

U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)



Issue Date: 23 July 2004

CASE NUMBER: 2003-LHC-02540

OWCP NUMBER: 14-138760

In the Matter of:

KAREN McALLISTER (widow of James McAllister),
Claimant,

v.

LOCKHEED SHIPBUILDING, ALBINA ENGINE & MACHINE
and WILLAMETTE IRON & STEEL Co. (aka Guy Atkinson),
Employers,
and

WAUSAU INSURANCE CO., FIREMAN'S FUND INSURANCE CO.,
and SAIF CORP.,
Insurers

Appearances

Peter Preston, Esquire
Preston, Bunnell & Stone
1100 SW 6th Ave, Suite 1405
Portland, Oregon 97204
For the Claimant

Dennis VavRosky, Esquire
VavRosky, MacColl & Olson
One SW Columbia Street
Portland, Oregon 97258
For Albina Engine & Machine
and Fireman's Fund Insurance Co.

Russell Metz, Esquire
Metz & Associates
1620 4th Avenue
Seattle, Washington 98101
For Lockheed Shipbuilding
and Wausau Insurance Co.

Norman Cole, Esquire
SAIF Corporation
400 High Street SE
Salem, Oregon 97312
For Willamette Iron & Steel Co.
and SAIF Corp.

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the "Act" or the "Longshore Act"). A trial on the merits of the claim was held in Portland, Oregon, on February 26, 2004.

All parties were represented by counsel and the following exhibits were admitted into evidence: Claimant Exhibits (CX) 1-3 and 10-16, Lockheed Shipbuilding Exhibits (LX) 1-5, Albina Engine & Machine Exhibits (AX) 1-7, and Willamette Iron & Steel Exhibits (WX) 1-13. Rulings on the admissibility of Claimant's Exhibits 4 to 9 and Albina Exhibits 8 and 9 were deferred until after the receipt of post-trial briefs.

BACKGROUND

James McAllister was born on September 5, 1938, and began working in 1955. CX 11 (death certificate), CX 1 (Social Security employment records). In 1956, he worked at two shipyards in the vicinity of Portland, Oregon: Guy F. Atkinson's Willamette Iron and Steel Company (hereinafter "WISCO") and Albina Engine and Machine Works (hereinafter "Albina"). CX 1 (Social Security employment records), Tr. at 70-72 (testimony of Margaret Mitchell). In the summer of 1957, Mr. McAllister and his first wife, Margaret K. Mitchell, moved to Seattle and Mr. McAllister began working at Puget Sound Bridge and Dry Dock Company, which later changed its name to Lockheed Shipbuilding and Construction Company (hereinafter referred to as "the Puget Sound-Lockheed shipyard"). Tr. at 42 (counsel for Lockheed and its insurer, Wausau Insurance Co., concedes that both the assets and liabilities of Puget Sound Bridge and Dry Dock Company were acquired by Lockheed Shipbuilding and Construction Company), CX 1 (Social Security records showing Mr. McAllister commenced employment at the Puget Sound-Lockheed shipyard sometime between July and September of 1957), Tr. at 70-73 (testimony of Margaret Mitchell). According to the testimony of Ms. Mitchell, during the entire period that Mr. McAllister worked in shipyards he would leave in the morning with clean clothes and return at the end of the day with dusty and dirty clothes. Tr. at 74.

In approximately 1960, Mr. McAllister ceased working in shipyards and instead began working for a steel company. CX 1 (Social Security employment records), Tr. at 52-53 (testimony of Mrs. McAllister). Later, Mr. McAllister began working as a roofer and eventually spent most of his working years in that line of work. CX 1 (Social Security employment records), Tr. at 60-61 (testimony of Mrs. McAllister).

On April 23, 2002, Mr. McAllister was examined by Dr. Arthur Zbinden, a board-certified specialist in internal medicine and pulmonary diseases. CX 10 (clinical notes), CX 13 (statement of Dr. Zbinden), CX 16 (curriculum vitae of Dr. Zbinden). During the examination, Mr. McAllister reported that he had been experiencing chest pain for seven months and told Dr. Zbinden that he had worked as a carpenter in shipyards during the 1950s and 1960s. CX 10, CX 13. However, he did not identify any specific shipyards. CX 13. Dr. Zbinden suspected that Mr. McAllister had an asbestos-related disease such as primary lung cancer or pleural mesothelioma. CX 10, CX 13.

According to Mrs. McAllister's testimony, on April 30, 2002 she and Mr. McAllister discussed places where he believed he had been exposed to asbestos. Tr. at 54, 57, 65-66. During the course of this discussion, she testified, Mr. McAllister told her that he thought he had been exposed to asbestos in 1956 when he had a job at WISCO that required him to cut "masonite paneling" out of two U.S. Navy destroyers, the *Monterey* and the *Mariposa*. Tr. at 54, 56-57, 59. In addition, Mrs. McAllister testified, her late husband recalled that after working for

WISCO, he worked for Albina. Tr. at 57. According to Mrs. McAllister, during this same conversation Mr. McAllister also told her that he had worked in Seattle for two years building destroyers, but did not specifically say that he believed he had been exposed to asbestos during that employment. Tr. at 50, 60.

Mr. McAlister died on September 22, 2002. CX 11 (death certificate). An autopsy was performed on September 30, 2002 by Dr. William J. Brady, a board-certified pathologist. CX 12, CX 15. According to Dr. Brady's report, the cause of Mr. McAllister's death was "left pleural mesothelioma." CX 12 at 447.

ANALYSIS

The parties have stipulated: (1) that any alleged injuries to Mr. McAllister occurred at a maritime situs and while Mr. McAllister was employed in a maritime status, (2) that Mr. McAllister's death was due to mesothelioma, (3) that the mesothelioma was caused by Mr. McAllister's exposure to asbestos, (4) that the claimant, Karen McAllister, is the widow of Mr. McAllister and entitled to survivor's benefits under Section 9 of the Longshore Act if there is a valid claim under the Act, and (5) that if Dr. Brady were called to testify he would testify that any level of exposure to asbestos can potentially cause a person to develop mesothelioma.

There are disputes concerning the following issues: (1) the identity of the last maritime employer, and (2) the amount of the average weekly wage to be used in determining survivor's benefits under section 9 of the Act.

1. Last Responsible Maritime Employer

Under the so-called "last employer rule" a single employer may be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for more than one employer. In such multiple employer situations, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker's employers will be held liable for all of the worker's disability. The first test applies in cases involving disabilities that are categorized as occupational diseases and the second test applies in cases involving disabilities that are the result of multiple or cumulative traumas. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991). Under the rule which applies in occupational disease cases (e.g., cases involving asbestos-related diseases), the responsible employer is the employer which last exposed the worker to potentially injurious stimuli prior to the date upon which the worker became aware that he was suffering from an occupational disease arising from his employment. See *Port of Portland v. Director, OWCP*, 932 F.2d 836, 840 (9th Cir. 1991); *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317 (9th Cir. 1990); *Lustig v. U.S. Department of Labor*, 881 F.2d 593, 596 (9th Cir. 1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986).

In attempting to prove that an occupational disease arose out of employment with a particular employer, claimants are aided by subsection 20(a) of the Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order

to invoke this presumption, a claimant must produce evidence indicating that he or she suffered some harm or pain and that working conditions existed or an accident occurred that could have caused the harm or pain. See *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. See *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, a claimant is entitled to invoke the presumption if he or she adduces only “some evidence tending to establish” both prerequisites and is not required to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990) (emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting substantial evidence to counter the presumed relationship between the claimant's impairment and its alleged cause. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. See also *Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995).

In this case, the parties have stipulated that if Dr. Brady were called as a witness, he would testify that any exposure to asbestos has the potential to cause a person to develop mesothelioma. Tr. at 81-82. None of the defendants has submitted any evidence that would rebut Dr. Brady's opinion on the causal relationship between exposure to asbestos and mesothelioma. Hence, it must be presumed in this case that exposure to any amount of asbestos could have potentially caused the mesothelioma that led to the death of Mr. McAllister. Thus, it is also necessary to conclude that the responsible employer in this case will be the last maritime employer to have exposed Mr. McAllister to asbestos, regardless of how limited that exposure may have been. It is further noted in this regard that under the rule set forth in the *Brown v. I.T.T./Continental Baking Co.* decision, *supra*, the claimant in this case needs to provide only “some” evidence that Mr. McAllister was exposed to asbestos in order to invoke the subsection 20(a) presumption against a particular employer and is not required to show asbestos exposure by a preponderance of the evidence.

According to WISCO, Albina, and the claimant, the last maritime employer to have exposed Mr. McAllister to asbestos is Lockheed. Three different types of evidence have been offered to show that Mr. McAllister was exposed to asbestos while employed at the Puget Sound-Lockheed shipyard. First, there is testimony from Mrs. McAllister and a statement signed by Dr. Zbinden (Claimant's Exhibit 13) describing statements Mr. McAllister purportedly made to his wife and to Dr. Zbinden concerning his exposure to asbestos while employed as a shipyard worker. Second, there are proposed Albina Exhibits 8 and 9, which are copies of a BRB decision and a Ninth Circuit decision finding that Lockheed was responsible for the asbestos-related diseases of two of its former employees. Third, there is deposition testimony that was given in two unrelated lawsuits by two individuals who formerly worked on the premises of the Puget Sound-Lockheed shipyard. One of these individuals was Norman Kinsman, a former asbestos worker who had been employed at many different locations in and around Seattle, Washington, during the 1950s, 1960s and 1970s. His testimony was taken in 1984 and has been marked as proposed Claimant's Exhibit 6. The other individual was George Noregaard, a former

superintendent for Owens-Corning Fiberglass who had an office at the Puget Sound-Lockheed shipyard from 1957 until 1971 or 1972. CX 4 at 14-18. Mr. Noregaard's deposition testimony, which is contained in proposed Claimant's Exhibits 4 and 5, was taken in 1982 in connection with two lawsuits filed in Washington state courts against various manufacturers and distributors of asbestos products. During the deposition, Mr. Noregaard testified that he had an office at the Puget Sound-Lockheed shipyard from 1957 to 1971 or 1972 and that during that period his duties involved bidding on ship repair and construction jobs requiring the installation or removal of insulation materials. CX 4 at 21. He also testified that various components of the pipe insulation that the company's workers installed on ships between 1957 and 1972 contained asbestos. CX 4 at 62, 65-67. Mr. Noregaard also acknowledged that on those occasions when the pipe insulation was being installed, members of "almost all crafts" would be in the vicinity. CX 4 at 46-47.

Lockheed contends that none of the foregoing material is sufficient to show that Mr. McAllister was exposed to asbestos while employed at the Puget Sound-Lockheed shipyard. In particular, Lockheed alleges that neither Mrs. McAllister's trial testimony nor Dr. Zbinden's written statement unequivocally indicates that Mr. McAllister ever directly told either his wife or Dr. Zbinden that he was exposed to asbestos while working at the Puget Sound-Lockheed shipyard. In addition, Lockheed contends there would be a violation of its right to due process if the BRB and Ninth Circuit decisions contained in proposed Albina Exhibits 8 and 9 were admitted into evidence. Finally, Lockheed further argues that the deposition testimony contained in proposed Claimant's Exhibits 4, 5, and 6 should also be excluded from evidence because this testimony was taken in other cases involving other parties and therefore constitutes inadmissible hearsay.

After consideration of the arguments of all the parties, it has been concluded that Lockheed is correct in contending that the testimony of Mrs. McAllister and the written statement of Dr. Zbinden do not establish that Mr. McAllister ever specifically alleged that he was exposed to asbestos while employed by Lockheed. At most, this evidence shows only that Mr. McAllister gave Mrs. McAllister and Dr. Zbinden a general impression that Mr. McAllister believed that he had been exposed to asbestos during the period he worked at the Puget Sound-Lockheed shipyard. Although these subjective perceptions are certainly relevant, it is doubtful that they are sufficiently probative to warrant invocation of the subsection 20(a) presumption under the "some evidence" standard set forth in the *Brown v. I.T.T./Continental Baking Co.* decision, *supra*. Equally correct is Lockheed's contention that proposed Albina Exhibits 8 and 9 and proposed Claimant's Exhibit 6 should not be admitted into evidence. Although the judicial decisions in the two proposed Albina exhibits indicate that some former Puget Sound-Lockheed shipyard workers were exposed to asbestos during the course of their employment, these decisions do not indicate that the asbestos exposure occurred during the 1957-1960 period when Mr. McAllister worked there. Hence, it has been determined that proposed Albina Exhibits 8 and 9 are irrelevant to the issues in this case. Likewise, even though proposed Claimant's Exhibit 6 concerns the use of asbestos products at Seattle area shipyards, it fails to contain any information concerning the use of asbestos during the specific time period that Mr. McAllister worked at the Puget Sound-Lockheed shipyard. Therefore, proposed Claimant's Exhibit 6 must also be excluded from evidence.

In contrast, Claimant's Exhibits 4 and 5 do contain reliable information concerning the use of asbestos at the Puget Sound-Lockheed shipyard during the period that Mr. McAllister worked there and, for that reason, both of these proposed exhibits will be admitted into evidence.¹ In this regard, it is recognized that Mr. Noregaard's deposition testimony constitutes hearsay as defined by Federal Rule of Evidence 801 and that this testimony does not fall within any of the exceptions to the hearsay rule set forth in Federal Rules of Evidence 803 and 804. It is further recognized that Lockheed was not represented at Mr. Noregaard's deposition and was not even a party to the litigation that led to the deposition. However, it is well established that when conducting hearings under the Longshore Act, Administrative Law Judges are not bound by "common law or statutory rules of evidence" like the Federal Rules of Evidence and are instead directed to admit such evidence as is relevant and needed in order to best ascertain the rights of the parties. See 33 U.S.C. §923(a); *Casey v. Georgetown University Medical Center*, 31 BRBS 147, 151-52 (1997). In this case, Mr. Noregaard's testimony clearly meets these criteria. Moreover, it should also be noted that, in analogous situations, testimony such as Mr. Noregaard's has even been found to be admissible into evidence under the provisions of Federal Rule of Evidence 807. See *Bohler-Uddeholm America, Inc. v. Ellwood Group*, 247 F.3d 79 (3rd Cir. 2001).

Because Mr. Noregaard's testimony concerning the use of asbestos products at the Puget Sound-Lockheed shipyard between 1957 and 1960 was given under oath and appears to be truthful, it has been determined that, under the "some" evidence standard set forth in the *Brown v. I.T.T./Continental Baking Co.* decision, *supra*, this testimony is sufficiently probative to warrant subsection 20(a) presumptions (1) that Mr. McAllister was exposed to asbestos while working at the Puget Sound-Lockheed shipyard between 1957 and 1960, and (2) that there was a causal relationship between Mr. McAllister's mesothelioma and that employment. Therefore, because Lockheed has not provided any evidence that would rebut this presumption, it has also been concluded that Lockheed is the last responsible maritime employer.

2. Average Weekly Wage

Subsections 10(a), 10(b), and 10(c) of the Longshore Act set forth three alternative methods for determining an injured worker's average weekly wage. Subsection 10(a) applies when an injured worker worked in the same employment for "substantially the whole of the year" immediately preceding his or her injury. If subsection 10(a) applies, the average weekly wage for a five-day a week worker is based on the worker's average daily wage, which is then multiplied by 260 and divided by 52. Subsection 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of "similarly situated" employees who did work substantially the whole of the year. If subsection 10(b) applies, the average weekly wage an injured five-day a week worker is based on the average daily wage of the similarly situated employees, which is then multiplied by 260 and divided by 52. When neither subsection 10(a) or 10(b) can "reasonably and fairly be applied," subsection 10(c) provides the general method for determining the appropriate average

¹ Similarly, proposed Claimant's Exhibits 7, 8, and 9 are also being admitted into evidence because they contain testimony concerning the use of asbestos products at the Abina and WISCO shipyards during the times that Mr. McAllister worked in those shipyards.

weekly wage. Although subsection 10(c) does not set forth any specific formula, it does require calculation of an amount that “shall reasonably represent the annual earning capacity of the injured employee.” In that regard, subsection 10(c) further specifies that consideration must be given to the injured worker’s previous earnings in the employment at the time of injury, the earnings of other workers of the same or most similar class in the same employment, and any “other” employment of the injured worker, “including the reasonable value of the services” of any injured worker who was engaged in “self employment.” Administrative Law Judges have broad discretion in determining an injured worker’s annual earning capacity under the provisions of subsection 10(c). *See Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). In addition, in appropriate cases an Administrative Law Judge may base an average weekly wage calculation on an injured worker’s earnings over a period of more than one year. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Walker v. Washington Metropolitan Transit Authority*, 793 F.2d 319, 322 (D.C. Cir. 1986); *Tri-State Terminals v. Jesse*, 596 F.2d 752 (7th Cir. 1979).

In this case, the evidence shows that for many years preceding his death Mr. McAllister was self-employed as the sole proprietor of a roofing business known as Park Place Construction.² For this reason, McAllister’s average weekly wage cannot be calculated under subsection 10(a). *Rountree v. Newport Shipbuilding & Repair*, 13 BRBS 862 at 867 n.6 (1981) *rev’d on other grounds* 698 F.2d 743 (5th Cir. 1983), *panel decision rev’d en banc*, 723 F.2d 399 (5th Cir. 1984). Likewise, subsection 10(b) cannot be applied because there is no evidence in the record concerning the wages of similarly situated workers. As a result, all the parties appear to agree that Mr. McAllister’s average weekly wage must be established under the provisions of subsection 10(c). In addition, all parties have all focused their arguments concerning any subsection 10(c) calculation on the amounts shown in Schedule C of the McAllisters’ joint Federal income tax return for 2001, which was Mr. McAllister’s last full year of self-employment.

Review of the Schedule C of the McAllister’s 2001 tax return indicates that in calendar year 2001 Mr. McAllister’s roofing business had total gross receipts of \$205,543. CX 14 at 466, 491. The Schedule C further shows that the business had a 2001 “gross profit” of \$66,578 after deducting \$138,965 for the “cost of goods sold” and a “net profit” of \$31,423 after deducting “expenses” totaling \$35,155. The principal “expense” deductions were for depreciation (\$16,242), employee benefit programs (\$4,463), and insurance (\$5,152). Documents submitted by the claimant also show that Park Place Construction had the following **net** profits during five years preceding 2001: 2000--\$73,695, 1999--\$95,917, 1998--\$118,278, 1997--\$171,900, and 1996--\$166,021. In addition, the exhibits show that during 1999, 2000 and 2001 the total amount the company paid in wages never exceeded \$2350 per year and that during 1996, 1997 and 1998 the company paid no wages to anyone. This in turn suggests the company’s owner, Mr. McAllister, personally generated almost all of the company’s income and then took his wages in the form of “profits.” CX 14. *See Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989) (holding that where an owner of a business performs such extensive services for the business that the income represents salary rather than profits, the income should be considered in determining the owner’s wage-earning capacity).

² The business was dissolved after the death of Mr. McAllister. CX 14 at 492.

The claimant contends that Mr. McAllister's average weekly wage should be based solely on his 2001 "gross profit" of \$66,578 and that no reductions should be made for the "expenses" that reduced the "gross profit" to a "net profit" of only \$31,423. Thus, the claimant's contends, Mr. McAllister's average weekly wage is \$1,280.36. As support for this contention, the claimant relies on the Benefits Review Board's decision in *Rountree v. Newport Shipbuilding & Repair, supra*. As pointed out by the claimant, that decision asserts that "income tax deductions are not necessarily indicative of actual business expenditures or the costs of doing business as an independent contractor" and therefore concludes that was "no basis" for an Administrative Law Judge to have assumed that "the reasonable value" of the claimant's services as a self-employed welder were "equal to his net earnings." 13 BRBS at 869. Further, the claimant argues, it would be unfair to rely solely on Mr. McAllister's 2001 "net profit" because his net income for the five proceeding years was considerably greater than it was in 2001.

In contrast, defendants Lockheed and Wausau point out that that the BRB decision in *Rountree* explicitly found that the Administrative Law Judge in that case had "erred in solely relying on claimant's gross earnings in self-employment to approximate the reasonable value of claimant's services." 13 BRBS at 870 (emphasis added). Thus, Lockheed and Wausau contend, Mr. McAllister's average weekly wage should be based solely on his 2001 net profit of \$31,423. Under this method of calculation, Mr. McAllister's average weekly wage would be \$604.26.

After consideration of the arguments of the parties, it has been determined that the gross profits from Mr. McAllister's roofing business did not reasonably represent his annual earning capacity and therefore should not be used to calculate his average weekly wage under subsection 10(c). As pointed out by Lockheed and Wausau, even though the BRB's *Rountree* decision asserts that income tax deductions are not necessarily indicative of actual business expenditures, that decision also explicitly rejects the use of gross earnings as a method of determining an injured worker's annual earning capacity. Moreover, in this case there is no reason to conclude that any of the business expense deductions shown on the McAllisters' tax returns were not in fact indicative of actual business expenditures. Indeed, the only expense deduction that was not directly derived from actual out-of-pocket expenditures is the deduction for depreciation, and it appears likely that even that deduction was the result of real out-of-pocket expenditures for tools and equipment during 2001 or earlier years. Hence, it has been concluded that Mr. McAllister's average weekly wage should be based on his net income, rather than on his gross income. See *Wayland v. Moore Dry Dock Co.*, 25 BRBS 53, 59 n.3 (1991) (distinguishing the holding in *Rountree* and holding that it is within the discretion of an Administrative Law Judge to base a self-employed claimant's average weekly wage on his net earnings).

However, it has also been concluded that it would not be appropriate to base Mr. McAllister's average weekly wage solely on his net earnings during the year 2001. As pointed out by the claimant, Mr. McAllister's earnings during 2001 were substantially lower than they were during any of the previous five years. Moreover, year 2001 earnings were unusually low for many businesses because of the terrorist attacks of September 11, 2001 and, in this case, Mr. McAllister's earnings may have also been reduced by the onset of the symptoms of his mesothelioma. CX 10 (chart notes indicating that Mr. McAllister reported that he had been experiencing chest pains for seven months prior to his April 2002 examination by Dr. Zbinden). Hence, it has been determined that an average of Mr. McAllister's net profits during his last three

calendar years of self-employment provides the most reasonable representation of his true earning capacity. As previously noted, the net profits during these years were \$31,423 (2001), \$73,695 (2000), and \$95,917 (1999). Thus, the average net profit during these three years was \$67,011.66. Therefore, pursuant to the provisions of subsection 10(d)(1) of the Act, it has been determined that the appropriate average weekly wage in this case is \$1,288.68.

ORDER

1. Beginning on September 22, 2002, and for so long as the claimant remains unmarried, Lockheed Shipbuilding and Wausau Insurance Company shall pay the claimant, Karen McAllister, widow's benefits in the amount of \$644.34 per week plus such annual adjustments as are required by the provisions of subsection 10(f) of the Longshore Act. If the claimant remarries, such payments will terminate after two years.

2. Lockheed Shipbuilding and Wausau Insurance Company shall pay interest on each unpaid installment of compensation from the date such compensation became due at the rates to be determined by the District Director.

3. The District Director shall make all calculations necessary to carry out this order.

4. Counsel for the claimant shall within 20 days of service of this order submit a fully supported application for costs and fees to the counsel for Lockheed Shipbuilding and Wausau Insurance Company. Within 15 days thereafter, the counsel for Lockheed Shipbuilding and Wausau Insurance Company shall provide the claimant's counsel with a written list specifically describing each and every objection to the proposed fees and costs. Within 15 days after receipt of such objections, the claimant's counsel shall verbally discuss each of the objections with counsel for Lockheed Shipbuilding and Wausau Insurance Company. If the two counsel thereupon agree on an appropriate award of fees and costs they shall file written notification within ten days and shall also provide a statement of the agreed-upon fees and costs. Alternatively, if the counsel disagree on any of the proposed fees and costs, the claimant's counsel shall within 15 days file a fully documented petition listing those fees and costs which are in dispute and set forth a statement of his position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by the counsel for Lockheed Shipbuilding and Wausau Insurance Company. The counsel for Lockheed Shipbuilding and Wausau Insurance Company shall have 15 days from the date of service of such application in which to respond. No reply to that reply will be permitted unless specifically authorized in advance by the undersigned administrative law judge.

A

Paul A. Mapes
Administrative Law Judge

