

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 July 2014

CASE NO.: 2013-LHC-363

OWCP NO.: 07-192295

IN THE MATTER OF:

WALTER TILLERY, JR.

Claimant

v.

UNION CARBIDE CORPORATION

Employer

and

**ACE AMERICAN INSURANCE COMPANY
c/o Broadspire**

Carrier

APPEARANCES:

JOHN F. DILLON, ESQ.

For The Claimant

SCOTT LEDET, ESQ.

PHILIP FOCO, ESQ.

For The Employer/Carrier

**Before: LEE J. ROMERO, JR.
Administrative Law Judge**

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq.,

(herein the Act), brought by Claimant against Union Carbide Corporation and Ace American Insurance Company, c/o Broadspire (hereinafter Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on January 23, 2014, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 32 exhibits, Employer/Carrier proffered 13 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.¹

Post-hearing briefs were received from the Claimant and the Employer/Carrier by the due date of March 24, 2014. The Director's brief was received on April 24, 2014, after an extension of time within which to file briefs. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered 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 (JX-1), and I find:

1. That the Claimant was injured on November 18, 2010.
2. That the Employer was notified of the accident/injury on June 10, 2011.
3. That Employer/Carrier filed a Notice of Controversion on June 27, 2011.
4. That an informal conference before the District Director was held on November 13, 2012.

¹ References to the transcript and exhibits are as follows: Transcript: Tr.____; Claimant's Exhibits: CX-____; Employer/Carrier's Exhibits: EX-____; and Joint Exhibit: JX-____.

II. ISSUES

The unresolved issues presented by the parties are:

1. Injurious Exposure/Causation.
2. The nature and extent of Claimant's disability.
3. Whether Claimant has reached maximum medical improvement.
4. Claimant's average weekly wage.
5. Entitlement to and authorization for medical care and services.
6. Employer's entitlement to Section 8(f) relief.
7. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at the formal hearing and was deposed on February 2, 2004 (CX-3) and July 23, 2013 (EX-3). In deposition, he testified that his father smoked when he lived with him and his mother in Greensburg, but not in the house. (CX-3, p. 13). He took after his mother and never smoked. (CX-3, pp. 15-16).

Claimant testified that he was in the Navy from 1955 to 1959. (EX-2, p. 11). He stated there was asbestos on the Navy ships. He worked in the fuel department and cleaned tanks. (Tr. 28). He did not physically strip the insulation, they just worked in the tanks. (Tr. 29-30). However, in his deposition, Claimant stated he was involved in the removal of insulation. (CX-4, EX-3, p. 18).

From 1965 to 1969 he worked two jobs: as a meter reader for Jefferson Parish and doing janitorial work for the Michoud NASA plant. (EX-2, p. 23). He would sweep and clean and worked part-time at night. He did not know if asbestos was present at the facility. He stated if asbestos was present, he was exposed to it. (Tr. 30). In his 2004 deposition he stated he was not

exposed to any hazardous substances or chemicals there, and didn't experience any types of health problems then. (CX-3, p. 24). In his 2013 deposition, however, he stated he was exposed to asbestos at NASA. (EX-3, pp. 20-21).

Claimant testified in deposition that he went to work for Employer in 1969, and his first job there was as a liaison clerk. (EX-3, pp. 24-25). He thinks he was exposed to asbestos during that time. Asbestos was in the piping all over the shipping department. (CX-4, p. 8). At one point, he was assigned as a supervisor of an asbestos crew that was removing insulation and cleaning it up. (Tr. 24-25). In 1970, he became a distribution technician. His duties were to load trucks and cars. During that time he felt he was being exposed to chemicals and his wife would tell him she could smell them on him. He would have coughing and headaches symptoms. That was the first time he started to experience asthma symptoms. (CX-3, pp. 30, 32). Claimant stated that in the 1970s he developed asthma from Ethanediamine, or EDA. (Tr. 41).

In 1972, he became a marine dock technician and loaded and unloaded barges and ships. (Tr. 35). Those vessels carried every type of chemical they made in the plant, and there was lots of exposure to the chemicals during the loading and unloading process. (CX-3, pp. 40, 41). He would wear a rain suit, gloves, and shield, but no respirator. (EX-3, p. 47). He stated he handled asbestos gaskets. (Tr. 36). He did not test the gaskets for asbestos, but asbestos floated in the air. (Tr. 37). He saw insulation on ships, but did not really know if it contained asbestos. Although the workers called the gaskets "asbestos gaskets," he did not know if the gaskets contained asbestos. (Tr. 38). All the ships were old and had asbestos piping. (CX-4, p. 12). After the 1980's there was a lot of maintenance and removal of those asbestos pipes. He was around that work all the time, though he did not actually do the work himself. (CX-4, p. 14). He would wear a paper mask. (CX-4, p. 15).

In 1974, respirators were required and were always worn on the docks. From 1974 to 1980, masks with filters were required. In 1979-1980, fresh air tanks were required. Claimant stated he could not wear the mask. (Tr. 39). When he supervised the removal of asbestos installation, he wore a "passive" respirator. (Tr. 40).

He was certified by the U.S. Coast Guard as a tankerman in the 1980s when he worked for Employer. He worked on the docks for eight to ten years before becoming a tankerman. (Tr. 20). He stated there was asbestos on the docks and in old barges. Overseas ships came to the docks and he boarded the ships for inspection. (Tr. 21). There were asbestos gaskets hanging in the shack and used frequently. Workers made gaskets from an asbestos sheet and cut out the gasket in various sizes from six inches to 16 inches. (Tr. 23).

Claimant boarded and inspected U.S. Navy ships from World War II at the docks, which Employer had purchased. He stated the ships had asbestos insulation. (Tr. 21). During this time there was no training offered and times were "laxed." Exposure to asbestos was never measured. (Tr. 22).

Claimant stated tankermen went with surveyors to check lines and went inside tanks. The condition of the insulation on the ships varied, but some were in a deteriorated state. He stated he believes he was exposed to asbestos while on such ships. (Tr. 24).

Claimant was also put on special projects. He was assigned as a supervisor to be in and around insulation being taken off pipes on ships. He had to go in and sign permits and check on the progress and inspect the work. He was within ten feet of the work being done and wore no respirator. That work was on the land side of things. (Tr. 24-25).

In the 1980s, his asthma got worse and he was sent home from work. He had pneumonia three times. His asthma caused him to become permanently partially disabled. Employer knew about his asthmatic condition. He completed a medical questionnaire in 1988 in which he noted he had occupational asthma and had been transferred to an inside position in the lab. (Tr. 41-42; EX-7, p. 14).

Claimant testified he was moved to the lab in 1985 because of breathing problems from the fumes. EDA and Naptha were "really killing [me]." Labs were not asbestos-free. Pipes overhead had insulation on them. (Tr. 26). He stated he was last exposed to asbestos on the dock in 1985. (Tr. 27).

He has lived in Marrero, Louisiana since 1996. (Tr. 31). He did not have an asbestos driveway in his neighborhood. He lived in a new subdivision. (Tr. 33). In the 1950s and 1960s, asbestos was used to construct driveways. (EX-8, pp. 1, 2, 5-6). They weren't concerned about asbestos exposure. (Tr. 34).

Claimant retired in 1995 because he was disabled by his respiratory condition. He could not work anywhere at that point. His respiratory condition was caused by exposure to toxic substances. His symptoms in 2002 were shortness of breath, chest pains, and coughing, which are the same symptoms he currently has, but which have worsened. (Tr. 45). His symptoms haven't changed since 2002, they have just gotten worse. (Tr. 46).

On re-direct examination, Claimant testified he was diagnosed by Drs. Gomes and Glade with asbestosis. (Tr. 46-47). He stated he did not know if he was exposed to asbestos in the Navy. (Tr. 47). Corrently, he is using breathing equipment and taking a blood thinner for his asbestosis. (Tr. 47).

The Medical Evidence

Dr. Glenn Gomes

Dr. Gomes was deposed by the parties on June 14, 2013. (CX-6; EX-4). He is board certified in pulmonary diseases and trauma medicine. He works for the Ochsner Health system and saw Claimant first in 2002. (CX-6, p. 6). At that time, Claimant was 66, had complaints of shortness of breath and fairly significant symptoms, even when he was walking at a slow pace. Claimant had dyspnea, a chronic morning cough, and chest discomfort. He was having symptoms of lung disease on a daily basis. Claimant told him he had a history of pneumonia and was diagnosed with asthma and COPD by another pulmonologist. (CX-6, pp. 6-7). He took Claimant's history, took X-rays, and performed pulmonary function studies. Claimant had a complicated history of problems with asthma as a child and numerous exposures throughout his working years—to dust, chemicals, and asbestos dust, which could cause asthma and other lung problems. (CX-6, pp 7-8). At that time, Claimant had some changes on his X-rays that Dr. Gomes thought were more related to asthma. He was unable to identify any clear-cut pleural plaques, and thought Claimant's problems were largely due to his chemical exposures at work. Claimant had occupational asthma. (CX-6, p. 8).

Dr. Gomes was concerned that because of Claimant's exposure to asbestos dust, he might develop further scarring in his lungs, and thought he was at risk of developing a cancer. He advised Claimant to continue to follow up with his pulmonologist and to monitor his lung disease carefully. (CX-6, p. 8). He wanted to see Claimant every year for a chest X-ray and complete set of pulmonary function studies. (CX-6, p. 9).

The next time he saw Claimant was November 18, 2010. His symptoms seemed to worsen, and his shortness of breath was interfering with his activities. (CX-6, pp. 9-10). Claimant had cut back on many of his activities. His pulmonary function studies showed moderate impairment of lung function, consistent with his symptoms, and his chest X-ray showed some diaphragmatic pleural plaques, normally associated with asbestos exposure. There was some atelectasis or scarring in his right lung base as well as hyperinflation. It appeared Claimant's symptoms had progressed: his pulmonary function studies had gotten worse and his X-ray had worsened. On that visit he more clearly had evidence of asbestos-related disease. His diagnosis of asbestos-related pleural disease remained the same. (CX-6, p. 10).

He saw Claimant again in 2012. Claimant indicated he was still very short of breath, and that it had gotten worse. Claimant had been diagnosed with additional pulmonary problems: a spot on his lung as well as some blood clots which were treated by Dr. Glade. (CX-6, p. 11). Claimant still demonstrated moderate impairment in his lung function and there appeared to be further deterioration. Claimant's chest X-ray showed clear cut evidence of some interstitial fibrosis in the lower lung fields, which resembled the type seen with asbestosis. The pleural plaques seen before were re-confirmed. (CX-6, p. 12). The pulmonary function study was a forced vital capacity of 2.87 liters or 70 percent of predicted. Claimant's forced expiratory volume of one second for the FEV1 was 1.58 liters or 59 percent of predicted. (CX-6, p. 12). The forced vital capacity was reduced compared to Claimant's 2002 values. From 2002 to 2012 there was a progression of pleural plaques, increased scarring at the base of the lungs, the development of blood clots, and a decline in lung function. Being less active is a contributing factor to the development of blood clots. (CX-6, p. 13).

In his opinion, Claimant's asbestosis contributed in some degree to the increase of lung impairment. Asbestosis is a progressive disease, which he believes is demonstrated in Claimant's case. (CX-6, p. 14). Claimant will need to be followed closely for any evidence of cancer, and is at increased risk of developing infections in his chest. Dr. Gomes thought there will be worsening lung function and further impairment of Claimant's daily activities over time. Generally speaking, the other chemical agents Claimant was exposed to at work do not pose as great of a cancer risk as asbestos exposure. (CX-6, p. 15).

Presently, Claimant takes many pulmonary medications: bronchodilators, including Symbicort and Albuteral; fluid pills to keep his lungs dry; and nebulizer treatments. Those treatments are appropriate both for someone with a pre-existing lung injury from exposure to chemicals and someone with asbestosis. There will be times when Claimant's treatment regimen will need to intensify. He will be taking these medications the rest of his life. (CX-6, p. 16). There is a high risk of respiratory failure within the next five to ten years. There is a high probability Claimant will be hospitalized in the intensive care unit and require oxygen on a regular basis. It is difficult to assign a percentage of impairment because of the asbestosis as compared to the pre-existing asthma conditions, because Claimant is no longer exposed to the chemicals and things irritating his lungs and causing his asthma, whereas the asbestos fibers are still in the lung and there is some progression of the disease process for which there is no treatment. He thinks both processes are going to be significant factors in the deterioration of Claimant's lung function over time. (CX-6, p. 17). From the last ten to 12 years, he would guess it will probably be a combination of 50 percent asbestosis and 50 percent from his underlying asthma condition. He would place Claimant at moderately impaired, according to AMA guidelines. (CX-6, p. 18).

On cross-examination, Dr. Gomes clarified that atelectasis can be related to scarred areas of the lung not opening up properly, but is not necessarily equated with scarring. It can be caused by anything that prevents you from totally expanding the lung. (CX-6, p. 19).

In 2002, Dr. Gomes characterized Claimant's pulmonary function tests as revealing moderate to severe impairment of lung function, primarily of the obstructed type. Claimant's FEV1—how much air he blew out in one second—was reduced. The ratio of how much air he blew out in one second to his forced vital capacity was 60 percent, which was low, and that was an obstructive pattern. (CX-6, p. 20). The pulmonary function study tells whether or not you are looking at a restrictive lung disease versus an obstructive lung disease based on what results and variables are low and high. (CX-6, p. 21).

His conclusion about the 2010 pulmonary function study was that it revealed moderate impairment of Claimant's lung function, of an obstructive nature. In 2012, the pulmonary function study again revealed a moderate impairment of the obstructive type. (CX-6, p. 21). Dr. Gomes opined that based on the three lung studies alone, they did not clearly demonstrate a worsening of Claimant's symptoms, but the numbers themselves would suggest he had a persistent moderate impairment of lung function over those three studies. When he looked at Claimant's comparison study from 2010 to 2012, he did have reduction in his forced vital capacity and FEV1. When he compared it back to 2002, the association is not quite as clear because they were using a slightly different machine for the pulmonary function studies. Claimant's lung function certainly hasn't improved much. The studies from 2010 to 2012 showed a decline. Dr. Gomes stated when he characterizes a test result as "severe," there is more dysfunction than a moderate result. (CX-6, pp. 22-23).

Asbestosis is normally characterized by restrictive lung disease. Dr. Gomes characterized Claimant's disease as obstructive in nature. (CX-6, p. 23). The diagnostic criteria for asbestosis are a significant history of prior asbestos exposure, the adequate latency period for the asbestos fibers to cause scarring and its manifestations, physical findings of rales and abnormality on examination, lung function abnormalities, and chest X-ray abnormalities of interstitial fibrosis. (CX-6, p. 24).

He personally reviewed Claimant's 2002 x-ray films. He noted bilateral apical pleural thickening, which could have been due to asbestos exposure. (CX-6, p. 24). But generally that type of finding is seen with other disease processes, and they do not usually use that for diagnostic criteria for asbestos exposure, though it certainly could have been due to it. (CX-6, pp. 24-25). In 2002, Dr. Gomes also noted interstitial markings

in the lower lung zone bilaterally. By 2012, the films appeared to show increased interstitial fibrotic markings more definitively, which met the diagnostic criteria for pulmonary asbestosis. (CX-6, p. 26). That factor was the main thing that led him to the diagnosis of asbestosis. He was seeing a progression in the films. There was also information from Dr. Glade and more detailed studies to include a CT scan. In his opinion in reviewing the radiography from 2002 to 2012, the findings became more clear. There was evidence of progression and clear-cut evidence of interstitial fibrosis normally associated with asbestos exposure. (CX-6, p. 27).

In 2002, he saw "something" on the chest X-ray, but it did not meet the radiographic diagnostic criteria. A CT scan done at that time may have shown the scarring more clearly and a diagnosis may have been made at that time. In 2012, it looked like the scarring had progressed and that it met the criteria. He also had the CT scan report that more or less confirmed interstitial fibrosis. That is why the diagnosis was more obvious at that time. In 2002, Dr. Gomes only had a chest X-ray. (CX-6, p. 28).

In the 2012 films as compared to the 2010 films, Dr. Gomes opined the radiologist referred to some areas of atelectasis at the right base of the lung that seemed to clear or decrease in prominence. (CX-6, pp. 31-32). From Dr. Gomes's interpretation, there is bibasilar scarring—the term they use for scarring from asbestos—in both the 2010 and 2012 reports.

Upon re-direct examination, Dr. Gomes stated that he is a certified NIOSH B Reader, meeting the criteria for being able to read standard films and correlate them with sample films. The idea is to create some objective standardization in the reading of films for people who have occupational dust diseases, including asbestosis. (CX-6, p. 33).

He stated that Claimant's case demonstrates the progression of fibrotic changes over time. In 2002, he considered Claimant's other problems, to include asthma, and was not convinced that there was enough asbestos-related scarring to describe him as having asbestos-related disease. (CX-6, pp. 36-37). However, in 2010, Dr. Gomes believed Claimant "most clearly fit the diagnosis of asbestos-related pleural disease." (CX-6, p. 37). He opined Claimant's case meets the American Thoracic Society's criteria for non-malignant, asbestos-related disease. (CX-6, p. 37).

Dr. Gomes opined that asbestos can, especially in the early stages, cause an obstructive component to lung dysfunction, but it usually causes more of a restriction of the lung as time goes on. Normally what you would expect with someone who has asthma is that the lungs would be hyperinflated and total lung capacity would be over one hundred percent of what is predicted. But in combined disease processes, you begin to get restriction or reduction of total lung capacity, here measured at 85 percent of predicted, which is what Dr. Gomes saw with Claimant. (CX-6, p. 38). There is a restrictive component, but it is not clearly demonstrated classically as a reduction of total lung capacity, but you would expect the total lung capacity to be higher than what it is on the study. (CX-6, pp. 38-39).

Claimant showed below 80 percent of forced vital capacity. Someone with asthma is always going to show some obstruction, which would eclipse the effects of what asbestos is doing to Claimant's lungs. (CX-6, pp. 39-40). Total lung capacity is 85 percent of predicted, and 80 percent of predicted and above is normal for someone of Claimant's age, height, and sex. Based on Claimant's clinical condition of his longstanding history of asthma and his description of hyperinflation on the X-rays, you would expect it to be higher, and it is not. You would expect it to be over 100 percent, because the lungs get hyperinflated with asthma. That is an indication that the asbestos is affecting Claimant's total lung capacity, which is manifested by his forced vital capacity being low. (CX-6, p. 40).

When Dr. Gomes saw fibrosis on the 2002 X-ray that was not enough to assign it level one asbestosis, which does not mean the fibrosis was not causing some effect on Claimant's lung function at that time. (CX-6, pp. 41-42). A chest X-ray is not a very sensitive tool in picking up fibrotic changes, and can miss about 20 percent of early changes of fibrosis. He thinks a CAT scan in 2002 probably would have picked up some changes in Claimant from asbestos exposure. (CX-6, pp. 42-43).

On cross-examination, Dr. Gomes testified that in 2002 he did encourage Claimant to continue to see Dr. Malloy and Dr. Grimstad, who were following his lung disease. He did specifically communicate to Claimant how his asbestos exposure in the past might affect his lungs in the future. (CX-6, p. 44).

Dr. Glenn Mason

Dr. Mason was deposed by the parties on July 31, 2013. (CX-9). Dr. Mason is board certified in radiology and has been practicing for 21 years. (CX-9, p. 5). He read Claimant's chest X-rays on March 28, 2012, and compared them to 2010 X-rays. The abnormalities he reported at the lung bases looked like they had improved slightly from the previous chest X-ray of November 2010. (CX-9, pp. 9-10).

Dr. Gomes's review of the same X-ray was consistent with his own in that he found increased interstitial fibrotic markings in the lower lung fields. Dr. Mason did not appreciate any pleural plaques. There was some pleural thickening, but when he thinks of plaques he thinks of more focal pleural thickening than he saw. What he saw was a little more diffuse than what he would call "plaques." There is probably some difference in opinion as to what would be called a plaque as opposed to just diffused pleural thickening. (CX-9, p. 12). He testified he was not very specific on his report about pleural thickening. He referred to "pleural parenchymal," which means involvement of the pleura, but is not specific as to focal or diffuse. (CX-9, pp. 12-13). Dr. Gomes's next finding was atelectasis in the right lung base, which Dr. Mason guessed was consistent with what he saw. The changes he described can be seen with scarring or atelectasis. (CX-9, p. 13). Atelectasis is when a portion of the lung is not expanded like it is supposed to be. It can be a temporary thing from something like mucus plugging, or it can be something more fibrotic that is forming a scar that never resolves. Dr. Mason stated you can have atelectasis and scarring co-existing. Atelectasis can progress to scarring. They can appear very similar. (CX-9, pp. 13-15).

He differed from Dr. Gomes in that he thought the interstitial fibrotic changes appeared slightly less prominent, which would make him interpret it as improving. (CX-9, p. 15). He thinks there is a slight contradiction in Dr. Gomes's description on the 2010 X-ray. Dr. Gomes stated pulmonary parenchyma appeared normal, but then stated atelectasis was noted in the right lung base. Dr. Mason opined if you have atelectasis, parenchymal is not normal; but perhaps Dr. Gomes was referencing the airspace components of the lungs. (CX-9, p. 17). In the 2010 X-ray, Dr. Mason testified that he saw more of a diffuse pleural thickening than pleural plaques, though that may be a difference in terminology. When you term something a "pleural plaque," you are insinuating asbestosis. He did not

have Claimant's history, so he did not want to jump to that conclusion and state "pleural plaques." (CX-9, pp. 17-18).

If he had known Claimant's history, he probably would have still described the changes the way he did, but probably would have stated something to the effect that those changes are consistent with asbestos-related lung disease. Other processes can produce similar changes. (CX-9, p. 18). He stated they have to deal with probabilities, and if he knew those factors, he would indicate he thought it was very likely to be asbestos-related. (CX-9, p. 20). If he sees calcifications on an X-ray, which he thinks appeared on Claimant's CT, then he is almost 100 percent certain that it is asbestos-related pleural disease. Chest X-rays are more of a screening exam. CTs are more detailed. If you see something on a chest X-ray you want to see in greater detail, then the CT would provide that detail. (CX-9, p. 19).

On cross-examination, Dr. Mason opined that his findings on the X-rays were not very different at all from Dr. Gomes's. He thinks the difference in specialties sometimes leads to different terminology and therefore he may phrase things differently than a pulmonologist. He would agree that the findings for Claimant are "consistent with asbestosis." (CX-9, pp. 21-22).

Causation/Exposure Evidence

Frank Parker, CIH

Frank Parker has been a certified industrial hygienist since the 1970s. He wrote a report dated June 20, 2013, at Claimant's request after reviewing his medical records, doctor's deposition, Claimant's depositions, depositions of Wilson Callaway, Milton Trainor, Barry Horner, records from Employer and a narrative summary of exposure prepared by Counsel for Claimant. (CX-8, pp. 5-7; CX-8, exh. 5). Based on Claimant's testimony, he believed Claimant's exposure to asbestos occurred while he worked for Employer. He is not aware of a minimum safe exposure level of asbestos that has been accepted by the EPA or OSHA. (CX-8, p. 17).

None of the data in the reports upon which he relied was taken from Employer's docks. (CX-8, p. 24). He does not know if Mr. Trainor or Mr. Horner worked with Claimant on the docks at Employer. (CX-8, pp. 26-27). He did not review any PNID drawings or other specifications that provided information as to

whether there was thermal insulation containing asbestos installed on the docks at Union Carbide. (CX-8, p. 28). In forming his opinion, he relied upon the fact that Claimant was exposed to asbestos, that Claimant testified he handled asbestos gaskets on the dock (which he knows are very common on docks), and that given the timeframe, the vast majority of the thermal system insulation and gaskets were asbestos. (CX-8, p. 29).

Because of the industrial use of asbestos, there is a presence of asbestos fibers in the ambient air, even in non-industrial settings. (CX-8, p. 30). Generally, asbestos must be disturbed to get it into the ambient air. He understood that Claimant was not working as a pipe fitter or an insulator at Employer's dock. Claimant was loading and unloading barges. Parker has not been to the Union Carbide facility nor seen an aerial photo of the facility and does not know how far the docks are from the production area of the plant. (CX-8, pp. 32-34). He has not quantified Claimant's unique exposure. He has not seen any data as to the amount of asbestos fibers present in the air at Employer's docks. (CX-8, p. 38). He does not know to what specific asbestos-containing products Claimant was exposed. (CX-8, p. 39).

As an industrial hygienist, he thinks Claimant's work in the U.S. Navy and at the Michoud facility exposed him to asbestos. He testified it is clear that asbestos was commonly used on Navy ships. (CX-8, p. 44). Parker relied upon Counsel's narrative summary that no respiratory protection was worn by Claimant, which is clearly not accurate. He did not render an opinion about the likelihood of exposure for an individual who wore respiratory protection. (CX-7).

Dr. J. Cressend Schonberg, Sc.D., QEP

Dr. Schonberg is a doctor of science in environmental engineering and testified in a deposition on September 24, 2013. (EX-6, p. 9). He started working for Employer in 1970 as a process engineer and is president of a consulting firm doing safety, health, and environmental affairs work. (EX-6, pp. 8-9).

At Employer, they always wanted to make sure they had equivalent or better procedures than NIOSH [National Institute for Occupational Safety and Health] recommended as far as detectable amounts of asbestos. (EX-6, pp. 14-15). There are three aspects of his job: recognition, evaluation, and recommended controls. The recognition portion looks at the

materials being handled, the material safety data sheets, and toxicity data to determine that materials might be hazardous. He also looked at the individual jobs where people are handling the material and how they are handling it. He talked to supervisors and individuals to find out their job tasks and where they may have potential exposure to hazardous substances. The evaluation portion of his job requires monitoring to have a good feel for the overall levels and so that, for example with asbestos, the proper area can be roped off. If there are levels that are above the allowable OSHA limits, you come back in with engineering controls and change the process. He might require respiratory protection or wet down the materials so you do not create dust. (EX-6, pp. 16-18).

He reviewed Claimant's deposition and he knows that where Claimant was working, as a marine dock technician out on the barge dock, would not have exposed him to asbestos because he was not removing asbestos insulation in the Taft Plant. Production technicians did not do that. A contractor or maintenance position went in and removed insulation. (EX-6, pp. 29-32).

He testified that Claimant's work as a dock technician had him either in an open area or inside a climate-controlled technician shelter. 50 to 60 percent of Claimant's work time would be in the technician shelter, where he would not have had any asbestos exposure. (EX-6, pp. 33-34). There was no asbestos in that building. He does not recall doing any testing or sampling of that building. (EX-6, p. 133). On the dock that is right on the river, there are all kinds of air currents, so even if there were asbestos fibers there, they would be significantly diluted. (EX-6, pp. 34-35).

Gaskets are like the stoppers used in a hose. If a hose leaks, sometimes it is because the gasket has come out or gone bad. If Claimant observed a leak in his connection lines, the first thing he would think about is changing the gasket. He would not be changing the gaskets in a line, but at a hose connection to a barge or a tanker. (EX-6, pp. 38-39). Claimant would get material from the distribution area in lines that came across the plant or across the levees into the barge or tanker dock and then monitor the transportation of the material. (EX-6, p. 39). He does not feel Claimant could have gotten any exposure to asbestos doing that. (EX-6, pp. 39-40).

He testified that he did monitor people removing gaskets and was not able to pick up any levels of asbestos while they

were being removed. Not all the gaskets contained asbestos. He would doubt if Claimant changed more than one gasket a month. (EX-6, p. 40).

He cannot believe Claimant would have had exposure from any ships docked at Employer's facility. If the ships had asbestos in them, it would be in their boiler areas and he cannot imagine why Claimant would be down there. (EX-6, p. 43). Based on his personal experience, he does not believe Claimant was exposed to asbestos in his position as a marine deck technician at Employer. He was there when Claimant was there, and he observed those areas. (EX-6, p. 44).

He stated that if asbestos removal was being done inside the plant, he did not believe it was likely Claimant would have faced any exposure while out on the docks. There is a large levee that separates the docks from the plant. There are wind currents on the river all the time. If there was asbestos removal going on, it would have been roped off to an area where it was non-detectable. (EX-6, p. 46).

He thinks that if Claimant was removing gaskets, he would not have been doing it with a power wire brush, which would have caused asbestos fiber release. If he had used a power wire brush for removal, that would have required a safe work permit. He would have been doing it in open areas. Sometimes if a gasket has been in place for 20 years or more, it gets mashed in the pipeline and you cannot get the whole thing out. A lot of times people would use their knives to remove them. (EX-6, pp. 48-50).

He testified that he believes any asbestos exposure Claimant had would have been at the NASA facility or while in the Navy, but he would have to look at the data and what Claimant specifically did to be sure. (EX-6, p. 54). With respect to Claimant living in Marrero, he cannot say whether or not he would have been exposed to asbestos. (EX-6, p. 56).

On cross-examination, Dr. Schonberg stated that he did not believe the barges would have insulation material made out of asbestos. They did not transfer materials that are hot and asbestos is used primarily for hot materials. He does not recall testing any of the vessels coming in and out of Employer's terminals. (EX-6, pp. 62-63).

He testified that his view is that all of the monitoring they did showed levels at or below the threshold limits, with no

exceptions to his knowledge. That is one of the reasons he believes Claimant could not have been exposed to asbestos while working for Employer. The levels were less than detectable at the particular levels that they were able to detect them at the time. (EX-6, p. 66).

He testified that he does not know if Employer's policy was to count a bundle of fibers or a single fiber as one, but did not know if that would be a big deal. (EX-6, pp. 73-74). Based on the information provided him as an industrial hygienist, he stated that exposures at or below the threshold limit value are safe. (EX-6, p. 75). That conclusion is based on his knowledge of what Claimant did and knowing the site, not on studies done on the docks. In his opinion, a significant asbestos exposure is one that would be more than the detectable limit. (EX-6, p. 77).

He agrees with the statement that "all forms of asbestos are capable of inducing," [asbestosis or mesothelioma] if it is a carcinogen. (EX-6, p. 85). He does not believe Claimant was exposed to asbestos on the barge docks. (EX-6, p. 122). He does not see how Claimant could have been exposed at areas other than the docks while working for Employer because of the surveys, monitoring, safe work permits, and procedures they followed. (EX-6, p. 123).

On re-direct examination, he stated that a dock worker's risk of exposure to asbestos on ships with asbestos insulation would be minimal unless they were moving it, beating it, or causing it to create dust. (EX-6, pp. 137-138). Asbestos has to be disturbed. (EX-6, p. 138). It is his opinion that the procedures, policies, and practices implemented at Employer sufficiently mitigated the risk of asbestos exposure. (EX-6, p. 140).

The Contentions of the Parties

Claimant contends he was exposed to multiple toxic substances and developed breathing problems. He was reassigned to the lab in 1995 because he was unable to wear a respirator mask. In 2003, Claimant filed a claim alleging toxic exposure. He agrees that in Judge Rosenow's 2007 Order compensation was determined to be time-barred. However, medical care was found to be warranted. He contends he was not diagnosed with asbestosis until 2010 by Dr. Gomes, and that his complaint was thus timely filed. Claimant also argues that principles of **res judicata** do not apply, given the new set of facts regarding

exposure and diagnosis of a different occupational disease. The instant claim was filed in 2011 and amended in 2012 based upon a finding of pleural plaques.

Employer agrees that Claimant has health problems related to asbestosis. It argues that **res judicata** precludes the claim because Claimant produced no evidence that the alleged injuries are separate from those litigated in 2003. Alternatively, it argues the claim should be dismissed because it is untimely, as Claimant knew his respiratory condition was caused by exposure to asbestos in 2002, based on Dr. Gomes's examination and imaging. Employer also disputes causation and argues Claimant was exposed to asbestos elsewhere. Alternatively, Employer contends that it is entitled to Section 8(f) relief since Claimant had occupational asthma in the 1970s, about which Employer had knowledge, and that his asthma combined with his worsening respiratory problems to cause a greater impairment.

The Director contends that Claimant filed a claim on September 23, 2003, alleging exposure to toxic gases and respiratory injuries. This claim resulted in a Decision and Order finding compensation benefits time-barred, but granting future medical benefits. The District Director referred the case to OALJ on November 19, 2012, noting that Section 8(f) had not been raised and was not an issue. Employer filed its application for Section 8(f) relief on September 13, 2013, which the Director contends is not timely submitted and barred by the Absolute Defense. The Director asserts that Employer was aware of the permanency of Claimant's condition in 2003 when he filed his first claim and at the latest when he filed his 2011 claim. Employer failed to file an application for Section 8(f) relief prior to the District Director considering the case at the November 13, 2012 informal conference. Nevertheless, the Director does not object to Section 8(f) relief if the undersigned determines Employer is not barred by the Absolute Defense and Claimant is permanently totally disabled. However, if the undersigned finds that Claimant is permanently partially disabled, the Director objects to Section 8(f) relief because Employer has failed to meet its burden to show the resulting disability is "materially and substantially greater" than that which would have resulted from the work-related injury alone.

IV. DISCUSSION

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). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

A. Timeliness of Claim

Under Section 20(b) of the Act, it is presumed that the claim for benefits was timely filed. 33 U.S.C. § 902(b). In occupational disease cases such as this one, there is no injury until the accumulated effects of the harmful substance manifest themselves and the claimant becomes aware or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the disability. Bath Iron Works Corp. v. Dir., OWCP, 244 F.3d 222, 228 (1st Cir., 2001); Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir. 1955).

The claim for benefits must be filed within two years after the employee becomes aware of the above connection between his employment, the disease, and the disability. 33 U.S.C. § 913(b)(2). Where the decedent retires prior to the date upon which his injury occurred, disability is defined as permanent medical impairment rated under the American Medical Association's Guides to the Evaluation of Permanent Impairment. 33 U.S.C. §§ 902(10), 908(c)(23); Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989).

In this case, Dr. Gomes testified that though he knew about Claimant's exposure to asbestos in 2002, he was unable to identify any clear-cut indications that Claimant's symptoms were related to asbestos exposure, and instead felt his problems were related to his chemical exposures at work. (CX-6, p. 8). He advised Claimant to continue to see a pulmonologist and to monitor his lung disease carefully. Claimant did not return until 2010, whereupon Dr. Gomes diagnosed him with asbestos-related pleural disease. This diagnosis was based on imaging

that showed pleural plaques. I find that, though Claimant was always at risk of developing asbestos-related disease, there was no injury and no awareness of that injury until 2010. Claimant's asbestos-related claim is therefore not time-barred.

B. Res Judicata

An application of **res judicata** requires a showing of the following: 1) the parties must be identical in both suits, 2) the prior judgment must have been rendered by a court of competent jurisdiction, 3) there must have been a final judgment on the merits, and 4) the same cause of action must be involved in both cases. In re Paige, 610 F.3d 865, 870 (5th Cir. 2010). The first three factors are met in this case, but the parties dispute that the same cause of action is involved here as it was in the stipulated order. The fact that Claimant mentioned asbestosis in his initial LS-203 does not mean that issue was determined in 2003. There was no finding in the previous decision and order that Claimant suffered from asbestos-related ailments. Judge Rosenow's order found that "Claimant was exposed to toxic gases and suffered respiratory injuries thereby while working for Employer." W.T. v. Union Carbide Chemicals & Plastics, Case No. 2007-LHC-00124 (ALJ Oct. 4, 2007). I find that the prior decision and order did not address Claimant's present claim for disability related to asbestos exposure, and therefore principles of **res judicata** do not apply.

C. Credibility

I have considered and evaluated the rationality and internal consistencies of the testimony of the witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative and available evidence, while analyzing and assessing its cumulative impact on the record. See Indiana Metal Products v. National Labor Relations Board, 442 F.2d. 46, 52 (7th Cir. 1971). An administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Mijangos v. Avondale Shipyards, Inc., 948 F.2d 941 (5th Cir. 1991).

Moreover, in arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v.

Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

I found Claimant's testimony generally reliable and consistent. However, the competing testimony and opinions of Parker and Schonberg was the decisive factor in this matter. Parker's testimony was riddled with generalizations about asbestos and its effects. He had no first-hand knowledge of the facility or Claimant's work for Employer. In part, his conclusions were based on inaccurate information. Schonberg on the other hand worked for Employer and was more intimately familiar with the facility and Claimant's job tasks. I have given more probative weight to the testimony and opinions of Schonberg.

D. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In 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—that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990).

These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

In an occupational disease case, the question of causation and responsible employer can become conflated. Causation establishes a claimant's entitlement to benefits and addresses whether or not the alleged harm is related to any workplace exposure. Where the claimant's injury is related to an occupational exposure, the responsible employer rule allocates liability.

1. Claimant's Prima Facie Case

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5th Cir. 1982).

It is well-established that credible testimony from a claimant and/or histories from treating physicians where the claimant previously described working conditions that included exposure to asbestos material are sufficient to establish a **prima facie** case and invoke the Section 20(a) presumption. Shaller v. Cramp Shipbuilding and Dry Dock Co., 23 BRBS 140, 147 (1989). Moreover, the existence of pleural plaques, resulting from exposure to asbestos and aided by the statutory presumption, may establish a work-related injury as a matter of law. Romeike v. Kaiser Shipyards, 22 BRBS 57, 59 (1989).

Claimant argues in his brief that he has satisfied his burden under Section 20(a) "while reserving the issues of exposures on Employer's job site," because it is not disputed that he has asbestosis. (Claimant's brief, p. 57). He urges that the rebuttal burden is thus on Employer. Before he can establish his entitlement to the presumption, however, Claimant must show by a preponderance of the evidence that conditions existed at work that could have caused his injury.

Claimant credibly testified that he handled asbestos gaskets and worked within ten feet of asbestos insulation removal projects from pipes on ships while working for Employer. Dr. Schonberg confirmed that asbestos was present at Employer's facility, though he argued about the degree of exposure Claimant would have had. (EX-6, p. 66). Parker testified that given the timeline of Claimant's work for Employer, he believed Claimant

would have been exposed to asbestos on Employer's docks. (CX-8, p. 29). I find this evidence sufficient to establish by a preponderance that asbestos was present at Employer's facilities.

The medical evidence indicates, and Employer does not contest, that Claimant has asbestos-related pleural plaques. His treating physician, Dr. Gomes, testified that Claimant has evidence of asbestos-related disease. (CX-6, p. 10). Dr. Mason agreed that Claimant's medical findings were consistent with asbestosis. (CX-9, pp. 21-22). Thus, Claimant has established a **prima facie** case that he suffered an injury that falls under the Act.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have caused them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT) (5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT) (5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29 (CRT) (5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Substantial evidence is evidence that provides "a substantial basis of fact from which the fact in issue can be reasonably inferred," or such evidence that "a reasonable mind might accept as adequate to support a conclusion." New Thoughts Finishing Co. v. Chilton, 118 F.3d 1028, 1030 (5th Cir. 1997); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Claimant argues that New Orleans Stevedores v. Ibos governs, and mandates that Employer prove either "(1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing

work covered under the LHWCA for a subsequent employer" when he was exposed. 317 F.3d 480, 485 (5th Cir. 2003). Because Employer cannot "present specific, comprehensive medical evidence disproving" that Claimant's pulmonary problems are caused by his exposure to asbestos, Claimant urges he should prevail. Id. Claimant overstates the legal requirements to rebut the Section 20(a) presumption. In Ceres Gulf, Inc. v. Director, OWCP, the Fifth Circuit noted that while in occupational disease cases, "the employer might have to adduce more evidence to rebut a plaintiff's prima facie case[,"] its burden may not be raised "from that of simply adducing 'substantial evidence' to the more onerous task of disproving the Claimant's prima facie case." 683 F.3d 225, 231-32 (5th Cir. 2012).

In this case, Employer does not attempt to rebut the medical evidence that Claimant suffers from asbestos exposure-related illness. Instead, it focuses its effort on refuting that Claimant's exposure to asbestos occurred while he was working on the docks at its facilities. To this end, Employer relies on its expert, Dr. Schonberg, who testified that Claimant would not have been exposed to asbestos in the course of his employment. Dr. Schonberg stated that Claimant would have spent 50 to 60 percent of his time inside a climate-controlled technician shelter that had no asbestos in it, that the open-air environment of the docks would have dissipated any asbestos in the air, and that Claimant's duties would not have put him at risk of asbestos exposure because he would not have been moving it or causing it to create dust. Dr. Schonberg also testified that the monitoring he did during the time Claimant was a dock worker for Employer indicated asbestos levels at or below threshold limits. Employer does not invoke the "last responsible" rule, since Claimant did not return to work after retiring from its facility in 1995.

Dr. Schonberg's expert and first-hand testimony is sufficient to rebut the Section 20(a) presumption and place back on Claimant the burden of proving by a preponderance that conditions at work could have caused his asbestos-related injuries. A reasonable mind could conclude that Claimant was not exposed to asbestos at work for Employer.

3. Weighing All the Evidence

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole.

Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

The medical evidence focused on the nature and extent of Claimant's pulmonary problems, rather than on their source. Dr. Gomes noted Claimant's complex history of exposure to different chemicals and asbestos, which could contribute to lung problems, but that observation was based on the history of exposure given by Claimant. (CX-6, pp. 7-8). Similarly, while Dr. Mason was more cautious, he did admit that if he had known Claimant was exposed to asbestos, he would have indicated that the changes he observed in Claimant's lungs were consistent with asbestos-related lung disease. Dr. Mason stated, however, that there were other processes that could cause similar changes. (CX-9, p. 18).

Claimant testified in deposition that he believed he was exposed to asbestos while working for the U.S. Navy, and while working as a janitor for the Michoud NASA facility. (EX-3, pp. 17, 20-21). At hearing, he testified more equivocally that he could have been exposed to asbestos while working at both places. (Tr. 28-31). While I do not believe Claimant had any intent to mislead, his testimony indicated the fundamental uncertainty he has with regard to his asbestos exposure. As a lay worker, he could not affirm for certain if and when he had been exposed.

Claimant testified that "asbestos floated in the air," but he conceded that he did not know if the gaskets he handled or the insulation on ships on which he worked contained asbestos. (Tr. 38). He testified that in the 1980s, there was maintenance and removal of asbestos piping that he was around, though he did not actually do any of the removal himself. (EX-4, p. 14). No other evidence was adduced in support of Claimant's claims that the gaskets he handled or the insulation to which he was proximal contained asbestos. Nor could Claimant testify to specific details that would support his assertions that the ships on which he worked contained asbestos.

Frank Parker testified that he believed Claimant's exposure to asbestos occurred while he worked for Employer, and that he was not aware of any safe exposure level. (CX-8, p. 17). Parker did not take any samples or data from Employer's docks, however, and relied solely on Claimant's testimony that he handled asbestos gaskets and that during the time Claimant worked for Employer on the docks, the "vast majority" of thermal

system insulation in use was asbestos. (CX-8, p. 29). He testified that you generally had to disturb asbestos to get it into the ambient air, and that he had not seen any data as to the amount of asbestos in the air at Employer's docks. (CX-8, p. 38). Parker's report also stated that Claimant was likely exposed to asbestos while he was in the U.S. Navy and while working for the Michoud NASA facility. (CX-7, p. 1). Nevertheless, it was Mr. Parker's opinion that Claimant's last exposure to asbestos was while working for Employer.

Dr. Schonberg testified that he tested employees removing gaskets and was unable to pick up any levels of asbestos exposure. (EX-6, p. 40). He stated that he did not believe Claimant would have been exposed to asbestos on ships because he would not have been in the areas of the ships where asbestos was present. (EX-6, p. 43). He also stated that the barges Claimant worked with did not have asbestos insulation because they did not transfer hot materials for which asbestos insulation would have been necessary. (EX-6, pp. 62-63). Dr. Schonberg testified that a dock worker's risk of exposure to asbestos is minimal unless they were causing it to be disturbed and create dust. (EX-6, pp. 137-38).

Employer included considerable documentation describing testing at its facility and protective measures taken by workers. (EX-12, exh. i-ff). Claimant corroborated that he wore a respirator while working on the docks. (Tr. 39).

In Franklin, the Board affirmed benefits, noting that the ALJ had rejected the employer's attempts to prove with statistics that its exposure could not have been injurious, and that the claimant's exposure was not so infrequent or of such low intensity that it could not have given rise to his condition. Franklin v. Dillingham Ship Repair, 18 BRBS 198 (Apr. 17, 1986).

In Todd Shipyards Corp. v. Black, however, the Ninth Circuit stated that minimal exposure to asbestos is not sufficient, and that claimant must prove the covered employer exposed the worker to injurious stimuli in sufficient quantities to cause the disease. 717 F.2d 1280, 1286 (9th Cir. 1983). In Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich), the Ninth Circuit upheld an ALJ's finding that exposure to asbestos at levels significantly lower than that mandated by the Occupational Safety and Health Act is not sufficient to affix liability on the employer in the absence of a showing that such levels were in fact hazardous. 914 F.3d 1317 (9th Cir. 1990).

In this case, weighing all the evidence, Claimant cannot carry the burden of proving that he was exposed to injurious levels of asbestos while working for Employer as a tankerman. I gave Dr. Schonberg's testimony greater weight than Parker's, because he was intimately involved in the working conditions at Employer, specifically tested various areas including that of gasket handlers, and it was his expert opinion that Claimant had not been exposed. Claimant's lay opinion about his own exposure, while sufficient to raise the Section 20(a) presumption, cannot carry his burden after rebuttal. Claimant must show by a preponderance of the evidence that he was exposed to sufficient quantities of asbestos to constitute injurious exposure. See Greenwich Collieries, supra. Because I deny his claim, I did not reach the question of Employer's entitlement to Section 8(f) relief.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, it is hereby **ORDERED** that Claimant's claim for disability and medical benefits under the Act be and it is **DENIED**.

ORDERED this 31st day of July, 2014, at Covington, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge