U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

MAILED: 1/19/2001

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IN THE MATTER OF:               *
                                *
Robert H. Post                  *
     Claimant                   *
                                *
         v.                     * Case Nos.:      2 0 0 0 - L H C -
                                *                  0628/0907
                                *             2000-LHC-0908/0909
General Dynamics Corporation       *
     Employer                   *
                                * OWCP Nos.:      1-144503
          and                   *             1-9536
                                *             1-93268
INA/CIGNA                        *
     Carrier                     *
                                *
          and                   *
                                *
Director, Office of Workers'     *
Compensation Programs, United    *
States Department of Labor      *
     Party-in-Interest          *
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APPEARANCES:

Stephen C. Embry, Esq.
For the Claimant

Mark W. Oberlatz, Esq.
For the Employer

Richard T. Stabnick, Esq.
For the Carrier

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 worker's compensation benefits under 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 January 27, 2000 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 Administration 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.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
ALJ EX 11	District Director Marcia Finn's letter of referral forwarding Claimant's companion claims: 1-95360 (2000-LHC-908) 1-93268 (2000-LHC-909) 1-144503 (2000-LHC-907)[1]	01/20/00
CX 11	Deposition Notice Dr. Arthur DeGraff (2/2/00)	01/28/00
CX 12	Attorney Embry's letter filing with the Court a copy of CX 10, a document admitted into evidence at the hearing	02/07/00

The record was closed on February 17, 2000, upon the filing of the official hearing transcript.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

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[1]Apparently, OWCP No. 1-144503 has been assigned 2 "LHC" numbers.

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

3. On July 28, 1998[2], Claimant suffered an injury in the course and scope of his employment.

4. Claimant gave the Employer notice of the injury 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 November 18, 1998.

7. The average weekly wage is $878.87.

8. The Employer voluntarily and without an award has paid temporary total compensation from July 28, 1998 through the present and continuing

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Robert H. Post ("Claimant" herein), fifty-nine (59) years of age, with an eighth grade education and an employment history of manual labor, began working on May 8, 1959 as a painter at 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. As a painter, Claimant had duties of preparing the metal surfaces of the boats to be painted and he would then use brushes, rollers or sprayers to paint those surfaces. He worked all over the boats, often in tight and confined spaces, sometimes in awkward positions. He also had duties of cleaning up the various areas after the welders, shipfitters, laggers, pipefitters, etc., had completed

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[2]This record clearly establishes that Claimant stopped working on July 25, 1998, and was hospitalized for three days and has not worked since then.

their assigned tasks. He used various air hoses to blow down the asbestos dust and fibers on a daily basis and he wore no face mask or respirator. As a painter he worked with various types of paint, some of which emitted noxious fumes and which made him feel light-headed, and occasionally he had to leave the boat "to get some fresh air" because of the fumes he had inhaled. He also worked in close proximity to the pipe laggers who were cutting and installing asbestos and such work caused asbestos dust and fibers to fly around the ambient air of the work environment to such an extent that he had to cover his mouth and nose with a handkerchief. (TR 18-24; RX 2)

Claimant's multiple medical problems are extensively detailed in the closed record before me and the most pertinent of those will be discussed herein to put this matter in proper perspective and to resolve the issues in dispute.

Initially I note that Claimant's October 3, 1984 chest x-ray taken at the Employer's Yard Hospital as part of its program to monitor the health of its workers was read as "abnormal" as showing "huge bilateral plaques" and, according to the report, "these plaque formations were first noted definitely in 1974 and have increased moderately since that time." (RX 3)

Claimant received the following letter on or about December 3, 1984 from Dr. Edward A. Gaensler, School of Medicine, Boston University Medical Center, the pre-eminent pulmonary and thoracic specialist who was in charge of the Employer's survey of its asbestos-exposed workers (ALJ EX 4):

We were very glad to have had an opportunity to examine you in November, 1984 during our recent respiratory survey at the General Dynamics yard in Groton.

During your visit you had no complaints referable to the respiratory tract and we were glad to note that the results of your chest physical examination as well as all of the lung function tests were entirely within normal limits.

Your chest x-ray showed some small pleural plaques. These are thin scars on your chest wall presumably indicative of some asbestos exposure, however slight, at least 15 and probably more years ago. These plaques are not a disease as such in that they do not cause any symptoms nor do they cause any loss of function as is well illustrated by your case. We attach with this a note that explains the significance of plaques in more detail...

Enclosure

PS: You have smoked 1 ½ packs for 25 years-time to stop.
Your blood pressure was elevated at 170/100, according to

the doctor.

Claimant continued to work as a painter and he was daily exposed to asbestos dust and fibers and other pulmonary irritants and he was finally referred to the Occupational Health Center at the Lawrence and Memorial Hospital (L&M) and Dr. Martin Cherniack, the Medical Director, reports as follows in his February 6, 1987 letter to Claimant's attorney (RX 5):

I saw your client and my patient, Mr. Robert Post, on two occasions, on the 5th of January and on the 5th of February 1987 at the Occupational Medicine Center at Lawrence and Memorial Hospital.

Briefly, he is a 46-year-old while male painter who has been employed by Electric Boat since 1959. From 1961 to 1968 he had moderately heavy asbestos exposure, and in a screening of his (union) local he was found to have bilateral pleural plaques. His chief symptoms are shortness of breath with exertion over the last seven to eight years with increased intensity over the last year. This is characterized by the inability to walk more than a quarter of a mile at his own pace without stopping twice, and the ability to climb only twelve stairs. He claims he uses the respirator approximately two hours per day for solvent use and Savopon paints, and he is forced to remove the respiratory approximately every 30 minutes to 1 hour due to shortness of breath, particularly induced by these paints and thinner uses. His wheezing has been noted by co-workers in similar situations. He has heavy use of Unisolve paint remover and complains of a headache at the termination of work.

The past medical history is also significant for a notation of high blood pressure in August of 1986, and left shoulder fracture in 1978.

Habits are significant for a positive smoking history of 50-pack years, with discontinuation in January of 1987...

In summary, Mr. Robert Post is a 46-year-old painter, who enjoys his work but has several medical problems. These include hypertension, for which he has now sought medical attention from Dr. Bernard Ferguson, IV. Number 2. Symptomatic shortness of breath which is primarily of asbestos-related etiology, as he has evidence for mild restriction, extension pleural plaques and a compromise pulmonary stress test. Number 3. This problem is exacerbated by his reliance on a respiratory with extensor solvent use. The solvents themselves, particularly Unisolve, and the dissolved epoxide paint themselves, are irritants and may exacerbate the situation due to the leakage in the respirator and his necessity of removing the respirator, secondary to shortness of breath.

It is my feeling that he has mild to moderate respiratory disease, were I to rate him on the AM system of pulmonary impairment, he would have approximately a 40% impairment of the whole man. However, he desires to continue working and I think every effort should be made to develop a form of work which he can tolerate, which essentially would involve some limitations on physical exertion and limitations to exposure to irritants, and to reliance on respirator use. We have agreed to re-evaluate him in three to four months, after he has discontinued his ... smoking, at which case we will reassess the possibilities of his suitability for his job and respirator use, according to the doctor.

Dr. Cherniack then sent the following letter on April 3, 1987 to Donald Kent, the Employer's Medical Director (ALJ EX 4):

I would like to keep you apprized of the clinical status of an Electric Boat employee, Mr. Robert Post, who has been followed by the Occupational Heath Center at Lawrence and Memorial Hospital.

Mr. Post was recently discharged from Lawrence and Memorial Hospital following a posterior wall myocardial infarction. I was asked by his primary care physician, Dr. Bernard Ferguson, to assist in his care, since he was familiar to me, from an evaluation of asbestos related lung disease. I wanted to approach you with the initial questions at this time for his eventual return to work and fitness for work.

Briefly, Mr. Post is a 46-year-old male who was first seen here in January of 1987 with moderate dyspnea on exertion and rather severe pleural disease. A pulmonary stress test showed a primary respiratory insufficiency without EKG changes. At that time we discussed job transfer to a less strenuous work than his current tenure of painter, but we agreed to observe given that Mr. Post had recently discontinued smoking, pending symptomatic improvement of his pulmonary status. I believe that his recent myocardial infarction rather changes the picture...

I still feel that Mr. Post's respiratory status is a fundamental concern as it may place additional stress on his cardiovascular system. He is strongly motivated to work and I think he would be personally debilitated by too severe a limitation on his functions. We are still probably a good two months away from the time when he actually may return to the job. However, I did want to begin thinking about jobs that he might perform. I think that he could perform at a moderate work level. Again, my only reason for writing is for you to be informed of his status and to have the opportunity to begin to think about his eventual return to work. I offer caveat that in the past he has great difficulty with this respirator because of dyspnea on exertion

and has frequently removed it, thus exacerbating his primary respiratory problems. I would think that any job that required a respirator dependence would not be suitable, according to the doctor.

The Employer referred Claimant for a pulmonary evaluation by Dr. Thomas J. Godar, Director, Section of Pulmonary Diseases, Saint Francis Hospital and Medical Center, reports as follows in his May 3, 1988 report (RX 9):

CHIEF COMPLAINT: The patient is a 47 year old white male currently employed at the Electric Boat Shipyard as a maintenance mechanic in the paint shop, who has just returned to active employment in October 1987 following coronary artery bypass graft at the Yale-New Haven Medical Center, referred for evaluation of an abnormal chest x-ray for the purpose of diagnosis, a measure of impairment, if any, and a determination of any relationship between pulmonary disease and previous work exposures.

Dr. Godar, after the usual social and employment history, his review of Claimant's medical records and diagnostic tests and the physical examination, concluded as follows (RX 9 at 7-9):

IMPRESSIONS: 1) ASHD, status post posterior myocardial infarction and coronary artery bypass graft for severe 3 vessel disease, compensated.

2) Essential hypertension with mild left ventricular hypertrophy.

3) Bilateral pleural plaques consistent with asbestos exposure but without respiratory impairment.

4) Mild COPD and diffusion impairment associated with extensive cigarette smoking with treated superimposed asthmatic bronchitis controlled on medication.

5) Mild restrictive disease due to combined obesity and status post cardiac surgery.

6) Obesity, exogenous.

COMMENTS & RECOMMENDATIONS: It is clear from the work history and from the chest x-ray that the patient has substantial bilateral pleural plaques consistent with asbestos exposure but for which there is no corresponding respiratory impairment. The physical examination and chest x-ray provide no evidence for the

presence of asbestosis and the mild restriction noted in total lung capacity is entirely consistent with the patient's having had coronary artery bypass surgery as well as having persistent mild obesity. In fact, the x-rays suggest that lung fields are slightly smaller since the surgical procedure than they were before when increase in AP diameter and some flattening of the diaphragms were quite significant and suggested some element of COPD. The patient has had a sufficient cigarette smoke exposure to have some impairment in diffusion capacity and at least early changes of COPD...

It is my impression that much of his exercise associated dyspnea was a product of gradual progression fo COPD in a patient who had frequently been warned to discontinue smoking but continued smoking until 1987. In addition, he was at least mildly overweight, was hypertensive, and clearly was having chest pain and dyspnea in intermittent episodes that could be clearly ascribed to angina pectoria and which were therefore cardiac in origin rather than pulmonary. I believe he had dyspnea associated with both slowly developing COPD as well as coronary disease.

It appears that in the last 2 years he has developed a superimposed asthmatic bronchitis, some of which may be ascribable to exposure to fumes and chemicals such as various paints in the workplace although this was clearly superimposed on pre-existing airway disease. His bronchial asthma has been relatively well controlled on medication and in his current light duty assignment.

I see no convincing evidence of asbestosis and in fact find that most of the patient's problems are cardiovascular in that he has relatively untreated and persistent hypertension and has had coronary artery bypass graft for myocardial infarction and a high grade of coronary obstruction. This clearly would limit his exercise tolerance significantly. I cannot disagree with the estimate of impairment due to cardiac disease ascribed to the patient by Dr. Lawrence Baker in his report of February 1, or March 2, 1988 in which he estimates a 25-30% impairment of cardiac function.

Using the AMA Respiratory Impairment Guidelines, I would estimate the patient's respiratory impairment to be no more than 20% for both lungs and for the whole person with 1/3 due to COPD associated with cigarette smoking, 1/3 associated with the restrictive changes of obesity and open-heart surgery, and 1/3 of that loss ascribed to asthmatic bronchitis which is currently well controlled. I believe only the asthmatic bronchitis could be in any way ascribed to his occupational exposure such as to paints and other fumes in the workplace which has no relationship whatsoever to asbestos exposure and which has been

terminated by his current assignment. Given the relatively good lung function tests on 4/18/88, the asthmatic bronchitis appears to be well controlled and to have reached a maximum medical improvement. There is no evidence for asbestosis or other workplace respiratory impairment in my opinion.

Needless to say, with the presence of cardiovascular disease, obesity, and progressive airway obstruction associated with cigarette smoking, the patient clearly has an impairment that is materially and substantially greater than it would otherwise be if he did not have these preexisting conditions. Therefore industrial irritant exposures after October 19, 1984 would have resulted in an impairment that was materially and substantially greater than would have been the case had he ceased exposure in October 1984, according to the doctor.

Claimant was also examined by Dr. Lawrence Baker and the doctor, a noted specialist in the Commonwealth of Massachusetts, opined in his November 19, 1987 report (CX 9) that Claimant's arteriosclerotic coronary disease predated his March 4, 1987 heart attack "for an indeterminate period of time," that this "was a disease process to which he was predisposed by virtue of hypertension, cigarette smoking and a positive family history," "that there was a definite causal relationship between the work efforts expended by Mr. Post on march 4, 1987 and his development of the beginning symptomatology of (an) acute MI, eventuating in hospitalization," that Claimant does have permanent limitations in terms of his ability to perform gainful employment," that he is "incapable of performing any work that requires more than minimal exertional efforts, or any work that requires being out in inclement weather or work that requires excesses of stair climbing or walking" and that "these limitations bear a direct limitation to the work-related MI of March 4, 1987." With reference to Claimant's "respiratory status, there is no question that he has moderately severe respiratory disease of both an obstructive and restrictive nature," caused partly by "his heavy cigarette smoking over the years" and "his exposures to the noxious dusts of asbestos while employed at Electric Boat."

The Employer accepted Claimant's March 4, 1987 heart attack as work-related and voluntarily paid him, as of July 29, 1988, benefits for his 27.50% impairment of the heart, an award permitted by the Connecticut Workers' Compensation Act. (CX 7) Likewise, the Employer accepted Claimant's pulmonary problems as work-related and voluntarily paid him, as of November 10, 1988, benefits for his twenty (20%) percent permanent partial disability of the lungs, an award also permitted by the state act. (CX 8)

According to Claimant, he was out of work for about two

years or so because of his heart attack and he was released to return to work on light duty. The Employer accepted Claimant's return to work and provided light duty work for Claimant in the paint shop for the last eight or nine years he worked at the shipyard. However, he still was occasionally exposed to paint fumes, dust and other irritants as spray painting took place in the paint shop. He was also assigned to work in the so-called wheel-a-brator room where that huge machine was used to blast rust off large components of the boats. In 1995 he was assigned to work in the respirator room and he had duties of repairing and storing respirators and of handing them out to the workers as needed. On July 25, 1998 Claimant was performing his assigned duties and while standing near his computer, experienced the onset of chest pains and "significant shortness of breath" and he was brought by ambulance to the Emergency Room at L&M where he was examined by Dr. Steven P. Johnson, his family doctor. Claimant was hospitalized for further examination and observation and Dr. John S. Urbanetti, who was called in "to review the respiratory status" of the Claimant, reports as follows in his July 27, 1998 Report of Consultation (CX 3):

IMPRESSION:

1. Chronic obstructive pulmonary disease, chronic asthmatic bronchitis predominant, minimal to mild.

2. History of asbestos exposure with pleural plaques identified radiologically.

3. Congestive heart failure, biventricular left greater than right, mild.

4. Suspected nocturnal hypoxia in this setting as contributed to #3.

5. Shortness of breath on exertion, a likely combination factor of above with unknown degree of interstitial fibrotic change secondary to asbestos exposure (see below).

SUGGESTIONS: As per order sheet. Continued aggressive inhalational therapy is appropriate in this setting. At present, there appears no indication for chest steroid therapy. Nocturnal oximetry will be investigated over a period.

This gentleman's pulmonary history details the onset of smoking at age eighteen and continuing at the rate of up to one and a half packs per day to spontaneous discontinuation coincidental with "small heart attack" approximately eight years ago. Subsequent to that time, there has been mild shortness of breath progressing to one flight limitation at the present time. It is

this shortness of breath which has become particularly aggrieved over the past six months that prompts hospital evaluation in the patient's mind...

This gentleman's cardiorespiratory status is stabilizing with aggressive therapeutic interventions as noted above. Coronary artery investigation is proceeding with Persantine stress testing scheduled. Repeat flow-volume loop would be appropriate as well as nocturnal oximetry at this time, according to the doctor.

Claimant was discharged on July 28, 1998 with these Discharge Diagnoses (CX 3):

1. Chronic obstructive pulmonary disease exacerbation.

2. Nonspecific chest pain.

3. Hypertension.

Dr. Johnson referred Claimant for further evaluation by a pulmonary specialist, Dr. Robert J. Keltner, and the doctor, in his September 11, 1988 report, states as follows (ALJ EX 4):

The patient is a 57-year-old man who is seen today following pulmonary consultation during this late July hospitalization for chest pain.

The patient is an ex-smoker and has been followed for chronic obstructive airway disease by Dr. Johnson. He smoked approximately 1-1/2 packs of cigarettes a day from age 18 until cessation about 8-9 years ago. He had a myocardial infarction in 1987 and subsequently had coronary artery bypass grafting surgery. The patient has had vague chest discomfort on and off for some time.

He is admitted with some chest tightness in late July. Acute myocardial infarction was ruled out. There were no new electrocardiogram changes. A thallium stress test was eventually done which was unremarkable. Question of hypoxia was raised, however, there was no evidence of hypoxia by nocturnal oximetry, and the patient ambulated without desaturation on room air. Question of some congestive heart failure was raised because of peripheral edema and some vague x-ray changes. The patient, in fact, was placed on Lasix 40 mg daily when discharged, but this has been discontinued by Dr. Johnson since then as it did not seem to make any difference. He is currently taking Combivent two puffs four times a day and Vanceril four puffs twice a day using a spacer. He feels that his breathing is a little better doing this. He does describe episodes of some congestion and slight cough and perhaps even a little

wheeziness which has gotten better with the above therapy, but he is still quite short of breath with any activity. The patient is also on Uniphyl a total of 800 mg daily which is well tolerated. He takes Verapamil SR 240 mg once a day and he is on one aspirin tablet a day.

The patient has no history of childhood asthma. He started working at Electric Boat in 1959 as a painter and janitor. He has been evaluated by Dr. Martin Cherniak regarding asbestos exposure, and the patient says he was told he had "asbestosis." Chest x-rays have shown evidence of pleural thickening bilaterally without much in the way of any interstitial disease. Pulmonary function testing from December of 1994 had shown mild bronchodilator responsive obstructive airway disease with a normal diffusion capacity and what I believe are normal lung volumes. Spirometry done on July 27th at the hospital showed normal flow rates with slightly decreased forced vital capacity.

The patient has no history of significant allergies or atopy. At this point, the patient is no longer working and he is seeking disability retirement. He feels that because of his easy fatigability and marked dyspnea with any activity, he cannot do any work. He had been on light duty for some time.

Mr. Post says he is short of breath climbing up only half a flight of stairs and walking only a short distance on level ground. He says that he becomes short of breath just sitting in a chair and doing very light work. From day to day, there is very little cough and mucus production. He has not had any anginal-type chest pain or palpitations. There is slight edema in the feet or ankles which has not changed despite the use of Lasix. The patient was given an antianxiety medicine by Dr. Johnson (I believe it was Zanax, but I do not know the dose) which the patient has taken perhaps once of twice a day with no obvious improvement in h is sensation of dyspnea. Appetite is good. he is overweight, but the patient says he has put on only about 10 lbs, in weight over the past 1-2 years. There is no history of dizziness, headache or visual disturbances. He has not had any symptoms of gastroesophageal reflux disease...

Dr. Keltner concluded as follows (**Id.**)"

IMPRESSION: The patient probably has mild obstructive airway disease from his previous cigarette smoking days which does appear to have improved to a modest degree since he was placed on inhaled and oral bronchodilators as well as inhaled steroids. There is clearly a significant discrepancy between the measurable degree of his pulmonary disease/impairment and his symptoms of shortness of breath. **Given the history of asbestos exposure, the patient may have more in the way of interstitial lung disease than is evident by chest x-ray.** He clearly has

pleural thickening and pleural plaquing related to asbestos exposure. He is somewhat overweight, but again the amount of obesity is still not enough to explain his level of shortness of breath. My plan would be to obtain a high resolution CT scan of the chest to see if there is a significant amount of interstitial lung disease not appreciated by plain x-ray and repeat pulmonary function tests with full lung volumes and diffusion capacity to see if these have changed since 1994. The patient will be started on a much more high potency inhaled steroid. If there has been no improvement, consideration might be given to a trial of oral steroids, but I would like to avoid these in this individual if at all possible. Clearly, if he has significant asbestosis, his responsiveness to steroids would be expected to be minimal but his obstructive airway disease, even though it seems to be mild, may improve significantly with a course of systemic steroids. (Emphasis added)

PLAN:

1. Switch from Vanceril to Flovent-220 four puffs twice a day, continue other medications as before.

2. Arrange for high resolution CT scan of the chest to be done, and the patient will also have full pulmonary function tests done.

3. Return in several weeks to discuss results of above studies, according to the doctor.

Claimant has also been examined by Dr. Arthur C. DeGraff, Jr., a noted pulmonary expert, and the doctor concludes as follows in his November 7, 1998 report (CX 2):

Thank you for asking me to evaluate Mr. Post. I saw him in consultation on 11/4. Mr. Post is complaining of shortness of breath especially for the past 1-2 years and notes “a big change” and fatigue with work since that time.

<u>WORK HISTORY</u>: His first job was with Electric Boat in 1959 where he was employed as a painter and he continued to work as a painter until his retirement on 7/25/98. During his work he regularly “blew” ships down from 1959 to 1976, an operation that was carried on without the use of masks. Therefore Mr. Post would have been exposed to excessive asbestos dust. In addition to asbestos exposure, he also did sandblasting and used “black beauty.”

<u>PAST MEDICAL HISTORY</u>: He smoked cigarettes from 1960 until 1987, approximately 1 ¼ packs a day for 34 pack/year smoking history. He had myocardial infarct in 1987, one of the reasons he stopped smoking at that time. Following the myocardial infarct he

underwent bypass surgery and was out of work for 2 ½ years. He returned to work in 1990 and felt "not bad then" and felt that his "breathing was OK." He then worked until 7/25/98, at which time he experienced an episode of acute shortness of breath without chest pain for which reason he went to the emergency room and was hospitalized. Workup during that hospitalization failed to indicate any evidence of acute myocardial infarct and he was discharged with a diagnosis of non-specific chest pain...

CHEST CT: Available for my review and revealed diffuse bilateral pleural thickening throughout the chest wall with presence of scattered calcification.

LUNG FUNCTION STUDIES: Reports from 7/31/90, 5/17/91, 7/27/98 and 10/7/98 were available for my review. They all show evidence of restrictive ventilatory insufficiency manifest by reduced forced vital capacity and reduced total lung capacity. At the same time, the apparent diffusing capacity on 5/17/91 was 21/8 and has fallen to 16.3 which, according to the AMA **Guides for Evaluation of Permanent Impairment**, is 57% of its predicted value. Also according to the same AMA guide, the forced vital capacity and one-second expiratory volume are respectively 57% and 56% of their predicted values.

It is my impression that Mr. Post has diffuse pleural thickening secondary to asbestos related pleural disease resulting in moderately severe restrictive ventilatory insufficiency. The impaired mobility of the chest wall makes work of breathing excessive and adds to Mr. Post's sensation of dyspnea on effort. Based on the AMA **Guides for Evaluation of Permanent Impairment**, Mr. Post is moderately disabled with 32% loss in function of the whole man secondary to his restrictive lung disease. This disability is calculated on the basis of the reduced forced vital capacity and reduced one-second expiratory volume, according to the doctor.

Dr. Johnson sent the following letter to Claimant's attorney on August 10, 1998 (CX 1):

This is in response to your letter to me regarding my patient Robert Post. You had sent me two letters in the past few days about two different problems. The first letter dated on July 30 was in regard to numbness and tingling in his hands. Mr. Post mentioned this to me on March 30, 1998. His exam however was unremarkable and the condition seemed to be minimal and I did not feel further work up was necessary at that time. In fact this problem is minor compared to the other medical problem that he has so I will defer further comment on it at this time.

Mr. Post does suffer from significant and chronic obstructive lung disease and asbestosis. He did have a myocardial

infarction in 1987. He has recently been suffering from increased shortness of breath on exertion and he is even getting shortness of breath just in standing at his job. He was hospitalized from July 25 - July 28, 1998. Although he was having chest discomfort, this does not appear to be related to his underlying coronary artery disease. In fact his stress testing at the time was normal. Pulmonary consultation was obtained from Dr. John Urbanetti and Dr. Robert Keltner and he actually has a follow up with Dr. Keltner scheduled on August 10. The long-term prognosis with this condition is a little bit uncertain at this time however he does have significant chronic obstructive lung disease and I expect that this will preclude him from returning to work. I would like to see how Dr. Keltner feels about this in his follow up visit and see how the patient's condition evolves over the next few weeks before making a final determination but at this time he is unable to return to work, according to the doctor.

Claimant leads a mostly sedentary life as any physical exertion aggravates his multiple medical problems and he has been unable to return to work since July 25, 1998 because continued exposure to pulmonary irritants aggravates and exacerbates his cardiac and pulmonary problems. He had difficulty the last few years at the shipyard walking up the steep South yard hill, often referred to by the workers as "cardiac hill." He receives Social Security Administration disability benefits as that agency has declared him to be totally disabled for all employment. (TR 24-43)

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." **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. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). 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. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). 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. **Kier**, **supra**; **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). 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). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (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 neither party 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). **See also Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestosis and mixed obstructive/restrictive pulmonary disease, resulted from his exposure to and inhalation of asbestos and other pulmonary irritants 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); **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).

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).

This closed record conclusively establishes, and I so find and conclude, that Claimant’s maritime employment at the shipyard from January 18, 1959 through July 25, 1998, except for a short layoff and absences due to prior work-related injuries,

exposed him on a daily basis to asbestos and other pulmonary irritants, that his pulmonary problems began prior to August 3, 1980 (CX 8), that his continued exposure to the pulmonary irritants results in a new and discrete injury on July 25, 1998, due to an exacerbation while he was standing near his computer, that he was hospitalized for three days, that the Employer had timely notice of such injury, authorized appropriate medical care and treatment and paid appropriate compensation benefits while he was unable to return to work and that he timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve. I note that the parties have stipulated July 28, 1998 as the date of injury. (TR 7)

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 alternate 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 alternate 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 that he cannot return to work as a painter. 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 probative or persuasive 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 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).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, I find and conclude that Claimant has been permanently and totally disabled from July 25, 1998, when he was forced to discontinue working as a result of this occupational disease.

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).

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 Respondents have accepted the claim, provided the necessary medical care and treatment and voluntarily paid compensation benefits from the day of the accident to the present time and continuing. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Responsible Employer

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435

(1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

Claimant was daily exposed to pulmonary irritants at the Employer’s shipyard until his last day of work on July 28, 1998 and, as of that date, the Employer was a self-insurer under the Longshore Act.

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).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

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.**

However, employer’s liability is not limited pursuant to Section 8(f) where claimant’s disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990);**Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the

employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

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 began to work for the Employer on January 18, 1959, worked for a short time at the shipyard, was laid-off for several months and returned to the shipyard on May 8, 1959 as a painter (RX 2), (2) that Claimant's daily exposures to asbestos and other pulmonary irritants resulted in an asbestos-related pulmonary disease as of August 30, 1980 (CX 8), (3) that such disease was seen on Claimant's October 3, 1984 chest x-ray (CX 3), on his October 10, 1985 chest x-ray (CX 4), (4) that Dr. Cherniack rated Claimant's pulmonary impairment at 40 (40%) percent of the whole person as of February 65, 1987 (RX 5-3), (5) that the Employer accepted Claimant's pulmonary disease as work-related and voluntarily paid Claimant certain benefits under the state act (CX 8), (6) that Claimant sustained a work-related heart attack on March 4, 1987 (RX 6-1; CX 9), (7) that the Employer accepted the heart attack as compensable and, as of July 29, 1988, paid Claimant certain benefits under the state act (CX 7), (8) that Claimant has carried a diagnosis of essential hypertension since at least February 6, 1987 (RX 5-2) and obesity since at least September 11, 1987 (RX 8-2), (9) that Claimant was out of work for over two years because of his heart attack and coronary artery bypass surgery, (10) that claimant was released to return to work on light duty with restrictions, (11) that the Employer retained Claimant as a valued employee, even with actual knowledge of his multiple medical problems, and provided light duty work for the Claimant until his last day of work at the shipyard on July 28,

1998, (12) that he has sustained previous work-related industrial accidents prior to July 28, 1998, (13) while working at the Employer's shipyard and (14) that Claimant's permanent total disability is the result of the combination of his pre-existing permanent partial disability and his July 28, 1998 injury as such pre-existing disability, in combination with the subsequent work injury, has contributed to a greater degree of permanent disability, according to Dr. Johnson (CX 3), Dr. DeGraff (CX 2), Dr. Urbanetti (CX 3), Dr. Baker (CX 9), Dr. Cherniack (RX 5-2), Dr. Ferguson (RX 7-2), Dr. Hashim (RX 8-1) and Dr. Godar. (Rx 9-10, RX 13) **See Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989).

Claimant's condition, prior to this final injury on July 25, 1998, 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 Company 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 Industries**, 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 benefit. **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'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 shall filed a fee application concerning services rendered and costs incurred in representing Claimant 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. The fee petition shall be filed within thirty (30) days of this

decision and Employer's counsel shall have ten (10) days to comment thereon.

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. Commencing on July 25, 1998, and continuing thereafter for 104 weeks, the Employer as a self-insurer 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 $878.87, such compensation to be computed in accordance with Section 8(a) of the Act.

2. 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.

3. The Employer shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his July 25, 1998 injury. The Employer shall also receive a refund, with appropriate interest, of all overpayments of compensation made to Claimant herein.

4. 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.

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 first Order provision above, subject to the provisions of Section 7 of the Act.

6. 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 ten (10) days to comment thereon. This Court has jurisdiction over those services

rendered and costs incurred after the informal conference on November 18, 1998.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:jl