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Issue Date: 30 August 2007

CASE NOS.: 2007-LHC-00109; 2007-LHC-00612

OWCP NOS.: 01-164096; 05-123752

In the Matter of

M.S.[1]
Claimants

v.

**BATH IRON WORKS CORPORATION/
ONE BEACON INSURANCE COMPANY,
LIBERTY MUTUAL INSURANCE COMPANY,
AIG CLAIM SERVICE/BIRMINGHAM FIRE
INSURANCE COMPANY**
Employer / Insurance Carriers

and

BAE SYSTEMS / NORFOLK SHIP REPAIR
Employer

and

**DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS**
Party-in-Interest

Appearances:

G. William Higbee, Esquire (McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.), Topsham, Maine for the Claimants

Stephen Hessert, Esquire (Norman, Hanson & DeTroy), Portland, Maine for Bath Iron Works Corporation

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[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

Richard van Antwerp, Esquire (Robinson, Kreiger & McCallum), Portland, Maine for One Beacon Insurance Company

Dana Gillespie Herzer, Esquire (Law Offices of Frederick C. Moore), Portland, Maine for Liberty Mutual Insurance Company

Nelson J. Larkins, Esquire (Preti Flaherty Beliveau & Pachios), Portland, Maine for AIG Claim Service / Birmingham Fire Insurance Company

Kevin M. Gillis, Esquire (Troubh Heisler), Portland, Maine for BAE Systems Norfolk Ship Repair/F.A. Richard & Associates

Kathryn A. Joyce (Howard M. Radzely, Solicitor of Labor, Frank V. McDermott, Jr., Regional Solicitor), Boston, Massachusetts, for the Director, OWCP

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

B. S. (referred to hereinafter as the "Decedent" or collectively with his widow as "the Claimants") served in the United States Navy and worked as a machinist's mate from 1955 to 1964. He worked at BAE Systems / Norfolk Ship Repair ("BAE") as a machinist from October of 1965 to March of 1972. The Decedent remained in Virginia from 1972 to 1978, working first as a self-employed oil dealer and then for Allied Diesel & Hydraulics. He moved to Maine in 1978 and began working at Bath Iron Works Corporation ("BIW") as an outside machinist in November of 1978. The Decedent was diagnosed with lung cancer on March 17, 2005, and he retired from BIW on October 25, 2005 as a result of his lung cancer. He passed away on August 15, 2006 at the age of 68.

Shortly before his death, the Decedent filed a claim for workers' compensation benefits against BIW under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"), alleging that his lung cancer was caused by occupational exposure to asbestos. His surviving widow (the "Widow" or collectively with the Decedent, "the Claimants"), filed claims for funeral expenses and widow's benefits against BAE and BIW, alleging that the Decedent's lung cancer was caused by occupational exposure to asbestos. The parties were unable to resolve the claims through informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and the District Director, OWCP transferred the claims to the Office of Administrative Law Judges ("OALJ") where they were consolidated for formal hearing. 33 U.S.C. § 919(d); 20 C.F.R. § 702.345(b).

Pursuant to notice, a hearing was conducted in Portland, Maine on March 20, 2007, at which time all interested parties were afforded an opportunity to present evidence and argument. The Widow appeared at the hearing represented by counsel, and appearances were made on behalf of BAE, BIW, and three insurance companies which provided workers' compensation liability insurance to BIW during portions of the Decedent's employment -- Liberty Mutual Insurance Company ("Liberty Mutual"), One Beacon Insurance Company ("One Beacon") and AIG Claim Service/Birmingham Fire Insurance Company ("AIG") The Director, OWCP did not appear at the hearing.[2] The Widow testified at the hearing, and documentary evidence was admitted without objection as Administrative Law Judge Exhibits ("ALJX") 1-20, Claimant's Exhibits ("CX") 1-13, AIG Exhibits ("AX") 1-6, and BIW Exhibits ("EX") 1-56. Hearing Transcript ("TR") at 7-8, 10-11. The parties also offered written stipulations which were admitted as Joint Exhibit ("JX") 1. TR at 8-9. At the close of the hearing, the record was held open for BIW to offer deposition testimony of William A. Lowell, II which was scheduled to be taken on March 26, 2007. By letter dated April 11, 2007, BIW advised that due to scheduling conflicts, Lowell's deposition was rescheduled for April 30, 2007. BIW offered Lowell's deposition by letter dated June 18, 2007, and the deposition has been admitted into evidence as EX 57. All parties filed post-hearing briefs, and the record is now closed. Issuance of this decision has been expedited at the request of the Claimants' counsel based on financial hardship.

After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant's are entitled to an award of disability and death benefits as well as attorney's fees and that BAE is the liable party for payment of these benefits. My findings of fact and conclusions of law are set forth below.

II. Benefits Claimed

The Claimants seek awards of: (1) permanent partial disability compensation at 100% from October 25, 2005 through August 14, 2006 under Section 8 of the LHWCA; (2) funeral expenses and widow's benefits commencing on August 15, 2006 under Section 9 of the LHWCA; (3) medical expenses under Section 7 of the LHWCA; and (4) attorney's fees under Section 28 of the LHWCA. Claimants' Brief at 1.

III. Stipulations and Issues Presented

The parties stipulated at the hearing that: (1) the LHWCA applies to the claim; (2) the injuries occurred on March 18, 2005 for permanent partial disability and August 15, 2006 for widow's benefits; (3) the injuries arose out of and in the course of the worker's employment with the Employer; (4) there was an employer/employee relationship at the time of the injuries; (5) the

[2] The Director of the OWCP is an interested party as BIW, Liberty Mutual Insurance Company ("Liberty Mutual"), and One Beacon Insurance Company ("One Beacon") applied for liability relief from the Special Fund pursuant to Section 8(f) of the LHWCA. On December 19, 2006, the Director filed a motion to dismiss the requests of BIW, Liberty Mutual, and One Beacon for Special Fund relief under Section 8(f). In a letter dated January 23, 2007, AIG Claim Service/Birmingham Fire Insurance Company ("AIG") requested liability relief from the Special Fund pursuant to Section 8(f) as well. The undersigned ALJ denied the Director's motion to dismiss the application for Special Fund relief on January 26, 2007. BAE has not sought liability relief pursuant to Section 8(f). *See* Administrative Law Judge Exhibit 19 (BAE Pre-trial Statement).

Employer was timely notified of the injuries; (6) the claim was timely filed; (7) the Notice of Controversion was timely filed; (8) an informal conference was held on August 24, 2006; (9) the Decedent's average weekly wage at the time of the injury was $796.37; (10) BIW was self-insured for workers' compensation liability under the LHWCA prior to December 31, 1962 and after September 1, 1988; (11) One Beacon insured BIW for workers' compensation liability from January 1, 1963 through February 28, 1981; (12) Liberty Mutual provided coverage from March 1, 1981 through August 31, 1986; (13) AIG provided coverage from September 1, 1986 through August 31, 1988; (14) BAE was self-insured from October of 1965 through March of 1972; and (15) the Decedent had permanent partial disability at 100% from October 25, 2005 through August 14, 2006. JX 1; TR at 6-7, 8-9. The parties' stipulations are fully supported by the evidence of record, and I adopt them as my findings.

The issues presented for adjudication are: (1) the identity of the responsible carrier or self-insured employer; (2) whether the party found responsible is entitled to liability relief from the Special Fund pursuant to Section 8(f) of the LHWCA; and (3) third party recovery credit under Section 33 of the LHWCA. JX 1; TR at 8-9.

IV. Findings of Fact and Conclusions of Law

The medical evidence introduced in this case establishes that the Decedent died of lung cancer and that his exposure to asbestos was a significant contributing factor in the development of his terminal lung cancer. CX 2; CX 13 at 153-156. None of the parties has contested whether the Decedent's occupational exposure to asbestos resulted in his death, and they have stipulated that the Decedent was entitled to permanent partial disability compensation based on a 100 percent impairment from October 25, 2005 until his death on August 14, 2006. There also is no dispute that the Widow is entitled to death benefits as she testified without contradiction at the hearing that she was married to the Decedent at the time of his death and is his only surviving dependent. TR at 16; CX 9 at 3-4.

A. Responsible Party

Under the LHWCA, "the carrier which last insured the liable employer during the period in which the claimant was exposed to the injurious stimuli and prior to the date the claimant became disabled by an occupational disease arising naturally out of his employment and exposure is responsible for discharging the duties and obligations of the liable employer." *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 756 (1st Cir. 1992). The evidence of the Decedent's exposure to asbestos in the course of his employment at BAE and BIW consists of testimony from the Decedent and Mr. Lowell which is conflicting.

The Decedent's Testimony[3]

The Decedent testified at a deposition on May 22, 2006. CX 9.[4] He served in the U.S. Navy from 1955 through 1964 aboard a variety of ships. *Id.* at 4-5.[5] He testified that he was exposed to asbestos while working as a machinist's mate in the Navy where he mixed asbestos powder with water in a barrel to make "lagging pads" or insulation. *Id.* at 6-8. He also removed asbestos lagging pads from equipment that he worked on and testified that this was a dusty process and that he is sure that he inhaled asbestos dust because he wore no breathing protection. *Id.* at 7.

From October of 1965 to March of 1972, the Decedent was employed as an outside machinist at BAE. *Id.* at 8. He testified that he spent about 80 to 95 percent of his time at BAE in the engine and fire rooms of ships around pipe coverers who removed asbestos "lagging" from flanges and valves. *Id.* at 9. He also occasionally removed asbestos himself when there were no pipe coverers around. *Id.* at 10. He testified that the removal of asbestos was a dusty process, that he wore no breathing protection while at BAE and that he was constantly around machinery covered with asbestos during the 14 years that he worked for BAE. *Id.* at 9-10.

The Decedent went to work for BIW as an outside machinist in November of 1978. CX 9 at 11. He testified that during the first few years of his employment at BIW, he worked about 80-85 percent of the time on board ships and exclusively on overhauls. *Id.* at 12, 20, 28. His job on these overhauls involved installing and testing pumps, and he stated that he removed equipment that was covered with asbestos. *Id.* at 12-13. He testified that he sometimes had to remove asbestos that would get on machinery, and he felt that he was exposed to asbestos especially when working below boiler areas where lagging was being removed from pipes, causing dust to filter down to the area where he was working. *Id.* at 13-14. He could not recall whether he wore a respirator at BIW during the late 1970s but testified that he thought that he first began wearing a respirator "somewhere around 1980s [sic]" and that he worked in areas aboard ships without a respirator in the 1970s. *Id.* at 14-15. He also testified that at some point during his tenure at BIW, overhaul crews were used to remove asbestos from areas that were sealed off from the general work population which was not allowed into an area until the removal had been completed. *Id.* at 15. He later placed this development around 1980. *Id.* at 32, 37. However, he was skeptical of the effectiveness of this process and said that he was sure that there were occasions when he was exposed to asbestos despite BIW's protective efforts. *Id.* at 15, 22. He explained that he remembered that even after the asbestos removal process had been completed, he was still able to see asbestos in the air for about four years after BIW began using specialized personnel to remove asbestos. *Id.* at 23. When asked if he could recall when

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[3] The Decedent also discussed his work history in a two-page affidavit dated May 4, 2006 which was admitted without objection as CX 8. Since the Decedent was questioned in substantially greater detail less than three weeks later at his deposition, primary reliance has been placed on his deposition testimony.

[4] BAE was not represented at the Decedent's deposition but raised no objection to the admission of the deposition testimony.

[5] Citations to deposition transcripts herein use the original transcript page numbers rather that the "Bates Stamp" page numbers added to the bottom right corner.

his last exposure to asbestos occurred aboard a ship, the Decedent responded that it was when he worked on "the ship with the P-5 boiler"[6] where he removed "lagging and stuff to get in to take out the super heater on a boiler that had to go out through the bottom of the ship." *Id.* at 24. He elaborated that boilermakers were working nearby and had to remove asbestos in order to get the "super heater" out of the ship. *Id.* at 24-25. He was referred to BIW's overhaul records and testified that this asbestos exposure occurred aboard the USS Brumby between March 1, 1981 and December 18, 1981. *Id.* at 25.[7] The Decedent also recalled working on the overhaul of the USS Capodanno where he "possibly" could have been exposed to asbestos, but he added that it was "more than likely" that he wore a respirator while working aboard the Capodanno. *Id.* at 26.[8] However, he stated that he did not wear a respirator or protective equipment when he worked on the overhaul of the Brumby. *Id.* at 26-27.[9]

On cross-examination by Liberty Mutual's attorney, the Decedent stated that he only wore a respirator "[w]hen they were taking out asbestos." CX 9 at 27. Regarding his testimony about observing asbestos dust in the air while working on overhauls, he conceded that if there was another insulation such as fiberglass present, he would not have been able to discern the difference because "[f]iberglass and asbestos look pretty much the same." *Id.* at 28. He reiterated his belief that asbestos dust remained after it had supposedly been removed by the specialized crews, adding that "we had to sweep it out with our hands," but he agreed that he could not be certain whether this dust was from fiberglass or asbestos insulation. *Id.* at 29. He did insist that he had personal knowledge that he was exposed to asbestos "when they were removing lagging from boilers" because he was certain that the lagging was asbestos, but he could not recall the last time this occurred. *Id.* He then stated that this occurred aboard the USS Brumby during removal of the boiler and said that he was "pretty sure" that he was exposed to asbestos. *Id.* at 30. He testified that he could not remember whether he was wearing a respirator when this exposure occurred although he always had a respirator with him. *Id.* He then agreed that he could not be certain whether he was exposed to fiberglass or asbestos insulation aboard the Brumby. *Id.* at 31.

The Decedent testified that he worked for two years from March of 1984 to March of 1986 at BIW's Portland Dry Dock where he worked on the exterior of ships on shafts, screws and propellers. CX 9 at 32-34. When he transferred back to BIW's main shipyard, the Decedent worked on the overhaul of Coast Guard ship. After the overhaul of the Coast Guard ship was completed he worked on either new ship construction or in the outside machine shop on a lathe. *Id.* at 35. He agreed that he had never reported an instance of accidental exposure to asbestos

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[6] Mr. Lowell testified that the Claimant was referring to "pressure-fired" pr "P-fired" boilers and that "P-5" in the transcript of his deposition is the result of a transcription error by the reporter. EX 57 at 58-59.

[7] BIW's overhaul records, which are in evidence as EX 32, show that the USS Brumby was at BIW for regular overhauls from January 31, 1977 to April 13, 1978 and from March 1, 1981 to December 18, 1981. The Decedent testified that his exposure to asbestos in connection with the removal of the super heater occurred during this second overhaul. CX 9 at 25. He also testified that he had books at home which contained the hull numbers of all vessels that he worked on at BIW. *Id.* at 21.

[8] The USS Capodanno was at BIW for a regular overhaul from August 12, 1983 to April 8, 1984. EX 32.

[9] BIW's objections to the questions posed to the Decedent regarding his work on the USS Capodanno (relevance) and the USS Brumby (speculation) are overruled.

after 1980 and that he was not aware of any situation when air testing was done and the presence of asbestos was confirmed. *Id.* at 38.

On redirect examination, the Decedent testified that the USS Brumby and USS Capodanno were older ships and that the material that he described on the boilers was older. CX 9 at 40. He said that he knew that some of the material was asbestos because it "looked like cement" and just like the type of asbestos insulation that he has installed while serving in the Navy. *Id.* at 40-41.

Mr. Lowell's Testimony

William A. Lowell, II testified at a post-hearing deposition on April 30, 2007. EX 57. He is a graduate of the Maine Maritime Academy with a degree in marine engineering. *Id.* at 3. He has held a chief engineer's license since 1964 and was an officer in the Naval Reserve. *Id.* He worked at BIW for 33 1/2 years beginning in 1962 and was BIW's chief operating engineer at the Bath, Maine shipyard from 1968 until 1989 when he was responsible for all new construction as well as overhauls and conversions. *Id.* at 3-4, 48-49. Since his retirement from BIW in 1995, he has done consulting work, primarily as a witness in asbestos litigation, both at the request of defense and plaintiff attorneys. *Id.* at 4, 57-58. He testified that he is very familiar with how asbestos was purchased, used and discontinued at BIW. *Id.* at 5.

Mr. Lowell testified that he knew the Decedent and his parents and that he rode to high school on the same bus with the Decedent and his brother. EX 57 at 6. He said that he saw the Decedent "a little" when he was working at BIW, usually when he was coming through the shipyard at the start of his shift. *Id.* at 54. In preparation for his deposition, Mr. Lowell reviewed the Decedent's personnel records, time cards and diaries as well as the Decedent's deposition testimony. *Id.* at 6-7. He testified that the Decedent's diaries provided no information that assisted him in determining whether the Decedent was exposed to asbestos while working at BIW. *Id.* at 20.

Mr. Lowell testified that asbestos insulation was used extensively aboard steamships when he went to work at BIW in 1962 -- on machinery, boilers, turbines, sump pumps, valves and steam piping. EX 57 at 10. As a result a study by the Harvard Medical School in 1965, he said that it became apparent to BIW management that asbestos posed a health problem which prompted BIW to embark on a program in 1966 to eliminate use of the material. *Id.* at 10-11. Initially, this was accomplished by a transition to a lower asbestos-content pipe covering, and in 1973 BIW received a five-ship supply of a non-asbestos, calcium silicate insulation known as "Kalo" which was used on five tankers. *Id.* at 11.[10] He further testified that additional incentives to eliminate asbestos-based products came in 1972 from the OSHA (the Occupational Safety and Healty Administration) and in 1975 when the Navy directed that asbestos pipe covering, cloth and cements could no longer be used on either new ship construction or overhauls. *Id.* By the mid to late 1970s, Mr. Lowell asserted that BIW was taking "all the right precautions to keep people protected." *Id.* at 12. He stated that no asbestos was used in new ship

[10] When asked at his deposition to describe the insulation material aboard the USS Brumby that he thought to be asbestos, the Decedent stated that "it looked like Kalo" and "looked like cement" which he knew to be asbestos. CX 9 at 40.

construction after 1974 with the possible exception of some gaskets which were primarily put in by the pipe shop. *Id.* at 13-14. He acknowledged that asbestos continued to be aboard ships undergoing overhaul after 1975 but stated that by 1978 BIW had a rigid program in place where any asbestos was identified for removal from machinery spaces was removed by pipe coverers and cleaners who wore protective suits and respirators and who worked under the monitoring of laboratory personnel before any other mechanics were permitted to work in the area. *Id.* at 14-16. He added that the asbestos removal program used tenting and "negative vacuum" in some areas to prevent escape of asbestos dust and that a guard was posted to keep unauthorized personnel out of the asbestos removal area. *Id.* at 16. He also stated that as an outside machinist at BIW, the Decedent definitely would not have worked inside of a restricted area that was undergoing asbestos removal. *Id.* at 16-17.

With regard to the Decedent's past work history and exposure to asbestos, Mr. Lowell testified that he was familiar with the ships that the Decedent served aboard in the Navy and that it was his opinion that, as a machinist mate, the Decedent undoubtedly had exposure to asbestos since he spent his working time in asbestos-insulated machinery spaces for nine years. EX 57 at 17-19. He was also testified that he had been to the BAE shipyard in Norfolk and that it was his opinion that the Decedent was exposed to asbestos while working there because "[c]ertainly, the years between 1964 and 1970 are fertile years for him to get exposure and perhaps even beyond 1970." *Id.* at 19-20.

Mr. Lowell next addressed the Decedent's work at BIW and concluded from reviewing the timecards which show the hull numbers of the ships that the Decedent worked on that the Decedent did a lot of conversion work until 1987. EX 57 at 22-23, 26-27, 45.[11] Based on his knowledge of the Decedent's duties and his review of the records, it was his opinion that the Decedent was not exposed to asbestos at BIW. *Id.* at 23-24. He acknowledged that it was possible that an outside machinist could have handled an asbestos gasket, but he discounted the likelihood of the Decedent encountering an asbestos gasket by pointing out that gaskets were primarily the responsibility of the pipe shop and that the vast majority of gaskets by the 1970s were made of non-asbestos material. *Id.* at 25. Regarding the Decedent's testimony that he felt that he had been exposed to asbestos dust while working aboard the USS Brumby, Mr. Lowell stated that the records showed that he had worked on three ships with pressure-fired boilers – the McDonnell, the Brumby and the Page. *Id.* at 28. He further testified that records (EX 31) show that the insulation material used on the boilers in those vessels was not asbestos but mineral wool cement and felt. *Id.* at 29-33. He also stated that he understood how the Decedent may have believed that he was exposed to asbestos when he worked below the boilers on these ships:

> And in all deference to [the Decedent], when people saw white flakes or bits of pipe covering in the late '70s and particularly the early '80s, a lot of people would assume it was asbestos when, in fact, it wasn't. And I would tell you that I could not, certainly, tell the difference between asbestos and non-asbestos pipe covering and particles; nor could our lab people who had considerable training. They would have to take this down and do a spectrographic analysis to determine whether it was asbestos-containing product or whether it wasn't.

[11] Mr. Lowell used the terms "conversion" and "overhaul" interchangeably to distinguish that type of work from new ship construction.

Id. at 30-31. As for other possible exposures to asbestos, Mr. Lowell stated that the records showed that the Decedent first worked on a conversion in January of 1979 and that he worked on four conversions that year – the Connole, the Pharris, the Sims and the Conyngham. *Id.* at 33-34. However, he reiterated that by 1979 BIW had instituted the asbestos removal program where asbestos would be removed under very strict controls prior to the commencement of any other work. *Id.* at 34-35. He then reviewed the other conversions that the Decedent worked on and pointed out that the ships would have undergone prior overhauls since 1975 in which any asbestos that was removed was replaced with non-asbestos materials and that the types of equipment that the Decedent worked on, such as feed pumps and blowers, are addressed in every overhaul and would have had any asbestos covering removed and replaced with non-asbestos material before the conversion work that the Decedent performed beginning in 1979. *Id.* at 36-42.

On cross-examination by BAE's attorney, Mr. Lowell agreed that all asbestos would not have been removed from the ships that the Decedent worked on for BIW. EX 57 at 53-54. Indeed, he stated that many navy ships are decommissioned with much of the original asbestos intact. *Id.* at 54. He further agreed that while the pressure-fired boiler ships such as the Brumby did not have asbestos insulation, there was asbestos insulation in many other places such as the main turbines, auxiliary turbines, pumps and steam pipes. *Id.* at 55. He also stated that asbestos-based "portable insulating pads" on machinery would have been removed during prior overhauls. *Id.* He agreed that the Decedent would have worked in the boiler spaces during overhauls and that some asbestos would have been left aboard the ships on which the Decedent worked. *Id.* at 56, 60. However, he explained that any remaining asbestos was required to be "encapsulated" so that it would not pose a danger to anyone working nearby. *Id.* at 60-61.

The uncontradicted evidence clearly establishes that the Decedent had significant asbestos exposure while serving in the Navy and while employed in the BAE shipyard. The Decedent also believed that he had been exposed to asbestos while working on overhauls at BIW, and he cited three specific examples: (1) removing pumps that were covered with asbestos; (2) removing asbestos that would get on machinery; and (3) working below boiler areas where lagging was being removed from pipes, causing dust to filter down to the area where he was working. However, Mr. Lowell convincingly testified that any equipment that the Decedent worked on would have had asbestos insulation removed during prior overhauls and that the pressure-fired boiler ships never had asbestos insulation on their boilers. In addition, the Decedent and Mr. Lowell both agreed that they could not visually distinguish between asbestos-based and non-asbestos based insulating materials used aboard ships. It thus appears that the Decedent's belief that he was exposed to asbestos at BIW, though sincere, was mistaken. While the possibility that the Decedent was exposed to injurious levels of asbestos at BIW cannot be ruled out due to the admitted presence of asbestos gaskets and "encapsulated" asbestos on some ships after 1979, in the absence of any testimony that the Decedent worked with gaskets or was present when encapsulated insulation was breached, I find that a preponderance of the credible evidence does not establish that the Decedent was exposed to harmful asbestos at BIW. Consequently, I conclude that BAE was the last employer to expose the Decedent to injurious asbestos and is, therefore, the responsible party for any benefits awarded under the LHWCA.

B. Benefits Awarded

1. Disability Compensation

Based on the parties' stipulation that the Decedent was under a 100 percent permanent partial disability from October 25, 2005 through August 14, 2006, I find that he is entitled to disability compensation at a rate equal to two-thirds of the stipulated average weekly wage of $796.37 which is $530.91 per week. Prejudgment interest shall be added to the Claimant's compensation award; *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); and the appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

2. Death Benefits

As a surviving spouse who was married to and living with the Decedent at the time of his work-related death, the Widow is entitled to the death benefits and funeral expenses provided by section 9 of the LHWCA. *See Griffin v. Bath Iron Works Corp.*, 25 BRBS 26, 29 (1991). The Widow introduced receipts showing that she paid a total of $7,015.00 for the Decedent's funeral. CX 12. Pursuant to section 9(a) of the LHWCA, which allows for funeral expense reimbursement up to a maximum of $3,000.00, I find that she is entitled to an award of $3,000.00 in funeral expenses. I further conclude that the Widow is entitled to survivor's compensation pursuant to section 9(b) of the LHWCA at the rate of 50 percent of the Decedent's average weekly wages which produces a base compensation rate of $398.19 per week. This base compensation rate is subject to the annual increases provided for by section 10(f) of the LHWCA. *Donovan v Newport News Shipbuilding and Dry Dock Co*., 31 BRBS 2, 3-5 (1997). Interest will also be added to all death benefits including the funeral expenses. *Adams v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 78, 84 (1989).

3. Medical Care

As the responsible party, BAE is liable for all medical expenses reasonably and necessarily incurred by the Decedent in connection with his work-related lung cancer. *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001); *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 59 (1989). In addition, BAE will be ordered to reimburse the Decedent's estate for any payments already made for medical bills reasonably and necessarily incurred in connection with his work-related lung cancer.

4. Attorney's Fees

Having successfully established their right to compensation and medical benefits through the services of an attorney, the Claimants are entitled to an award of attorney's fees under section 28 of the LHWCA. *See Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). Pursuant to the LHWCA's implementing regulations, a party seeking attorney's fees has the burden to submit a fee petition which is supported by a complete statement of the extent and character of the necessary work done. *Parks v. Newport News Shipbuilding & Dry Dock Co*., 32

BRBS 90, 96 (1998) (*Parks*); 20 C.F.R. § 702.132(a). A fee application meets the regulatory criteria by clearly spelling out the date of service, the service provided, and by whom. 20 C.F.R. § 702.132(a). The regulation further requires that "[a]ny fee approved shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the issues involved, and the amount of benefits awarded" to the claimant. *Id.* The party seeking an award of fees under the fee shifting provisions of a statute such as the LHWCA bears the burden of establishing the necessity of claimed attorney services. *Hensley v Eckerhart*, 461 U.S. 424, 437 (1983); *Roach v. New York Protective Covering Co*., 16 BRBS 114, 116 (1984). *See also Director v. Greenwich Colleries*, 512 U.S. 267, 270 (1994). The proper test for determining whether an attorney's work is necessary is whether the work could reasonably be regarded as necessary to establish entitlement at the time that it was performed. O'*Kelley v. Dep't of Army*, 34 BRBS 39, 44 (2000); *Cabral v. General Dynamics Corp.*, 13 BRBS 97, 100 (1981).

The Claimants' attorney filed an itemized application for attorney's fees and costs totaling $13,437.83. In its post-hearing brief, BAE asserts that the claimed fees are based on professional services at an hourly rate of $220.00 that is "far in excess of the hourly rates normally seen for workers' compensation work in Maine." BAE Brief at 6. BAE also objects to several specific time charges as excessive or unnecessary, and it proposes that reasonable fees and costs would be $12,000.00. *Id.* at 7-8. The Claimant's attorney has not responded to BAE's objections.

Hourly Rate

BAE is incorrect in its assertion that the $220.00 hourly rate billed by the Claimants' attorney for professional services is well above the customary rate approved for legal services under the LHWCA in Maine. *See e.g., Parks v. Naval Personnel Command/MWR*, BRB No. 04-0179 (Oct. 27, 2004) (unpublished), slip op. at 13 (approving fees to another attorney in the same firm based on an hourly billing rate of $220.00). Accordingly, this objection is overruled.

Specific Objections

BAE objects that several entries for preparing or reviewing correspondence and pleadings are excessive. Most of the objected-to entries are for .20 hours (12 minutes) to review correspondence or pleadings filed by opposing counsel.[12] In my view, 12 minutes by an experienced attorney with a reputation for efficiency and integrity to review such correspondence is neither unreasonably excessive nor unnecessary. *See generally Biggs v. Ingalls Shipbuilding, Inc*., 27 BRBS 237, 243 (1993) (holding that ALJ did not abuse discretion if approving fee petition that billed in quarter-hour increments). Therefore, these objections are overruled with two exceptions -- the .90 hours billed on 5/8/06 for letters to medical providers and the .80 hours billed on 9/5/06 for letters to medical providers. BAE asserts that these appear to be routine requests for records that could have been handled by a secretary or paralegal. The Benefits Review Board ("BRB") has held that "time spent on clerical duties by an attorney is not

[12] Two of the challenged entries are for more than .20 hours: .40 hours on 7/18/06 to review "significant" medical records provided by opposing counsel and .30 hours on 9/14/06 to review correspondence and pleadings from BAE. As neither of these entries appear to involve "routine correspondence, I find that the charged time is not excessive.

compensable and cannot be included as part of the attorney's reported number of hours." *Staffile v. Int'l Terminal Operating Co., Inc.*, 12 BRBS 895, 898 (1980) (incorporating guidelines set forth in *Marcum v. Director, OWCP*, 12 BRBS 355, 360 (1980) (black lung case)). Typical clerical duties include organizing and copying exhibits. *Quintana v. Crescent Wharf & Whse. Co.*, 18 BRBS 254, 256 (1986); *Staffile*, 12 BRBS at 898. Absent any explanation from the Claimants' attorney, I am constrained to agree with BAE that these letters appear to have been routine requests for medical records that should not have been billed at an attorney's rate. While some attorney involvement in identifying the various medical providers would seem reasonable, I conclude that the total of 1.7 hours is not. Therefore, the objection is sustained, and a total of 1.4 hours billed for these services ($308.00) is disallowed.

BAE also objects that several entries for reviewing correspondence and pleadings relating to the requests for liability relief under section 8(f) are unnecessary. It is well-settled law that a claimant has no standing with regard to the applicability of section 8(f). *See Henry v. George Hyman Const. Co.*, 749 F.2d 65, 69-70 (D.C. Cir. 1984); *Coats v. Newport New Shipbuilding & Dry Dock Co.*, 21 BRBS 77, 79 n.2 (1988). However, it would be grossly negligent for an attorney representing a claimant not to at least examine 8(f) documents filed by another party as they typically refer to medical records and discuss disability issues that are the concern of a claimant. I have reviewed the six challenged charges, which range between .10 and .30 hours and total 1.2 hours, and conclude that they are not unreasonable. Therefore, the objection is overruled.

In conclusion, I find that the fee application complies with the requirements of 20 C.F.R. § 702.132(a). Based on the foregoing findings, a total of $308.00 in claimed fees has been disallowed. Accordingly, I conclude that fees and costs in the amount of $13,129.83 are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. BAE will be ordered to pay this amount.

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

(1) BAE Systems / Norfolk Ship Repair shall pay to the Decedent's estate disability compensation at the rate of $530.91 per week from October 25, 2005 through August 14, 2006 plus interest on all past due compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (2003), computed from the date each payment was originally due until paid;

(2) BAE Systems / Norfolk Ship Repair shall pay to the Widow survivor's compensation pursuant to 33 U.S.C. § 909(b) at the base rate of $398.19 per week, with the applicable annual adjustments provided in 33 U.S.C. § 910(f), commencing August 16, 2006 and continuing until death or remarriage, plus interest on all past due compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (2003), computed from the date each payment was originally due until paid;

(3) BAE Systems / Norfolk Ship Repair shall pay to the Widow funeral expenses in the statutory maximum amount of $3,000.00, plus interest on all such expenses at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (2003), computed from the date each expense was originally due until paid;

(4) BAE Systems / Norfolk Ship Repair is responsible for reasonable and necessary medical expenses incurred by the Decedent for treatment of his work-related lung cancer, and BAE Systems / Norfolk Ship Repair shall reimburse the Decedent's estate for any payments already made for medical bills reasonably and necessarily incurred in connection with the Decedent's work-related lung cancer;

(5) BAE Systems / Norfolk Ship Repair shall pay attorney's fees and costs to the Claimant's attorney, G. William Higbee, in the amount of $13,129.83; and

(6) All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts