had two primary cancers, an adenocarcinoma of the prostate and an adenocarcinoma which also appeared to be in the lung originating in the right lower lobe. There were, at first, questions whether or not this tumor represented either a mesothelioma or a metastasis from the prostatic cancer, but all the available data most firmly

supports a diagnosis of two separate cancers. The pathology was not suggestive of mesothelioma.

I understand that Mr. Gomes had been exposed to asbestos while working at Electric Boat. It has been well established that exposure to asbestos considerably increases the risk Of lung cancer, especially in patients who are smokers, or who were smokers. Mr. Gomes had been a smoker many years ago. I, therefore, do feel that exposure to asbestos was a significant contributory factor in the development of his lung cancer.

Dr. Joseph A. Cox has filed this Addendum with reference to his analysis of Decedent's pathology stains on October 23, 1997 (CX 10-21):

ADDENDUM

Mucicarmine stain was performed and shows very rare focal intra cytoplasmic positivity. While an adenocarcinoma is slightly favored because of the focal positive staining, the absence of more overwhelming positivity makes it impossible to definitively exclude other differential possibilities, such as mesothelioma. Consider fine needle biopsy of the pulmonary nodules for definitive diagnosis if clinically indicated.

Dr. Urbanetti certified carcenoma of the lung as the immediate cause of death and carcinoma of the prostate is identified as another significant condition contributing to death. (CX 16).

Claimant who was born on August 28, 1939 (CX 17) married Decedent on October 31, 1959 (CX 18) and she was living with Decedent at the time of his death. (TR 15-16) Funeral expenses exceeded $3,000.00 (CX 19).

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 fo 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).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he/she experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where

the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the

opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to her husband's bodily frame, **i.e.**, his adenocarcinoma of the lung, resulted from working conditions and/or resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, **see Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). 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); **Januszewicz 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).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should become have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

The uncontradicted testimony of Michael J. Haney (CX 24) AND Robert B. Stanton (CX 25) establishes that Decedent was exposed to and inhaled asbestos dust and fibers in the course of his maritime employment at the Employer’s shipyard.

This closed record conclusively establishes, and I so find and conclude, that Decedent’s adenocarcioma of the lung constitutes a work-related injury and, in so finding, I have given more weight to the medical evidence offered by Claimant to the effect that the lung cancer is a primary disease and not a secondary condition as a result of the metastasis from Decedent’s prostate cancer, a non-work-related condition. That is the forthright and categorical opinion of Dr. Keltner, Claimant’s medical expert.

While Dr. Gee has opined that Decedent’s lung cancer is a secondary or metastatic tumor, the doctor did not state that opinion in an unequivocal or forthright manner. As noted above, Dr. Gee, in both of his reports (RX 5, RX 6), concluded: **While a primary lung cancer cannot be excluded, the prostatic disease can certainly explain all findings, an opinion also expressed at MGH.”** (RX 5) Moreover, in his July 15, 1999 report (RX 6), Dr. Gee’s first sentence is as follows: **I still consider that prostatic**

cancer remains the more likely diagnosis since: and the doctor then repeats the five reasons for that **more likely** opinion, one of which reasons is "based on the principle of Occam's Razor, **i.e.**, if one diagnosis explains all features this being the case here, I consider (**to a reasonable degree of medical certainty)** the diagnosis is primary and metastatic prostate cancer." Dr. Gee reiterated his opinions at his October 27, 1999 deposition.

With reference to Decedent's examination at MGH on November 5, 1997 (CX 11), while Dr. Robert Carey opined that it was "highly likely" that the prostatic cancer had "spread extensively to the skeleton and into the chest," the doctor suggested that other tests be conducted, i.e., **"if the cells in the pleural fluid stain for PSA, then it should pretty much prove the uni-polar hypothesis"** summarized in Occam's Razor. (CX 11-1) I note that Dr. Carey concludes as follows:

> I will be most interested to see if my **theory** of one disease is substantiated by review of pathology and by subsequent immunologic testing of the cells.

As noted above, Decedent passed away twelve (12) days later. (CX 14) Dr. gee noted in his November 17, 1998 report (**no PSA was performed on this material, i.e.,** lung biopsy material). Thus, apparently the tests suggested by Dr. Carey were not performed.

In view of the foregoing, I cannot accept the opinion of Dr. Gee or the **theory** of Dr. Carey because those opinions do not qualify as an **unequivocal** statement ruling out **completely** any connection between Decedent's lung cancer and his maritime exposure to asbestos. I also place great weight on the fact that the autopsy protocal notes the presence of "bilateral pleural plaques" and rare "ferruginous bodies in (the) lungs," both of which are so-called "markers" of past asbestos exposure and which, when found in conjunction with lung cancer, lead to the conclusion that the lung cancer was caused, in part, by the asbestos exposure, together with the synergistic effect of an extensive cigarette smoking history, a well-accepted medico-scientific concept not recognized by Dr. Gee or Dr. Carey.

As noted above, pleural plaques resulting from asbestos exposure do constitute a work-related disease. **See Romeike, supra.** Moreover, I also note that Dr. Gee (RX 5) refers to the autopsy finding and "plaques" but simply states that their "presence ...

does not affect this conclusion" that a primary lung cancer is due solely to Decedent's "heavy smoking history," an opinion ignoring the well-accepted synergistic effect of cigarette smoking and asbestos exposure. (CX 15)

Accordingly, I further find and conclude that Decedent's lung cancer constitutes a work-related injury, that the date of injury is July 28, 1998 (CX 15), that claimant had filed her claim the previous month (RX 1) and that the Employer timely controverted Claimant's entitlement to Death Benefits. (RX 2)

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)

On the basis of the totality of this closed record, I find and conclude that Claimant has established that her husband could not return to any work on and after July 28, 1998. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate 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 alternate 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 Decedent Claimant had a total disability from July 28, 1998 through November 16, 1997, his date of death.

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983). **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136

(1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant took an early retirement on March 31, 1996. (RX 3) Therefore Section 10(a) is inapplicable. The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

The 1984 Amendments to the Longshore Act apply in a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant is a voluntary retiree as he was in good health on March 31, 1996, at which time he took an early retirement (RX 3), that he worked part-time just to keep busy, and as he passed away on November 16, 1997 (CX 16) and as the date of injury is July 28, 1998. (CX 15)

Accordingly Decedent’s estate is entitled to an award of compensation benefits for his one hundred (100%) percent permanent partial impairment of the whole person, pursuant to Section 8(c)(23) of the Act, from August 15, 1991 through November 16, 1997, based upon the National Average Weekly Wage as of that time **i.e.**, $400.53.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000.

33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on November 16, or 17, 1997, the date of her husband's death, based upon the National Average Weekly Wage $417.87 as of that date, as I find and conclude that Decedent's death resulted from his lung cancer which conditions were first diagnosed and reported by Dr. Keltner after Decedent's hospitalization from November 10, 1997 at the L&M. (CX 13 at 1 and 2) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury. Death Benefits shall continue for as long as Claimant is eligible therefor.

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 injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v.**

Washington Metropolitan Area Transit Authority, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of her husband’s work-related injury in a timely fashion and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

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.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted Claimant’s entitlement to benefits. (RX 2) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer as a self-insurer. Claimant's attorney filed a fee application on

January 10, 2000 (CX 27), concerning services rendered and costs incurred in representing Claimant between November 20, 1998 and January 5, 2000. Attorney Carolyn P. Kelly seeks a fee of $4,035.14 (including expenses) based on 22.75 hours of attorney time at $200.00 per hour and 5.25 hours of paralegal time at $55.00 per hour.

The Employer had no objections to the requested attorney's fee. (RX 10)

In accordance with established practice, I will consider only those services rendered and costs incurred after November 18, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Employer's comments on the requested fee, I find a legal fee of $4,735.14 (including expenses of $237.64) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

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 as a self-insurer shall pay to the Claimant, as representative of Decedent's estate, compensation benefits for Decedent's one hundred (100%) percent permanent partial impairment from August 15, 1997 through November 16, 1997, based upon the National Average Weekly Wage of $400.53, such compensation to be computed in accordance with Sections 8(c)(23) and 2(10) of the Act.

2. The Employer as a self-insurer shall pay Decedent's widow, Barbara S. Gomes, ("Claimant"), Death Benefits from November 17,

1997, based upon the National Average Weekly Wage of $417.87, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

3. The Employer shall reimburse or pay Claimant reasonable funeral expenses of $3,000.00, pursuant to Section 9(a) of the Act.

4. Interest shall be paid by the Employer 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. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

5. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required, between August 7, 1997 and November 16, 1997, subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Carolyn P. Kelly, the sum of $4,735.14 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between November 20, 1998 and January 5, 2000.

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DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:las