Jeffrey R. Sweet
Acting Chairman

STATE OF NEW YORK
WORKERS' COMPENSATION BOARD
107 DELAWARE AVE
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State of New York - Workers' Compensation Board

In regard to [redacted] (dec'd), WCB Case # [redacted]

RESERVED DECISION

keep for your records

At the Workers' Compensation hearing held on 03/26/2003 involving the claim of [redacted] (dec'd) at the Buffalo hearing location, the Judge did not make a decision in order to permit further study of the issues and facts presented. The following is the decision, findings and directions of Judge Michael Bluth:

RESERVED DECISON

In regard to the ESTATE OF [redacted]
WCB [redacted]
Decision

The Estate of [redacted] alleges that Mr. [redacted] died on August 22, 2001, from malignant mesothelioma causally related to his occupational exposure to asbestos at Garlock, Inc. The self-insured Employer has controverted this claim.

The undisputed medical evidence is that the Decedent died from malignant mesothelioma. Dr. Jerrold Abraham, professor of pathology and director of environmental and occupational pathology at Upstate Medical University, reported on November 14, 2001, his opinion to a reasonable degree of medical certainty that the Decedent's occupational asbestos exposure was the cause of his malignant mesothelioma and death.

The Employer's position that there is insufficient evidence of the Decedent's occupational exposure to asbestos is without merit. Lloyd Green, Jr., the former director of facility engineering at Garlock, Inc., provided credible evidence of the Decedent having substantial occupational exposure to asbestos. Mr. Green, a registered engineer with a Bachelor of Science Degree in Mechanical Engineering, described in great detail how Garlock, Inc. made asbestos containing products. He said bales of asbestos were brought in and were made into a string, which was then rolled into asbestos blankets. The asbestos blankets were then shipped to other companies for further finishing. Mr. Green said the bales of raw asbestos were shipped through the Decedent's department in a fork truck. The bales were frequently punctured and the asbestos used by this Employer in its manufacturing business was spread all around the building where the Decedent worked. He said that while the Decedent's department was

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Claimant -	[redacted] (dec'd)	Employer -	Garlock Inc
Social Security No. -	[redacted]	Carrier -	Employers Ins. Co. of Wausau
WCB Case No. -	[redacted]	Carrier ID No. -	W076004
Date of Accident -	08/22/2001	Carrier Case No. -	
District Office -	Buffalo	Date of Filing of this Decision -	12/23/2003

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

not involved in making the asbestos textile, the Decedent was involved in sweeping up the asbestos and in directly supervising other employees who were sweeping the asbestos. Mr. Green's response to being asked if the asbestos fibers were in the air was that walking through the textile department was like walking through a snowstorm of asbestos. The Decedent would have to go into the textile department as part of his job and he was exposed to asbestos there. Mr. Green said the Decedent was also exposed to asbestos in the tunnel ramp that went from the Decedent's usual work location, which was Building 12, to the textile department, which was Building 7.

In addition to providing substantial evidence the Decedent's occupational exposure to asbestos, Mr. Green's testimony also provided corroboration of the Decedent's deposition testimony sufficient for the deposition taken in an action against asbestos manufacturers on July 19, 2001, to be admitted into evidence herein. In MATTER OF GOLDSTONE v. NEW YORK STATE DEPT. OF MOTOR VEHICLES, 57 A.D.2d 973, 394 N.Y.S.2d 99 (Third Dept. 1977), the Appellate Division held that it is well established that the statutory corroboration required by Workers' Compensation Law section 118 is not as technical as that at common law and may consist of circumstances or other evidence. Proof of the duties, nature and circumstances of the work performed by decedent may constitute sufficient corroboration. MATTER OF ROSEN v. ROSE HARDWARE, INC., 34 A.D.2d 719, 309 N.Y.S.2d 687 (Third Dept. 1970). Mr. Green's testimony provided proof of the circumstances of the Employer's operations and facilities and of the duties and nature of the Decedent's job.

The Decedent testified in his deposition that he was employed by Garlock, Inc. from 1940 to 1975. He worked in the mechanical packing department, first as an assistant foreman, then as general foreman, supervisor and, finally, as superintendent. He said that his Employer used raw asbestos in Building 7 to make asbestos cloth. His work location, Building 12, shared a common wall with Building 7, and there was a ramp between the buildings. He testified that the asbestos would drop from the bales in his building and also come through the ramp and walls from Building 7 to Building 12, where all employees in Building 12 would have to grab a broom and be involved in the cleanup. The asbestos would be swept up and put into a waste can. The Decedent also testified that as part of his job as a supervisor and superintendent he would frequently, at least once per week, have to go into Building 7 to meet with other supervisors. He would have to go into the ramp to check on his own employees.

It is found that the Estate has established a recognizable link between the Decedent's mesothelioma and a distinctive feature of his employment. In the present case, it was the Employer's business to manufacture asbestos products and that the asbestos was regularly brought through the Decedent's usual work location as part of this manufacturing process. The Decedent was exposed in Building 12, in the ramp and in Building 7, where he frequently has to go as part of his job. The facts of the present case are distinguishable from those of MATTER OF DEMERS v. ST. LAWRENCE PSYCHIATRIC CENTER, 271 A.D.2d 857, 706 N.Y.S.2d 251 (Third Dept. 2000). In DEMERS, the Claimant was a therapy aide allegedly exposed to asbestos that flaked off steam pipes. His occupation and the business of his employer had nothing to do with asbestos. In the present case, the Decedent worked for an asbestos manufacturer, with raw asbestos routinely brought in right through the Decedent's work area as part of the Employer's usual business. It is found that asbestos exposure is part of a distinctive feature of the employment of a foreman and supervisor who works for an asbestos manufacturer.

The Carrier or self-insured Employer on the risk on the date of disablement is the liable entity in an occupational disease claim. MATTER OF MURGALO v. NEW YORK DAILY NEWS, 57 A.D.2d 978, 394 N.Y.S.2d 106 (Third Dept. 1977). If this were a claim that involved a diagnosis of a dust disease constituting a pneumoconiosis under Section 44-a, then the Carrier on the risk as of the last date of injurious exposure would be liable. MATTER OF HINTON v. ACME STEEL & MALLEABLE IRON WORKS, 243 A.D.2d 993, 663

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Reserved Decision on the Mesothelioma Death of a Garlock, Inc. Packing Superintendent (2003) Published by AsbestosClaims.Law
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N.Y.S.2d 693 (Third Dept. 1997). However, in the present claim there is no evidence of fibrotic interference in the parenchymal function within the lung, precluding a finding of a dust disease constituting a pneumoconiosis. MATTER OF SMITH v. CERTAIN TEED PRODUCTS CORP., 85 A.D.2d 820, 445 N.Y.S.2d 649 (Third Dept. 1981).

Thus, Garlock, Inc., which was self-insured as administered by Frank Gates Service Company on the date of death of August 22, 2001, is found to be liable herein. Additionally, since there is no evidence of a pneumoconiosis, there is no evidence of Section 15-8(ee) applicability.

Accordingly, this claim is established for the occupational disease death of [redacted] from mesothelioma due to occupational asbestos exposure.

The average weekly wage exceeds $600.00. Although the last injurious exposure is found to have occurred in 1975, the award herein is to be predicated on the wage of a similar employee working as superintendent for substantially the whole of the year preceding the date of death of August 22, 2001. In the present case, both the date of diagnosis of lung cancer and the date of death were in 2001. The date of disablement is deemed to be the date of death. In MATTER OF GRAHAM v. WALSH CONSTRUCTION CO., 30 A.D.2d 996, 296 N.Y.S.2d 31 (Third Dept. 1968), the workman was last exposed to compressed air in 1939 and the caisson disease resulting from such exposure was not diagnosed until 1965. The wages for the preceding year for a similar worker up to the 1965 date of diagnosis was held to be the proper average weekly wage.

The award is payable to the surviving spouse, [redacted], date of birth [redacted]. The award is from August 23, 2001 to date, and continuing, at [redacted] per week. The award is subject to any applicable Social Security offset. The Employer is entitled to credit of [redacted] based upon the settlement of the third party actions against asbestos manufacturers. [redacted] is to be reimbursed [redacted] for funeral expenses. The Employer is to withhold [redacted] as a lien on the award pending the fee application by the Estate's attorneys. Wausau and the Special Fund are discharged. The Board plans no further action on this claim.

Michael B. Bluth

Summary of Findings

AWARD - THE EMPLOYER OR INSURANCE CARRIER ARE DIRECTED TO PAY AT ONCE AS FOLLOWS:

For funeral expenses, pay to :
[redacted] in the amount of [redacted]

Initial decision.

The period from 8/23/2001 to 12/19/2003 for 121.2 weeks totaling [redacted] is awarded as follows:

Award to:	Relation	DOB	Pct	Rate / week	Total	Pay to:
[redacted]	Spouse	[redacted]	66.67%	[redacted]	[redacted]	[redacted]

*Rate due to Social Security Offset of $45.35

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Carrier Continue Payments bi-weekly in the amount of [redacted]

Any money previously paid for the above period(s) will be deducted from the total amount.

DECISION: The claimant [redacted] (dec'd) has an occupational disease which resulted in death due to asbestos exposure. The claimant's average weekly wage for the year worked before this work related injury or occupational disease is determined to be [redacted] or more per similar worker. Attorney fee is reserved pending the receipt of Form OC-400.1. Attorney/Licensed Representative, Lipsitz & Ponterio, to submit Form OC-400.1 within 30 days of receipt of this decision. No further action is planned by the Board at this time.

FEES:

As lien on above award payable by separate check by carrier TO CLAIMANT'S REPRESENTATIVE OR ATTORNEY:

Sum of	To
[redacted]	Lipsitz & Ponterio

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EC-23R (4/98)