Issue Date: 04 May 2012

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

CASE NOS.: 2011-LHC-01979, 2011-LHC-01980, 2011-LHC-01981
OWCP NOS.: 01-169022, 01-167320, 01-169024

In the Matter of:

PATRICK M. COX,
Claimant,

v.

BATH IRON WORKS CORPORATION,
Employer/Self-Insured.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

Janmarie Toker, Esq. (McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A.), Topsham, Maine, for the Claimant

John H. King, Jr., Esq. (Norman, Hanson & DeTroy, LLC), Portland, Maine, for the Employer/Self-Insured

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

The matter before me involves claims brought by Patrick Cox ("Cox" or the "Claimant") against Bath Iron Works Corporation ("BIW" or the "Employer") for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("the Act"), that were transferred to the Office of Administrative Law Judges for a formal evidentiary hearing. *See* 33 U.S.C. § 919(d). The formal hearing was held on January 17, 2012, in Portland, Maine.

The parties were represented by counsel, and the official documents were admitted in full without objection as Administrative Law Judge Exhibits ("ALJX") 1-13. I heard testimony from Patrick M. Cox and Robert Knowles, and the parties' documentary evidence was admitted in full without objection as Employer's Exhibits ("EX") 1-60,[1] and Claimant's Exhibits ("CX") 1-35. The record remained open after the hearing to allow the Employer additional time to review and file any objections to CX-36-73. By letter filed on January 25, 2012, the Employer stated that it had no objection to CX-36-73, and these exhibits are admitted in full. The record is now closed, and on January 25, 2012, I issued a Briefing Order. On March 13, 2012, the Employer's Brief ("Er. Br.") was filed, and on March 19, 2012, the Claimant's Brief ("Cl. Br.") was filed.

II. Stipulations and Issues Presented

The parties stipulate to the following facts: (1) The Act applies to the claims in this case; (2) Cox sustained an injury on March 6, 2008 (Cox's alleged injuries on January 30, 2009 are disputed); (3) The injury occurred at BIW's shipyard on the navigable waters of the Kennebec River in Bath, Maine; (4) The injury that occurred on March 6, 2008 arose out of and in the course of Cox's employment with BIW; (5) There was an employer/employee relationship at the time of the injuries; (6) BIW was timely notified of the March 6, 2008 injury;[2] (7) The claims were timely filed based on the alleged dates of injury; (8) The Notice of Controversion was timely filed; (9) The Informal Conference was conducted on July 7, 2011; and (10) Temporary total disability compensation was paid from March 7, 2008 to June 29, 2008, and temporary partial disability compensation was paid from June 30, 2008 through August 3, 2008. ALJX-13.

[1] Employer's EX-29 is a half-face respirator (a non-documentary exhibit).

[2] The Employer asserts that notice of the January 30, 2009 injuries was not provided until March 12, 2009, but concedes that it was not prejudiced as a result. Er. Br. 1.

The primary issue for my determination is causation. Upon consideration of the record as a whole, I find that Cox has met his burden of proving causation, and he is entitled to compensation and medical benefits under the Act.

III. Factual Summary

Patrick Cox is a sixty-one year old man with a high school education. TR 22. Before working at BIW, he served in Vietnam in the Marine Corps for approximately two years and later worked as a master forger (similar to a blacksmith) at American Hoist and Derrick for thirteen years. *Id.* at 22-24, 57-58; EX-13 at 0047. Cox became employed at BIW in 1987 and continued to work there until January 30, 2009. TR 23, 36; EX-13 at 0059. He was first employed as a shipfitter and then as a tinsmith for the last ten years. TR 23-24. As a tinsmith, Cox was part of the intake/uptake crew that built smoke stacks. *Id.* at 41-42. Cox testified that he would typically spend 6 out of 8 hours a day welding, and that 80-90 percent of the time he worked in enclosed spaces. *Id.* at 44, 80. He would often have to push pieces of the smoke stack, which weighed from 500-900 pounds, from one location to another using come-alongs and hoists. *Id.* at 27. He was also required to crawl, climb, twist, bend, and work in awkward positions, and he testified that he "had to be 90 percent contortionist and 10 percent foolish to do it." *Id.* at 27, 31.

During the welding process, the various metals and burning paint produced fumes, which employees breathed in when ventilation was not adequate. *Id.* at 37, 45. Cox testified that "smoke was always around us" and "[s]ometimes [the smoke] was so thick, you could cut it with a knife." *Id.* He testified that the walls would be black with dust and grease and his clothes would reek at the end of the day. *Id.* at 51. The buildings had a ventilation system that no longer worked and was covered up by plastic, so they relied on "sucker" (ventilation) tubes and ceiling

fans to remove the smoke and fumes. *Id.* at 46, 55. Cox testified that "there was always one way or another that some of the fumes, all of it wouldn't be caught." *Id.* at 39-41, 51, 73. Cox further testified that before BIW made it mandatory to wear a respirator in 2007, he only wore a respirator about 50% of the time. *Id.* at 143-46. Although he routinely wore a respirator after 2007, he was still exposed to fumes when he removed the respirator after completing a job. *Id.* at 38-39, 44. Additionally, Cox testified that the respirator was not always effective because the seal would frequently break when he had to adjust the respirator underneath his welding hood. *Id.* at 43, 47.

On March 6, 2008, Cox fell approximately eight feet on the job when the ladder he was climbing "just disintegrated underneath [him]." *Id.* at 24-25. Cox testified that "I hit my head coming down and the next thing I know, I was on the ladder sideways. The ladder had flipped up and I [came] down on it sideways on my back." *Id.* at 24. He was sent to the hospital and remained out of work for several months. *Id.* at 26. After Cox returned to work, he continued to experience pain in his back, hips, and shoulders. *Id.* at 26-27. Cox testified that 95% of his tasks involved some kind of stress or strain to his back and 50% of his tasks caused problems with his shoulders. *Id.* at 30. He often experienced cramps in his back when working in uncomfortable positions, and took Family Medical Leave about once a week because of his back pain. *Id.* at 28, 66. During his employment, Cox went to First Aid several times because of problems with his back, knees, and shoulders, and he was given shots and told to "take it easy a little bit." *Id.* at 29, 32, 34.

Cox began having respiratory problems in the 1990's. *Id.* at 60; EX-31 at 0651. In 2007, he failed BIW's annual pulmonary function test, and BIW issued him a positive pressure respirator as a result. TR 38; EX-31 at 0442. In 2009, Cox's cardiologist, Dr. John C. Love,

M.D., noted in a medical report that Cox's shortness of breath was likely due to a pulmonary impairment, not his cardiac issues. TR 64; EX-47 at 0908, 0912, 0925. Dr. George E. Bokinsky, Cox's treating pulmonologist, diagnosed Cox with chronic hypoxemic respiratory failure and emphysema. EX-49 at 0976, 0978. Cox has been relying on oxygen for the last two years. TR 53.

As a result of Cox's respiratory and orthopedic impairments, Cox was put on various medical restrictions at work, including weight limits on lifting, no excessive overhead work, and minimal climbing. *Id.* at 61, 65; EX-31 at 0651; EX-13 at 0065. Cox testified that he tried to work within the restrictions, but it was not always possible to do so. TR 32-33, 81. Cox testified "you got somebody at your back asking you why the job isn't getting done, what can I say?" *Id.* at 81. Not all of the buildings had elevators, and Cox would have to climb ladders on a daily basis despite his restrictions. *Id.* at 84. Permanent restrictions against climbing were in place when Cox fell off the ladder in March 2008. *Id.*

In addition to his respiratory and orthopedic conditions, Cox suffered from two heart attacks in 1989, and underwent bypass surgery in 1991. *Id.* at 57. Cox also has a history of cigarette smoking. *Id.* at 52. He smoked a couple packs of cigarettes a day for approximately 20 years, until he quit smoking after his heart attack in 1989. *Id.* at 52, 57. Cox is also overweight, weighing between 280 and 300 pounds for the past 15 years. *Id.* at 59.

Claimant's medical expert, Dr. David L. Phillips II, M.D, reviewed the medical records, evaluated Cox on September 30, 2009 and December 7, 2011, and wrote medical reports on October 1, 2009 and December 10, 2011. CX-32 at 0062, 0069. Dr. Phillips diagnosed Cox with chronic obstructive pulmonary disease ("COPD"), chronic bronchitis, reactive air disease, emphysema, and chronic low back, neck, bilateral shoulder, left elbow, bilateral knee, and

bilateral hand pain. *Id.* at 0071. Dr. Phillips opined that Cox's back and other orthopedic conditions, as well is his COPD are work-related. *Id.* at 0072-76.

BIW's medical expert, Dr. Alexander L. Mesrobian, M.D., reviewed the medical records, examined Cox on March 29, 2011, and wrote a medical report on the same day. EX-58. Dr. Mesrobian opined that Cox is not disabled as a result of his March 2008 injury. *Id.* In regard to Cox's respiratory impairment, Dr. Mesrobian found "no basis to conclude that employment at [BIW] was in any way responsible for [Cox's] cardiopulmonary problems or dyspnea", and instead attributed Cox's impairment to his cigarette smoking, obesity, and cardiac abnormalities. *Id.* at 1615. BIW also offered the testimony of Robert Knowles, an industrial hygienist at BIW, who testified about the physical environment where Cox worked. According to Knowles, the air at BIW has been tested and found to be safe, and even if smoke and fumes pose some risk to employee health, there are sufficient training and safety requirements in place to prevent harm due to the welding fumes. TR 91-92, 100, 105-07, 110, 115-16.

IV. Findings of Fact and Conclusions of Law

A. Causation – Respiratory Injury

1. *Prima Facie* Case

A claimant seeking workers' compensation benefits under the Act must establish that he suffered an "accidental injury . . . arising out of and in the course of employment. . . ." 33 U.S.C. § 902(2). In determining whether an injury arose out of and in the course of employment, a claimant is assisted by section 20(a) of the Act which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). A claimant establishes a *prima facie* case by proving that he suffered some harm and that conditions existed which could have caused the harm. *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999); *Rainey v. Dir., OWCP*, 517 F.3d 632,

634 (2d Cir. 2008) (*citing Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64-65 (2d Cir. 2001)); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140, 144 (1991). In presenting his case, "the claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." *Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004). The physical harm can be an aggravation of a previously existing condition. *Id.*; *see Gardner v. Dir., OWCP*, 640 F.2d 1385, 1389 (1st Cir. 1981) (holding that aggravation of claimant's symptoms from a previously existing condition was compensable under the Act); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 517 (5th Cir. 1986) ("[W]here an employment injury worsens or combines with a preexisting impairment to produce a disability greater than that which would have resulted from the employment injury alone, the entire resulting disability is compensable.").

Cox has met his burden of establishing a *prima facie* case by providing evidence that he has suffered a harm, specifically a pulmonary impairment, and that the pulmonary impairment could have been caused by his exposure to toxic chemicals while employed at BIW. *See* CX-32. This is demonstrated by Cox's own testimony about the conditions of his work environment, including the presence of toxic chemical fumes and smoke inside the enclosed spaces where he worked and his frequent non-use of a respirator, as well the medical opinion of Dr. Phillips, who opined that the smoke, dust, and chemicals inhaled by Cox while working at BIW, combined with his history of cigarette smoking, caused him to develop COPD. TR 37, 45-4, 51; CX-32 at 0076. Having met his *prima facie* burden, Cox is entitled to the section 20(a) presumption. *See* 33 U.S.C. § 920(a).

2. Rebuttal

Once a *prima facie* case is established, the burden shifts to the respondent to "rebut the presumption with substantial evidence that the [claimant's injury] . . . was not caused or aggravated by his employment." *Bath Iron Works Corp. v. Dir., OWCP*, 109 F.3d 53, 56 (1st Cir. 1997); *Rainey*, 517 F.3d at 634; *Merrill*, 25 BRBS at 144. At the rebuttal stage, the respondent bears a burden of production, not persuasion. *Rainey*, 517 F.3d at 637 (citation omitted). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a finding that the workplace conditions did not cause the injury. *Preston*, 380 F.3d at 605 n.2; *Rainey*, 517 F.3d at 637 (citation omitted); *see Richardson v. Perales*, 402 U.S. 389, 401 (1971).

Under the substantial evidence standard, a respondent does not have to exclude any possibility of a causal connection to employment; it is enough that it produce medical evidence of "reasonable probabilities" demonstrating lack of causation. *Bath Iron Works Corp. v. Dir., OWCP*, 137 F.3d 673, 675 (1st Cir. 1998); *see Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003), *cert. denied*, 540 U.S. 1056 (2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to contrary'"). A respondent may sufficiently rebut the presumption by introducing testimony of a physician who unequivocally states with a reasonable degree of medical certainty that the harm suffered by the claimant is not related to his employment or working conditions. *O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39, 41-42 (2000). When a respondent offers sufficient evidence to rebut the presumption, only then is the presumption overcome. *Conoco,*

Inc. v. Dir., OWCP, 194 F.3d 684, 690 (5th Cir. 1999) (*citing Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986)).

In rebuttal, BIW offers the testimony of Robert Knowles and the medical opinion of Dr. Mesrobian as evidence that Cox's employment at BIW did not cause or contribute to his lung impairment. Robert Knowles testified that the air at BIW is well within the acceptable level of exposure, and that BIW provides thorough training on how to avoid potential risks of exposure to toxic chemicals through the use of respirators and sucker tubes. TR 91-92, 100, 105-07. Knowles rejected Cox's description of smoke being so thick "you could cut it with a knife" and denied the existence of black grease on the walls of the buildings. *Id.* at 112, 137-38. Knowles testified that the current ventilation utilized is "really one of the best ventilation designs that you could use in an industry," and he was unaware of any instances where exposure to fumes from metals used at BIW caused COPD. *Id.* at 111, 115-16, 139.

BIW's medical expert, Dr. Mesrobian explained in his March 29, 2011 medical report that although the inhalation of toxic substances can cause interstitial lung disease and reactive airways disease, Cox does not suffer from either of these diseases, but instead has "severe obstruction complicated by underlying cardiac disease." EX-58 at 1615. Dr. Mesrobian concluded:

> The history of smoking two packs of cigarettes a day for 24 years also by itself can cause severe chronic obstructive lung disease. This patient's cardiac abnormalities can also feed into his dyspnea. In addition, his obesity and deconditioning can feed into his dyspnea. Consequently, I have no basis to conclude that employment at [BIW] was in any way responsible for this gentleman's cardiopulmonary problems or dyspnea with the information available which includes a workup by well known cardiologists and pulmonologists.

Id. The medical opinion of Dr. Mesrobian and the testimony of Robert Knowles is sufficient to rebut the section 20(a) presumption, and I must therefore move on to the final weighing prong of the burden shifting analysis.

3. Weighing the Evidence

When the section 20(a) presumption is rebutted, it no longer controls and I must weigh all of the evidence as a whole and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Sprague v. Dir., OWCP*, 688 F.2d 862, 865 (1st Cir. 1982); *Rainey*, 517 F.3d at 634; *Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 700 (2d Cir. 1982); *Holmes v. Universal Mar. Serv. Corp.*, 29 BRBS 18, 20 (1995); *Merrill*, 25 BRBS at 144. Cox ultimately bears the burden of persuasion in establishing causation based upon the record as a whole, and he meets this burden if a preponderance of the evidence establishes the requisite causal connection. *See Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-80 (1994); *Rainey*, 517 F.3d at 634.

In evaluating the evidence, the administrative law judge is entitled to weigh the medical evidence and draw inferences there from, but the judge is not bound to accept the opinion or theory of any particular medical expert. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). It is solely within the discretion of the judge to accept or reject all or any part of any testimony according to his or her judgment. *Poole v. Nat'l Steel & Shipbuilding Co.*, 11 BRBS 390, 395-96 (1979); *Perini Corp. v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969).

I find that Cox was exposed to toxic chemicals while employed at BIW, and such exposure contributed to his current respiratory impairment. Cox testified that prior to 2007, he

only used a respirator approximately 50% of the time.[3] TR 143-46, 148. Although this percentage may have differed in actuality, I find that there were times when Cox did not wear a respirator when he should have, and he was exposed to toxic fumes as a result. The Material Safety Data Sheets as well as the Risk Assessment for Cox's position as a tinsmith clearly establish that the various materials that Cox routinely worked around posed a risk to his health when inhaled. CX-54-73; *see also* TR 41. Even Knowles acknowledged that respirators are required because it is not healthy to inhale the fumes produced by the welding process. TR 132.

At the hearing, Cox and Knowles presented conflicting descriptions of the work environment at BIW. Cox testified that the sucker tubes often would not work properly because the tubes could not reach the tight spots where he welded and because cracks in the longer sucker tubes decreased suction capacity. *Id.* at 39-40, 49. As a result, the sucker tubes often did not catch all of the smoke produced by the welding. *Id.* at 48, 51, 55. Cox testified that smoke was all around him while he worked, the walls were covered in black grease, and his clothes reeked at the end of the day. *Id.* at 37, 45, 51. Although Cox's statement that he could "cut [the smoke] with a knife," may have been exaggerated, overall, I find that Cox testified credibly about his working conditions. In contrast, Knowles, a company employee, attempted to evoke an image of a near-perfect work environment. On balance, I find that the environment at BIW is not as safe as Knowles portrays it. In fact, Knowles, prompted by my questioning, admitted that he has observed smoke and dust in the buildings and that sucker tubes do not always catch all the smoke produced by welding. *Id.* at 137-38. Although Knowles testified that adequate safety

[3] The record is unclear about what changed in 2007. Cox testified that in 2007, BIW deemed it mandatory to wear a respirator, whereas prior to that, it was only recommended. TR 38. However, the respirator requirements in place in 2006 compared with the requirements in place in 2012, do not appear to have changed significantly. CX-25; CX-26. In fact, the 2006 requirements indicated that respirators must be worn in "confined or tight spaces." CX-26. Cox was issued a positive pressure respirator in 2007 by BIW's medical department, and this may explain his testimony that respirators became mandatory in 2007. EX-31 at 0442. Whatever the reason for his change in behavior in 2007, I find that there was a significant amount of time that Cox worked without a respirator and consequently he was exposed to toxic fumes.

requirements were in place and BIW monitored compliance with the requirements to prevent harm from exposure, Cox testified that sometimes he would work a whole day without seeing safety personnel. *Id.* at 69-70, 78, 104. The fact that Cox often had to climb ladders despite his medical restrictions against climbing tends to show that BIW does not always ensure that its requirements are followed. *Id.* at 83-84; EX-31 at 0419. Knowles testified that air sampling at BIW shows that it is well within safe levels of exposure; however, the mandatory use of respirators and other safety requirements imposed by BIW undermines Knowles' testimony that the air was safe. TR 138-39. As such, where conflict exists between Cox's testimony and Knowles' testimony regarding the physical environment at BIW, I accord more weight to Cox's testimony.

Although BIW's medical expert, Dr. Mesrobian, opined that there was no basis for establishing a causal nexus between Cox's employment and his respiratory impairment, he did not have all the relevant evidence before him when he offered his medical opinion. EX-58. Specifically, Dr. Mesrobian did not have access to the risk assessment documentation for Cox's position at BIW, or the various Material Safety Data Sheets analyzing the potential risks associated with the chemicals that Cox was exposed to. *See id.* at 1612. Additionally, Dr. Mesrobian did not unequivocal state that Cox's exposures at BIW did not cause his lung impairment. He wrote in his medical report that "[g]ranted that Mr. Cox works in an industry where a number of substances that are potentially toxic do exist and can be airborne and inhaled, we do not have any *direct evidence*, that, in fact, any exposure fed into his pulmonary condition with any *significant degree*." *Id.* at 1615. He also opined that "there is not enough evidence to state on a 'more-likely-than-not' basis that employment at [BIW] over the years was a *substantial or significant* input into the development of this gentleman's current pulmonary

status." *Id.* at 1613. However, under the Act, the Claimant's injury need not be substantially caused by his work exposure; even a small work-related contribution to a claimant's injury is sufficient to entitle the claimant to benefits under the Act. *Bath Iron Works Corp. v. Dir., OWCP*, 137 F.3d 673, 676 (1st Cir. 1998) (Lynch, J., dissenting). As such, I do not find Dr. Mesorbian's medical opinion to be particularly supportive of BIW's case.

Claimant's medical expert, Dr. Phillips, explained in his medical report that welding produces toxic compounds that cause damage to lung tissue when inhaled. CX-32 at 0075. He opined that Cox's exposure to smoke, dust, and chemicals at BIW, combined with his past history of cigarette smoking, caused his COPD. *Id.* at 0076. BIW argues that Dr. Phillips' opinions should be discounted because his responses in his medical report were prompted by a skewed portrayal of Cox's work environment by Claimant's counsel in her correspondence with Dr. Phillips. Er. Br. 9-11. However, the description of the work environment provided by counsel for the Claimant substantially aligns with Cox's credible testimony about the working conditions at BIW, and as such, I do not believe it resulted in an unfair influence over Dr. Phillip's medical opinion. Of course, Dr. Phillips is not entirely impartial in this case, as he was hired by the Claimant, but Dr. Mesrobian, as the medical expert for BIW, carries similar baggage. It is significant, however, that Cox's treating pulmonologist, Dr. Bokinsky, an impartial doctor with no stake in the outcome of the case, opined that "there is likely a lesser component [to Cox's pulmonary impairment] that may be related to his working as a welder at [BIW] especially if he has been unable to wear protective respiratory equipment." EX-49 at 0976.

Although BIW argues that exposure to industrial toxic fumes does not cause COPD, it is well established that such chemical exposures do cause respiratory issues. TR 111, 139; CX-32;

CX-37; CX-54-73. Therefore, although Cox's employment may not have directly caused his COPD, it clearly contributed to his respiratory impairment. Considering Cox's testimony regarding his frequent non-use of a respirator prior to 2007 and the constant presence of smoke and fumes, in addition to the statements of Dr. Phillips and Dr. Bokinsky linking Cox's exposures at work to his lung impairment, I find that Cox has met his burden of proving causation. Certainly there are additional causes to Cox's lung impairment besides exposure to toxic fumes at BIW, primarily Cox's cigarette smoking, and to a lesser extent, his cardiac condition and obesity. However, under the Act, the occupational cause need not be the sole cause, or even a primary cause, of the claimant's impairment to trigger entitlement to disability benefits. *Bath Iron Works Corp. v. Dir., OWCP*, 137 F.3d 673, 676 (1st Cir. 1998) (Lynch, J., dissenting) ("Under the 'aggravation rule,' even a small contribution by a work-related condition to the claimant's disability is sufficient to trigger full recovery under the LHWCA; primary causation need not be shown."). Cox has met his burden of establishing causal connection between his employment at BIW and his pulmonary impairment, and as a result, he is entitled to benefits under the Act.

B. Causation –Back Injury/"Worn Out Worker" Injury

Although I find that Cox is entitled to benefits based on his pulmonary impairment alone, for completeness of the record and possible appellate purposes, I will also address the issue of causation relating to Cox's March 6, 2008 back injury and his January 30, 2009 gradual orthopedic injury, applying the legal standard for causation set forth in the previous section.

Cox has established a *prima facie* case of causation for these injuries. First, it is uncontested that Cox's back injury in 2008 was work-related. ALJX-13. As for his gradual orthopedic injury, Cox has provided evidence that he has suffered a harm and that the harm

could have been caused by his employment. Specifically, Dr. Phillips diagnosed Cox with multiple orthopedic conditions, including chronic neck pain due to a chronic cervical strain and possible nerve root compression; chronic bilateral shoulder pain due to tendonitis and rotator cuff syndrome; chronic left elbow pain due to tendonitis; chronic bilateral knee pain due to chondromalacia patella and degenerative joint disease; and chronic bilateral hand paresthesias due to neuropathy. CX-32 at 0072. Additionally, Dr. Phillips opined that the nature of Cox's employment, which involved lifting, carrying, bending, twisting, pushing and pulling, combined with his back injury on March 6, 2008, resulted in his current back condition. *Id.*; *see also* TR 31. Dr. Phillips found that Cox's additional orthopedic problems were also a result of the nature of Cox's work at BIW. CX-32 at 0073. Thus, Cox has met his *prima facie* burden and the section 20(a) presumption is applicable.

On rebuttal, BIW offers the medical report of Dr. Mesrobian. *See* EX-58. The medical report is insufficient to rebut the section 20(a) presumption because Dr. Mesrobian only addressed the March 6, 2008 back injury, which is undisputed in this case, and did not analyze causation in relation to Cox's gradual orthopedic injury. *See id*. In its brief, BIW simply argues that Cox's back injury and orthopedic conditions did not result in any incapacity. Er. Br. 13; *see also* EX-58 at 1614-15. This does not address the issue of causation, but instead goes to the nature and extent of disability. Furthermore, the argument that these injuries did not result in any disability lacks merit, as discussed *infra* in note 4. BIW has not rebutted the section 20(a) presumption, and Cox has therefore met his burden of proving causation for his back injury and "worn out worker" injury.

C. Nature and Extent of Disability

In the parties' Stipulations, the Claimant alleges permanent and total disability from January 31, 2009 to the present and continuing, and the Employer "leaves to Claimant to proof [sic]." ALJX-13. Under the Act, "disability" is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991). Disability is addressed in terms of nature and extent. Thus, a disability analysis is comprised of a two-part inquiry: 1) whether the nature of the disability is temporary or permanent; and 2) whether the extent of the disability is partial or total. As to the first inquiry, the nature of the disability depends solely on the medical evidence in the record. *See, e.g., SGS Control Services v. Dir., OWCP*, 86 F.3d 438 (5th Cir. 1996). However, as to the second inquiry, the extent of the injury is a monetary as well as medical concept. *See, e.g., Quick*, 397 F.2d at 648.

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from a temporary one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *see Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989). Although the date a claimant reaches maximum medical improvement ("MMI") is typically the date used for establishing permanency, the parties did not stipulate to a date of MMI in this case, and as such, I must determine whether Cox's disability is one of lasting or indefinite duration. *See Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Watson*, 400 F.2d at 654. Cox has experienced respiratory problems since the 1990's and eventually his impairment reached a level where he could no longer perform his duties at BIW. His pulmonary impairment is of a

progressive nature that will not improve over time. *See Drake v. General Dynamics Corp., Electric Boat Division*, 11 BRBS 288, 290 n.2 (1979) (finding that an irreversible condition is permanent per se). As such, I find that Cox's impairment became permanent after his last day of work at BIW on January 31, 2009.

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. The employee has the initial burden establishing a *prima facie* case of total disability, by showing that he cannot return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 91 (1984). Once a *prima facie* case is proven by the claimant, the burden shifts to the employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *MacDonald v. Trailer Marine Transp. Corp.*, 18 BRBS 259 (1986), *aff'd*, No. 86-3444 (11th Cir. 1987) (unpublished). Dr. Phillips opined that Cox is totally and permanently disabled. CX-32 at 0068. Dr. Mesrobian also opined that Cox was completely disabled as a result of his cardiopulmonary condition, and BIW acknowledges as much in its brief. EX-58 at 1617; Er. Br. 14. Thus, I find that Cox's disability resulting from his pulmonary impairment is permanent and total as of January 31, 2009.[4]

[4] Although the Employer attempts to minimize the extent of Cox's orthopedic problems, Cox's testimony establishes that he was approaching total disability based on his orthopedic conditions alone. TR 26-27, 33-34, 53, 56. Although Cox returned to work after his back injury in March 2008, he continued to experience substantial pain in his back, shoulders, and hips and he typically used Family Medical Leave once a week because of his back pain. TR 66. Despite Cox's permanent medical restrictions, he frequently had to ignore these restrictions because he was expected to complete his tasks, and it is clear that BIW required Cox to work beyond his capacity. *See* TR 29, 32-33, 80-81. For example, Cox was required to frequently climb ladders despite permanent restrictions against climbing, and these restrictions against climbing were in place when Cox fell off the ladder in 2008. TR 83-85. Additionally, Dr. Phillips opined that "due to the multiple work-related orthopedic conditions . . . Cox is unable to return to work at BIW as a Tinsmith." CX-32 at 0073.

D. Compensation Due

The Act provides that "[i]n case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability." 33 U.S.C. § 908(a). The parties agree that Cox's average weekly wage ("AWW") for his March 6, 2008 injury is $797.95, but the parties disagree on Cox's AWW for his January 30, 2009 injuries. According to the parties' stipulations, the Claimant alleges an AWW of $797.95, and the Employer alleges an AWW of $646.16, which represents the gross average weekly wage in BIW's Wage Statement. ALJX-13; Cl. Br. 15 n.3; CX-17.

The Claimant argues that the Wage Statement is not an appropriate indicator of the AWW because it does not take into account the period of time that Cox was out of work due to his March 2008 disability, nor does it account for the additional time Cox missed from work because of continuing problems with his back. Cl. Br. 16; *see* CX-9 at 0010. The Claimant argues that his ongoing earnings in the year prior to his January 30, 2009 injuries were affected by his disabling injury in March 2008, and as a result, the AWW at the time of his March 2008 injury should be the controlling AWW for his January 2009 injuries. Cl. Br. 16. The Employer did not address the issue of AWW at trial or in its brief.

I agree with the Claimant that his AWW should not be affected by the work he missed due to his prior work-related injury and the AWW should be based on what Cox would have earned absent such injury. Calculation of the AWW pursuant to section 910 of the Act is meant to be a "theoretical approximation of what a claimant could ideally have been expected to earn[;] time lost due to strikes, personal business, illness, or other reasons is not deducted from the computation." *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *see also Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) ("When a claimant is

unable to work due to injury in the year preceding an injury for which compensation is sought, that factor must be taken into account in determining average weekly wage if the annual earning capacity is based on earnings in the year preceding the compensable injury.”).

After Cox’s injury on March 6, 2008, he was out of work on disability from March 7, 2008 until June 29, 2008, and only worked part time from June 30, 2008 to August 3, 2008. CX-9. Following his return to work, Claimant testified that he took unpaid Family Medical Leave on a weekly basis because of his back injury, and BIW’s Absence Detail Inquiry verifies that Cox frequently utilized Family Medical Leave. TR 66; CX-25. The Wage Statement relied on by BIW for the AWW does not account for the period of time that Cox was out of work on total and partial disability, nor does it account for the days Cox took unpaid Family Medical Leave. CX-23.

Based on evidence in the record, I am unable to determine the exact amount of money that Cox would have earned in the year preceding his January 30, 2009 injuries absent his prior back injury. However, I find it reasonable, especially in light of the lack of contention by the Employer, to apply the stipulated AWW of $797.95 that existed at the time of Cox’s March 2008 injury, thus ensuring that Cox’s AWW is not reduced because of his prior disability. Sixty-six and two-thirds per centum of the AWW ($797.95) is $531.97. As established previously, Cox’s disability became permanent in nature on January 31, 2009. Therefore, I find that the Claimant is entitled to compensation benefits at the rate of $531.97 per week from January 31, 2009 to the present and continuing.

E. Interest

Although not specifically authorized in the Act, the Benefits Review Board and the courts have consistently upheld interest awards on past due benefits to ensure that the employee

receives the full amount of compensation due. *Foundation Constructors, Inc. v. Dir., OWCP*, 950 F.2d 621, 625 (9th Cir. 1991); *Cowart v. Nicklos Drilling Co.*, 23 BRBS 42, 47 (1989), *rev'd in part*, 907 F.2d 1552 (5th Cir. 1990), *aff'd en banc*, 927 F.2d 828 (5th Cir. 1991), *aff'd*, 505 U.S. 469 (1992); *Grant v. Portland Stevedoring Co.*, 16 BRBS 267, 269 (1984), *on recon.*, 17 BRBS 20, 23 (1985). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). Interest is mandatory and cannot be waived in a contested case. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982). Interest is computed from the date each compensation payment becomes overdue. The first installment of compensation under the Act becomes due fourteen days after a claimant gives notice to the employer of an injury or the employer has knowledge of the injury. 33 U.S.C. § 914(b). Since compensation payments were not timely made, I find that Cox is entitled to an award of prejudgment interest. The interest shall be assessed as of the date Cox's compensation became due. *Wilkerson*, 125 F.3d at 907-08 (5th Cir. 1997). The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. § 1961, which is periodically changed to reflect the yield on United States Treasury Bills. *Grant*, 16 BRBS at 270. This compensation order incorporates 28 U.S.C. § 1961 by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Medical Care

An employer found liable for the payment of compensation is additionally responsible pursuant to section 7(a) of the Act for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. 33 U.S.C. § 907; *Dupre*, 23 BRBS at 94 (*citing Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979)). Accordingly, BIW shall remain

liable for all reasonable and necessary medical care as required by Cox for treatment of his work-related injuries.

G. Attorney's Fees

Having successfully established Claimant's right to compensation, Counsel for the Claimant is entitled to an award of attorney fees under section 28 of the Act. 33 U.S.C. § 928; *Am. Stevedores v. Salzano*, 538 F.2d 933, 937 (2d Cir. 1976).

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Pursuant to 33 U.S.C. § 908(a), Bath Iron Works Corporation shall pay Patrick Cox permanent and total disability compensation benefits in the amount of $531.97 per week commencing on January 31, 2009 to the present and continuing, plus annual adjustments pursuant to section 10(f) of the Act, 33 U.S.C. § 910(f);

2. Bath Iron Works Corporation shall pay Patrick Cox interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until paid;

3. Pursuant to 33 U.S.C. § 907, Bath Iron Works Corporation shall pay all reasonable and necessary medical care for treatment of all of Cox's work-related injuries;

4. In its post-trial brief, the Employer argued for section 8(f) relief from the Special Fund. Should the Director, Office of Workers' Compensation Programs object to Special Fund relief under section 8(f), it shall file its objection no later than **30 days** from the date of this Decision and Order. I will issue a supplemental decision dealing with the Employer's request for Special Fund relief;

5. If the Claimant seeks an award of attorney's fees and costs pursuant to 33 U.S.C. § 928, an application conforming to the requirements of 20 C.F.R. § 702.132(a) (2010) shall be filed within **30 days** of the date on which this Decision and Order is filed in the office of the District Director. Should the Employer object to any fees or costs requested in the application, the parties shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Employer's objections shall

be filed no later than **30 days** following service of the fee application. **The objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Claimant prior to the filing of the objections;** 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

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts