

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 29 September 2010**

**CASE NO.: 2009-LHC-01654**

**OWCP NO.: 07-180956**

**IN THE MATTER OF**

**SHANNON FREDERICK**

**Claimant and Surviving Widow  
of Blake Frederick  
v.**

**M-I, LLC,  
Employer**

**and**

**ACE AMERICAN INSURANCE COMPANY  
Carrier**

**APPEARANCES**

Frank Lemoine, Esq.  
On behalf of Survivor Claimant

Kenneth Givens, Esq.  
On behalf of Employer/Carrier

**BEFORE:**

Clement J. Kennington  
Administrative Law Judge

**DECISION AND ORDER**

This is a claim for death benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Shannon Frederick (Claimant and Surviving Widow), by Claimant and legal representative, Julie Hebert, for and on behalf of Decedent Blake Frederick's minor child Kailyn Frederick and by Davis and Willie Mae Frederick (parents of Decedent Blake Frederick) against M-I, LLC (Employer) and ACE

American Insurance Company (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on May 3, 2010, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their respective positions. Claimant and surviving widow, Shannon Frederick (Ms. Frederick) and physician, Dr. Emil Laga testified on behalf of claimants and introduced 28 exhibits which were admitted including decedent's obituary, death and marriage certificates; Kailyn's support judgment and birth certificate; decedent and widow's bank statement; correspondence from Carrier re claims; Employer accident report; OSHA investigation report; photographs of Employer facility; lime, diesel and VG Supreme products handled by Decedent; Mouton Cove Fire Department emergency response report; Acadian Ambulance report; medical reports of Abbeville General Hospital, Lafayette General Hospital, Lafayette General Coumadin Clinic, Abrom Kaplan Hospital; ARUP laboratories reports; Dr. Emil Laga preliminary and final autopsy reports; Wikipedia and E medicine Medscape.com articles.<sup>1</sup>

Employer introduced 16 exhibits which were admitted including Abbeville General and Lafayette General records, depositions and medical records of Drs. Gary Guidry, Michael Cain, William Newman, Louis Hamer; ATC environmental report, deposition of David N. Watts, report of Dr. Emil Laga and sample mask worn by decedent.

Post hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. On November 20, 2006, while in the course and scope of his employment with Employer during which an employer/employee relationship existed, Claimant suffered an injury.
2. Employer was advised of the injury on November 20, 2006.
3. Employer filed a notice of controversion on August 22, 2007.
4. An informal conference was held on January 8, 2008.
5. Decedent's average weekly wage prior to his death was \$938.07.<sup>1</sup>

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<sup>1</sup> The Parties stipulated to Decedent's average weekly wage after the conclusion of the hearing.

6. Employer paid Decedent temporary total disability from November 21, 2006 to December 12, 2006 and medical benefits as well.
7. The parties agree the location of the accident or situs of the injury is a maritime terminal and dock facility located immediately adjacent to the Intracoastal Waterway in Intracoastal City, Vermillion Parish, and Louisiana. At this location transport barges and boats are moored, loaded and unloaded. Employees of Employer load and unload such vessels with drilling fluids and dry chemicals which are used in exploration/drilling for oil and natural gas and shipped by water transport to and from inland and off shore drilling sites located over and upon navigable waters.

## **II. ISSUES**

The following unresolved issues were presented by the parties:

1. Status: whether decedent as a “liquid mud man” for Employer spent a sufficient portion of his regular work duties in the loading and unloading of drilling fluids to and from vessels moored at Employer’s dock facility so as confer upon him the requisite status for coverage under the Act.
2. Causation: whether Decedent’s injury of November 20, 2006, caused or in any way contributed to his subsequent illness, disability and death which occurred 22 days later on December 12, 2006.
3. Attorney’s fees.

## **III. STATEMENT OF THE CASE**

### **A. Chronology:<sup>2</sup>**

Decedent was born on May 26, 1978 and died on December 12, 2006 at Abrom Kaplan Memorial Hospital in Kaplan Louisiana. Decedent was survived by wife Shannon Frederick and an eight year old dependent female, Kailyn Grace Frederick who was born on June 8, 2001. (Tr. 23, 24, CX-1, 3). Decedent married Shannon Frederick on October 31, 2005. (CX-2, p. 1, 2). The death certificate filled out by the coroner on February 26, 2007, based upon an autopsy showed the immediate cause of death to be pulmonary embolus as a consequence of inhalation trauma (lime exposure) with an underlying cause of chronic obstructive pulmonary disease to chemical exposure. (CX-1, p.2)

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<sup>2</sup> The chronology consists of the parties’ stipulation, Decedent’s death certificate and the uncontested testimony of Decedent’s widow.

Prior to Decedent's untimely death he worked for Employer as a "liquid mud man." In this capacity his duties involved mixing barrels of oil based drilling fluids consisting of lime, VG Supreme and fuel oil in large open tanks and loading the fluid by means of hoses onto barges and boats for transport to inland and offshore drilling sites. (ALJX-1).

On November 20, 2006, Decedent began mixing a 2500 barrel order of drilling fluids. To accomplish this task Decedent had to personally handle, cut open and empty 100 separate 50 pound bags of lime and 70 separate 50 pound bags of VG Supreme into large open topped tanks of diesel fuel. Claimant finished mixing almost 1000 barrels of solution when he turned away from a co-worker, Calvin Tarver, removed a N-95 paper mask from his face, bent over, appeared to pass out and fell striking his head on a steel rail. Tarver caught Decedent by the waist, laid him against a pallet of lime. Decedent was unresponsive for about 3 to 4 minutes after which he complained of having difficulty breathing. (ALJX-1; CX-7, pp. 1-3)

Decedent then used his cell phone, called his wife and in a faint, mumbling voice told her he was going to the hospital and then proceeded by ambulance to the Emergency Room of Abbeville General Hospital (Tr. 26). Decedent's wife who worked only a short distance from the hospital arrived at the hospital before the ambulance and when Decedent arrived, noticed him covered from head to toe in a white powder and was on oxygen. (Tr.27). Decedent complained of difficulty breathing and being unable to get the taste of lime out of his mouth. (Tr.28). Previous to the accident on November 20, 2006, Decedent had called his wife and complained about strong wind conditions which prevented him from avoiding exposure to the lime dust. (Tr. 29).

Decedent remained at Abbeville General for 2 days during which he was treated for acute episodes of shortness of breath, diagnosed with pneumonitis and then transferred to Lafayette General on November 22, 2006, for further treatment. (EX-A, p. 97).

At Lafayette General where he remained until November 28, 2006, he was treated by pulmonary specialist, Dr. Gary Guidry, who found evidence of a massive bilateral pulmonary embolus with bilateral pulmonary infiltrates and prescribed Lovenox and Coumadin. (CX-17, 18, 19, p. 4; EX-A, pp. 142, 151). Dr. Guidry's initial opinion or impression was inhalational injury with powdered lime with subsequent hypoxemia felt to be multifactorial secondary to the inflammatory response as well as atelectasis from bed rest. (EX-A, p.109). Upon discharge on November 28, 2006, Dr. Guidry noted 'a strong family history of clotting.' (EX-A, p. 108). On a subsequent office visit with Dr. Michael Cain, Dr. Cain diagnosed massive bilateral pulmonary emboli and suspicious family history for hypercoaguable syndrome. (EX-A, p. 108, 131,132, 136). Deep vein studies were negative (EX-A, p. 135; EX-B, p.4, 26).

On December 12, 2006, he was taken to Abrom Kaplan Memorial Hospital Emergency Room where he was pronounced dead secondary to chemical inhalation. (CX-19, p.5). In response from Case Manager Julie Soileau, Dr. Guidry stated Decedent's death due to pulmonary emboli due to protein S or C deficiency and allegedly had nothing to do with chemical he work with although Dr. Guidry did not review the MSDS literature on lime, premium AG diesel fuel and VG Supreme mixture. (EX-E, p.1 EX-C, p. 17, 18). Dr. Cain and

Dr. William Newman both suspected protein S and C deficiencies but Dr. Caim admitted it was impossible to determine their deficiency due to use of Coumadin. (EX-G, p.2; EX-H, p.1).

### **B. Testimony of Decedent's Wife, Shannon Frederick**

Widow Frederick testified that she observed Decedent coughing and complaining of shortness of breath both in the hospital and after his discharge. This coughing continued until his death despite use of Advair and a nebulizer with Albuterol. (Tr. 31-33). While at home and despite medication which included Coumadin, Decedent had breathing problems and in fact, they became worse and were accompanied by high fevers up to his death. (Tr. 34-38). Prior to his death Decedent's widow never knew Decedent or his family to have any blood problems associated with hyper coagulation. (Tr. 42, 43).

On cross Employer's counsel confronted Widow Frederick with the ambulance and Abbeville Hospital records which did not mention coughing. Widow Frederick responded she still observed same and that when he arrived Decedent was on oxygen. Examination of the ambulance records show moderate shortness of breath which Decedent attributed to fumes caused by mixing lime dust. (CX-15, Tr. 46). Records from Abbeville General show an admission on November 20, 2006, followed by a transfer to Lafayette General on November 22, 2006. While at Abbeville General Decedent continued to display shortness of breath with an admitting diagnosis of pneumonitis desaturation. (CX-16, pp. 9, 21).

### **C. Testimony of Jessie Calvin Tarver**

Tarver currently works for Employer as a "Utility V employee or truck driver. In November 2006 Tarver drove trucks for Employer and worked alongside of Decedent on a daily basis at Employer's Intracoastal dock and slip facility. There boats or barges brought by tugboats or push boats were moored and then loaded or unload by Decedent with liquid mud or its dry components.(EX-L. p.3) Tarver saw Decedent on a frequent basis pump liquid mud onto barges or boats. Tarver described the transfer process in which he occasionally assisted Decedent as follows: Decedent would first mix the mud. Then he transferred it by four-inch hoses to facility tanks for storage or pumped the liquid mud directly onto the barge or boats. Before transferring the liquid mud to a boat, Decedent would board the vessel and inspect its tanks and then transfer the hose to vessel personnel after which he would pump the mud onto the vessel. (EX-L. p. 4). On occasion when a vessel returned some of the mud Decedent would board the vessel, take mud samples and run checks on it before allowing a transfer back. On occasion when Employer dealt with dry material, Decedent was involved in the transfer by forklifts or cranes of material stacked on pallets for transferring to vessels.

Tarver testified that on November 20, 2006, he was helping Decedent mix mud which contained diesel fuel and lime. The wind was blowing and dust covered Decedent. (EX-L, p. 15). In mixing process he and Decedent could smell the diesel fumes. Decedent opened 50 sacks of lime and with 7 sacks left he bent over and appeared to pass out, striking his head on a hand rail and thereafter was unresponsive for 3 to 4 minutes. (EX-L. p. 8). When he became responsive, he complained about having difficulty breathing. An ambulance was called whereupon Decedent was taken to Abbeville General Hospital. (EX-L.p. 20)

#### **D. Testimony of Dr. Emil Laga**

Dr. Laga, a board certified forensic pathologist and toxicologist who has performed over 5000 autopsies and testified in about 500 proceedings, performed an autopsy on Decedent on December 12, 2006. (Tr. 49, 50). From that autopsy Dr. Laga performed preliminary and final autopsy reports in which he summarized the clinical information available at that time. Dr. Laga concluded that Decedent died from a 100% blockage of the pulmonary artery probably resulting from a blood clot that came from the left lower extremity. (Tr. 51, 52). On January 10, 2010, Dr. Laga prepared a final report which was based on essentially the same information as the initial report and thus was almost a duplicate copy of that report. (Tr. 52).<sup>3</sup>

Unavailable at that time of these autopsy reports were records from Lafayette General, genetic testing of Decedent's mother and brother (CXs- 20, 21) and information on substances which Decedent inhaled on the jobsite including diesel fumes. Dr. Laga testified that the diesel used by Decedent produces fumes containing neuro-toxin (xylene, thromine, and hexane) that desaturated the incoming air and acted as organic solvents ripping off the inner lining of the pulmonary artery and activated a systemic inflammatory response first seen in the white count elevation and a patching or cascading clotting process unaffected by Coumadin. (Tr. 58, 61-66)

Dr. Laga testified that clots generally form in the legs and abdomen and are called thrombus. When these clots move they are called thrombo-embolus or embolus and can obstruct the flow of blood returning to the heart. However, subsequently obtained Lafayette General Doppler ultrasound reports show no lower leg clots. While genetic testing of family members (brother and mother) revealed no evidence of any predisposition of blood clot formation In this case a thrombus formed in the pulmonary artery. (Tr. 55- 57).

The blockage in question progressed very fast growing to 80% in two days. (Tr, 59). Decedent mixed two powdery substances (VG) , a silica or sand like product with Austin lime in large quantities (170 and 100 bags respectfully) with diesel which in turn produced fumes from an open top tank containing neuro-toxins that displaced oxygen and caused seizures and fainting. In turn the flow of blood to the pulmonary artery backed up with the diesel penetrating lung membranes triggering a systematic inflammatory response producing a cascading clotting effect that eventually layer by layer blocked the pulmonary artery and caused death. (Tr. 61-66). The high white blood cell count in excess of 12,000 confirmed this syndrome when no infection was present. (Tr. 67-71).

Dr. Laga identified CX-24 and CX-25 as accurate representations of what systematic inflammatory response syndrome (SIRS) was. The Wikipedia article presented SIRS in laymen terms and opposed to Medscape, a more technical presentation designed for physician instruction. (Tr. 73). Dr. Laga also found evidence of silica material in the lymph nodes linking exposure and inhalation in Decedent's media stynum (Tr. 75)

On cross Dr. Laga confirmed the fact that Claimant's mask (N-9 5) did not screen diesel fumes from inhalation. (Tr. 80). Further, doctors at Lafayette General and Abbeville General were not provided with material safety data sheets to show what Decedent had been exposed to.

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3. The preliminary and final autopsy reports prepared by Dr. Laga before all medical reports were received appeared as CX-26, 27).

(Tr. 81). In essence Decedent in Dr. Laga words had a rebuff or chemical injury of the lining of the pulmonary artery by the solvent properties of the diesel. (Tr. 100, 103). As far as other theories are concerned and specifically whether the family had any history of protein deficiency, the record contained no evidence of such. (Tr. 108; CX-20, 21).<sup>4</sup>

#### **E. Testimony of Drs. Gary Guidry, Michael Cain, William Newman, Louis Hamers**

Dr. Guidry, a board certified pulmonologist who treated Claimant at Lafayette General, testified that he examined Claimant on November 22, 2006 and found the results of the exam to be essentially normal. By chance Dr. Guidry ordered a CT scan of the lungs which revealed massive pulmonary emboli. Subsequently, Dr. Guidry learned from that Decedent's family had a history of clots.<sup>6</sup>

When asked if Decedent's inhalation of lime of lime caused or contributed to either the pulmonary emboli or his death, Dr. Guidry testified he had never seen any information attributing clot formation to inhalation injuries. (CX-C, p. 6). In fact, Dr. Guidry did not know the cause of the clot formation but suspected it could have been caused by a rare protein deficiency. However, Dr. Guidry admitted on cross that clotting could occur from an autoimmune response within the body. (CX-C. p.10).

Dr. Cain, board certified in internal medicine, medical oncology and hematology saw Decedent on a consult on November 28, 2006 and allegedly solicited a clotting history from Decedent concerning his brother and mother. Dr. Cain examined Decedent and found his lungs to be clear. Dr. Cain ordered a redraw of Protein C and Protein S but Decedent's use of Coumadin rendered those test useless. Dr. Cain next saw Decedent at his office on December 11, 2006. Decedent's exam was essentially normal or unremarkable. Dr. Cain saw Decedent to monitor his anticoagulation and secure additional family history. Dr. Cain testified that the cause of Decedent's clots was not determined at the time of his death Dr. Cain was not aware of lime use in association with clotting and could not tell if Decedent had any chemical reaction prior to his death. (EX-F, G).

Dr. Newman, a board certified pathologist, who reviewed Decedent's hospital and autopsy records, testified Decedent died of a pulmonary embolism which usually(95%) form in the leg veins with the remaining emboli forming in the femoral or iliac veins or upper extremity. Dr. Newman was not aware of any pulmonary emboli associated with inhalation problems including inhalation of lime. (EX-I). Dr. Hamer, a board certified internist and pulmonologist, examined material provided by Concentra and concluded Decedent died of pulmonary emboli. Concerning the cause of the emboli, Dr. Hamer suggested that it was caused by a genetic predisposition to blood clots since prolonged immobilization or other known disorders were not

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4. The material data safety sheets appeared as CX-10 to 13).

5 Employer utilized the services of ATC environmental to sample the area for air contaminants. Industrial hygienist, David Watts who worked for ATC testified about air samples taken on February 8, 2007 by Amy Begnaud of ATC's Lafayette office for monitoring of respirable dust and quartz samples at Employer's facility in question. Monitoring on this occasion which did not necessarily reflect conditions in November, 2006 when Decedent was exposed to respirable levels of lime, VG Supreme and VG Plus showed exposure levels over a two hour period less than OSHA permissible levels for these substances. (EX-M, exhibit A; EX-N). Watts conceded that large amounts of dust could have exposed Decedent to higher levels than those collected by Ms. Begnaud. (EX-N, p.40).

6. As noted above Dr. Guidry had incorrect information on Decedent's family clotting history.

present in Decedent's case. Dr. Hamer further testified that there was no medical literature associating inhalation and pulmonary emboli and again suggested a genetic abnormality making him susceptible to the emboli. On cross Dr. Hamer was unable to tell which records he reviewed prior to testifying. (EX-K).

#### **IV. DISCUSSION**

##### **A. Contention of the Parties:**

Employer contends that Decedent must show that the injury arose in the course of as well as out of employment and if successful in meeting this burden then Employer is entitled to come forward and rebut this presumption by producing substantial evidence that the injury in question was not caused by the workers environment. Employer argues that Claimant did not establish a presumption that Decedent's death was work related and even if he introduced sufficient evidence of such Employer rebutted it by the medical testimony of Dr. Gary Guidry who examined Claimant and found no inhalation symptoms, by Dr. Hamer who testified that inhalation of any substance did not produce clots, by Dr. Michael Cain who found no lung trauma and no connection between inhalation problems and the development of clots. Even Dr. Laga, Claimant's own pathologist, in his autopsy reports found no evidence of physical trauma and attributed the clots coming from the lower extremity.

Employer argues at page 12 of his brief that every physician involved in this case indicated that inhalation of any chemical or product could not have caused death and that Dr. Laga's autopsy showed Decedent lymph nodes were clear and his lungs were fine. Three years later Dr. Laga contradicted his report and concluded the only explanation must have been inhalation of fumes which ignores the fact that Tarver testified they were working in an open area with a 15-20 mph wind at their backs. Further, at page 14 of its brief, there is no support for Dr. Laga's conclusion which contradicts his own autopsy reports that clotting developed in the pulmonary artery itself. Rather the clotting was associated with a genetic condition (protein deficiency) as evident in clotting problems experienced by Decedent's mother and brother.

Employer contends, Dr. Laga changed his opinion only after no other physician could link Decedent's death to working conditions and despite the fact that his own report reflects no damage to the pulmonary artery or systemic failure of any other organ. Further, at page 13 of its brief Employer argues that there is no medical literature linking inhalation and clotting.

Claimant contends that Decedent satisfied both the situs and status elements for coverage under the Act and in fact Employer stipulated that its facility where Claimant worked was a maritime situs. Thus requiring Claimant to prove only status to establish jurisdiction which it did through not only the admission of Employer but the testimony of fellow worker, Calvin Turner which showed Decedent spending a substantial portion of his workday in not only mixing chemicals for liquid mud but transporting them either by four-inch hoses to vessels for transport to various drilling sites or when dry by use of fork lift and overhead crane to vessels for transport and also inspecting and off loading liquid mud when it was returned to the dock facility.

Concerning causation Claimant asserts that Dr. Cain who examined Claimant to determine whether Decedent had a genetic predisposition for the development of clots, testified that exposure to chemicals had the potential to affect the clothing system. More importantly, Dr. Laga who had extensive experience in forensic pathology and a PhD in toxicology after securing additional relevant information not available at the time of the autopsy concluded that Decedent's death was the end result of having suffered a systematic inflammatory response syndrome (SIRS) caused by exposure and inhalation of work chemicals (diesel, Austin lime, and VG Supreme) [powered clay and crystalline quartz]. In addition, Claimant asserts he produced eyewitness accounts of probable inhalation of these chemicals through Tarver and his widow testimony as well as photos at hospital admission showing powder remaining beneath the nose and use of less than effective masks.

Claimant argues that Decedent while both at Abbeville General and Lafayette General satisfied the criteria for a diagnosis of systemic inflammatory response syndrome which diagnosis can be made with any two of the following four criteria as established by the American College of Chest Physicians/Society of Critical Care Medicine Consensus Conference. (CX 15, pp.3, CX-16, pp. 5, 8, 10, 26, 32, 34, 48, 50, 51, 54 56, 58, 61 63; CX-17, pp. 48, 50 51, 57-62 75, 77, 83, 85, 108-116, 121-124, 124, 164, 1750175).

1. Body temperature less than 36 degrees C (97 degrees F) or greater than 38 degrees C (100 degrees F).
2. Heart rate greater than 90 beats per minute.
3. Tachypnea (high respiratory rate with greater than 20 beats per minute; or an arterial partial pressure of carbon dioxide less than 4.3 kPa (32 mmHg)
4. White blood cell count less than 4000 cells (cubed) or greater than 12,000 cells/mm (cubed) or the presence of greater than 10% immature neutrophils (band form).

Claimant argued Decedent's CT at Lafayette General showed minimal bilateral patchy areas of pulmonary infiltrates in both lungs which did not resolve. (CX-17, p. 53). As far as recognized causes of SIRS pulmonary embolism (CX-24, p.2) and chemical aspiration (CX-25) are included in medical literature. (CX-24, p.1).

## **B. Credibility**

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and 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, 467, *reh. denied*, 391 U.S. 929 (1968); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5<sup>th</sup> Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the Atruce doubt@ rule which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556 (d) and that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3<sup>rd</sup> Cir. 1993).

In this case I was impressed by the professionalism and detailed testimony of Dr. Laga who thoroughly explained in detailed how Decedent's death was related to SIRS. Indeed Dr. Laga testimony at hearing was the most recent with Drs. Guidry's taken by deposition on May 27, 2008; Dr. Cain by deposition on Sept 12, 2008; Dr. Newman by deposition on March 3, 2010 and Dr. Hammer by deposition on December 19, 2008. Dr. Laga's testimony was the most comprehensive taking in consideration the entire set of working conditions (wind blowing, dust circulation, Decedent's clothes covered in dust with Decedent using a respirator or mask not designed to fit his face or filter out diesel fumes which even Tarver could smell). Dr. Laga's testimony was supported by the medical records showing Decedent met not only two but four of the criteria of SIRS. Employer's subsequent work place testing did not attempt to replicate these conditions. I was also impressed by Ms. Frederick as she related Decedent's complaints of breathing while at work and then in the hospital and at home. In like manner, I found Tarver to be a credible witness showing working conditions he and Decedent were exposed to prior to Decedent's death.

### C. Jurisdiction: Status

The parties stipulated to the maritime situs of Decedent's work but left open to the undersigned the status of Decedent's work. For coverage under the Act Decedent must satisfy both elements: status as well as situs.

Status is an occupational test requiring an examination of the character of the work to see whether the claimant's activities bear a significant relationship to traditional maritime activity. Status may be determined either upon the maritime nature of claimant's activity at the time of his injury or upon the maritime nature of his employment as a whole. *Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 781 (5<sup>th</sup> Cir.1982); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5<sup>th</sup> Cir 1978). The first alternative is referred to as the "moment of injury" test while the second alternative requires only that the claimant spend "some" portion of his overall employment performing maritime activities. *Northeast Marine Terminal Co., v. Caputo*, 432 U.S. at 273; *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82-83 (1979); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5<sup>th</sup> Cir. 1980); *See also, Lennon v. Waterfront Transport*, 20 F.3d 658 (5<sup>th</sup> Cir. 1994).

In *Chesapeake & Ohio Railroad Co. v. Schwalb*, the Supreme Court held that employees not specifically enumerated in Section 902(3) were covered by the Act only if they are engaged in an activity that was an integral part of and essential to the overall loading and unloading process. *Chesapeake & Ohio Railroad Co. v. Schwalb*, 493 U.S. 40, 47 (1990). In *Munguia v.*

*Chevron U.S.A., Inc.*, the Fifth Circuit found that when focusing on the “loading and unloading test” for maritime employment, there is at least an implicit requirement that what is loaded or unloaded is “cargo”. *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 813 n. 8 (5<sup>th</sup> Cir. 1993). The Fifth Circuit also noted in *Hullingshorst Industries, Inc., v. Carroll*, that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lie within the scope of “maritime employment” as that term is used in the Act. *Hullingshorst Industries, Inc., v. Carroll*, 650 F.2d 750, 755 (5<sup>th</sup> Cir. 1981); *See also, Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). However, the Benefits Review Board has held that mere involvement in activity which supports the construction of vessels is not sufficient to grant a claimant status. *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999) (citing, *Chesapeake & Ohio Railroad Co. v. Schwalb*, 493 U.S. 40). In addition, the Supreme Court has held that “employees such as truckdrivers [ ] whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded or destined for maritime transportation are not covered” under the Act. *Northeast Marine Terminal Co., v. Caputo*, 432 U.S. at 267; *See also, Herb’s Welding, Inc., v. Gray*, 470 U.S. at 430-431 (Marshall, J., dissenting) (stating, “Workers such as truckdrivers or clericals, though present on a pier at certain times as part of their employment, are engaging in purely land-bound, rather than amphibious, occupations.”) (citing, *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. at 267); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. at 83 (stating, “There is no doubt for example, that neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the maritime situs. Such a person’s ‘responsibility is only to pick up stored cargo for further transshipment.’”) (citations omitted).

According to the Supreme Court, a claimant satisfies the status requirement for coverage if he spends “at least some of his time engaged in indisputably covered activities.” *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. at 273. The Fifth Circuit interpreted this holding strictly in *Boudloche v. Howard Trucking Co., Inc.*, specifically rejecting a “substantial portion” requirement and held that two and one-half percent (22%) to five percent (5%) of the claimant’s time spent loading and unloading was satisfactory. *Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 1347 (5<sup>th</sup> Cir. 1980). Likewise, in *McGoey v. Chiquita Brands International*, the Benefits Review Board held that the Administrative Law Judge’s finding that claimant spent three percent (3%) to five percent (5%) of his time in a covered activity alone was enough to invoke coverage under *Caputo* and *Boudloche*. *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997) (citing, *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993)).

While the actual numerical percentage of time spent by claimant in a covered activity plays an important role in this analysis, it is not the most crucial factor. It is not the overall frequency with which claimant performed the activity which is controlling. *See, McGoey v. Chiquita Brands International*, 30 BRBS at 239; *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34, 40 (1997). Rather, it is whether the covered activity is one which is regularly performed as a portion of the overall tasks which claimant is assigned which makes the ultimate determination. *See, Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d at 1348; *McGoey v. Chiquita Brands International*, 30 BRBS at 239 (citing, *Levins v. Benefit Review Board*, 724 F.2d 4 (1<sup>st</sup> Cir. 1984)); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS at 40. If regularly performed, the covered activities will not be intermittent, sporadic, and incidental to claimant’s

non-maritime job duties, and therefore, afforded protection under the Act. *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS at 40.

In this case it is clear that Decedent performed loading and unloading activities as a part of his regular duties as a liquid mud man and in fact appears to have spend a substantial portion of his work day when not mixing liquid mud in transferring it and its dry components to vessels (boats and barges) for transport to off shore and inland oil and gas drilling sites. In addition, Decedent as part of regular duties off loaded vessels of liquid mud when they returned unused material to Employer's dock side facility. As such, I find Decedent satisfied both the admitted situs as well as the status requirements of the Act and in so establish coverage or jurisdiction under the Act.

#### **D. Prima Facie Case and Section 20 (a) Presumption.**

Under the Act, Claimant has the burden of establishing the *prima facie* case of a compensable injury. The claimant must establish a *prima facie* case by proving that he suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm. *Kelaita v. Triple A Mach. Shop*, 13 BRBS 326 (1981). See *U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley)*, 455 U.S. 608, 14 BRBS 631, 633 (1982), *rev'g Riley v. U.S. Industries/Federal Sheet Metal*, 627 F.2d 455, 12 BRBS 237 (D.C. Cir. 1980); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is the claimant's burden to establish each element of his *prima facie* case by affirmative proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). In *U.S. Industries*, the United States Supreme Court stated, "[a] *prima facie* 'claim for compensation,' to which this statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Industries*, 455 U.S. at 615, 14 BRBS at 633.

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 a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991).

Section 2(2) of the Act defines injury as an accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2)(2003). In order to show the first element of harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C. Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866

(5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). “[T]he 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., v. Director, OWCP*, 455 U.S. 608 (1982). See also *Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. *Wheatley*, 407 F.2d at 313. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

For an injury to be compensable under the Act, it must have “arose out of” and occurred “in the course of employment.” 33 U.S.C. 902(2). These are separate elements that must both be proven. “Arising out of” refers to the activity in which the claimant was engaged when the injury occurred. “Course of employment” refers to the time, the place and the circumstances surrounding the injury. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593, 595 (1081). The general rule as established by the Board is that an injury occurs in the course and scope of employment if it occurs within the time and space boundaries of employment and in the course of an activity the purpose of which is related to the employment. *Alston v. Safeway Stores*, 19 BRBS 86, 88 (1986), *citing Wilson v. WMATA*, 16 BRBS 73 (1984); *Willis v. Titan Contractors*, 20 BRBS 11 (1987). The Board further defined their position in *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997), holding that the employee's action would be found within the “scope of employment” if it was of some benefit to the employer. However, the Act does not require that the employee, at the time of injury, be engaged in activity of benefit to the employer. *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 507 (1951).

A claimant's uncontradicted, credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimants reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980). On the other hand, uncorroborated

testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that certain conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2d Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

In establishing that an injury occurred in the course and scope of his employment, a claimant is entitled to rely on the presumption provided by Section 20(a) of the Act. *Willis*, 20 BRBS at 12; *Mulvaney*, 14 BRBS at 595; *Wilson*, 16 BRBS at 75. Section 20 provides that “[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act.” 33 U.S.C. 920(a). Once a *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of his employment. *Hunter*, 227 F.3d at 287.

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered prior, unquantifiable hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based on a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

*Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003) (the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (the hurdle is far lower than a ruling out standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983) (the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another

agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)( the “unequivocal testimony of a physician that no relationship exists between the injury and claimant’s employment is sufficient to rebut the presumption.”).

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, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285 at 288; *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, the administrative law judge must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 at 281. Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d) (2002). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries, supra*; *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

In this case I find that Claimant establish that Decedent suffered a harm or injury (blood clotting of the pulmonary artery) because of his exposure to lime and diesel fuel at work which because of a systematic inflammatory response syndrome (SIRS) caused a blockage of the pulmonary artery that led to his death. As such Claimant established both elements of a *prima facie* case (injury and conditions at work which caused or could have caused Decedent’s untimely death. Employer rebutted this presumption by expert testimony which denied any work connection between exposure and ingestion of fumes to clotting and death causing the undersigned to weigh the evidence to see if Claimant establish by a preponderance of evidence that Claimant’s exposure to diesel fuel and lime caused the blood clotting resulting in Decedent’s eventual death dues to SIRS.

After weighing all evidence I am convinced Claimant met this burden by the presentation of clear and credible testimony from Dr. Laga who with consideration of previously unavailable medical information showed by a preponderance of credible evidence that Decedent’s exposure to lime dust and diesel fumes caused damage to the pulmonary artery which in turn triggered a clotting mechanism to result in a SIRS response leading to a complete blockage of the pulmonary artery and death. To the extent that other physicians are not aware of or deny any connection between clotting and chemical exposure, I do not credit such testimony finding rather the more informed and credible testimony of Dr. Laga to be more persuasive and in line with the medical records and requirements of SIRS. As such, I find Claimant has met her burden of proof by a preponderance of credible evidence and established causation.

## V. INTEREST and ATTORNEY FEES

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments.

*Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 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). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. Section 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..."*Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See *Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Decedent Widow pursuant to Section 909 (b) of the Act 50 percent of the average weekly wages of the Decedent stipulated by the parties to be \$938.07.
2. Employer shall pay to the legal guardian of Decedent's child on behalf of said child pursuant to Section 909 (b) of the Act 16 2/3 per cent of the average weekly wages of the Decedent stipulated by the parties to be \$938.07.
3. Employer shall pay to parents of the Decedent reasonable funeral expenses of \$3,000.00, pursuant to Section 909 (a) of the Act.
4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. 1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

**A**

**CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE**

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<sup>i</sup> References to the records are as follows: Claimant exhibits (CX-); Employer exhibits (EX-); Administrative Law Judge exhibit (ALJS-); transcript-(Tr.).