



STATE OF NEW JERSEY

DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT



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## CP# 03-15381 Strader v. NJ Turnpike Authority

STATE OF NEW JERSEY  
NEW JERSEY DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT  
DIVISION OF WORKERS' COMPENSATION  
OCEAN COUNTY C.P. No. 2003-15381  
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RANDY L. STRADER  
S.S. # XXX-XX-XXXX  
Petitioner,

v. **RESERVED DECISION**

NEW JERSEY TURNPIKE AUTHORITY  
Respondent.  
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**B E F O R E:**           **HONORABLE BRADLEY W. HENSON, SR.**  
                                  **JUDGE OF COMPENSATION**

**A P P E A R A N C E S:**

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Attorney for Petitioner

**Kamensky & Cohen**

**BY: CURT J. COX, ESQ**  
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Attorney for Respondent

Petitioner, Randy L. Strader was born January 4, 1956 and is presently fifty years of age. He was initially employed by respondent, New Jersey Turnpike Authority (NJTA), in November 1985 and has worked for them since. He was a toll collector for approximately sixteen years until he became ill with lung cancer in the fall of 2001. After that time Mr. Strader worked in maintenance for the NJTA.

Petitioner's past medical history is significant for diabetes diagnosed approximately twelve years ago, hypertension diagnosed five years ago and carpal tunnel syndrome.

Petitioner was born in West Virginia and graduated high school. At age five he moved to New Jersey where he lived in the Somerville area and graduated from Franklin Township High School. After high school, he worked at a local grocery store for approximately two to three years and, thereafter, went to work as a security officer for a hospital in New Brunswick for three or four years. He then

became a security officer for six years at John F. Kennedy Medical Center, Edison, New Jersey. The petitioner then began his employment with the NJTA.

The petitioner testified that he was never exposed to any carcinogenic agents or substances prior to his employment with the NJTA. The petitioner has never smoked and does not recall ever being treated for any pulmonary disease or bronchial conditions prior to becoming ill about the fall of 2001. He was unaware of any familial history of cancer. His father died at age forty-six of cirrhoses of the liver and his mother is in fairly good health, although she is diabetic. His four brothers are healthy. He is unaware of any family members who have suffered

from cancer. The petitioner testified that he never owned a diesel motor vehicle in his lifetime. He has never lived with anyone who has owned a diesel vehicle and he has never lived in a household with smokers.

Throughout his sixteen years as a toll collector, the petitioner worked mostly at Interchange 9 in the New Brunswick area although he did perform some work at Interchange 10 in the Edison area.

Mr. Strader described his work at Interchange 9 as being in a valley like setting. The trucks, buses and cars came off the turnpike and down to the toll plazas. After they exited the toll plazas they traveled up to Route 18 or Route 1. He indicated that he worked various shifts but usually 8 hours per day with some overtime. He worked at least 40 hours per week.

In describing his work exposure, Mr. Strader indicated that there was very little ventilation and no filtration of air. At times he found himself choking from fumes from motor vehicles including buses, trucks and cars, some of which were operating poorly from an emission standpoint. Most of the trucks and buses, and even some cars had diesel engines and had particularly strong emissions. When a vehicle came through his lane, he would be breathing in whatever the vehicle was emitting. He did not wear a mask of any kind while working. He stated that there was no way that he could avoid breathing in the fumes from the vehicles, whether diesel or gasoline operated. He indicated there was nothing outside the toll booth by way of fans or other machinery to dissipate or disburse fumes. There was nothing to keep the fumes from coming into the toll booth. The door to the toll booth was kept open due to the busy nature of the traffic with one vehicle following another in close proximity. The interchanges where he worked were described as very busy; especially Interchange 9 where he worked most of the time. There were very rarely any breaks in traffic coming into and through the toll booth. The buses and trucks that came through the toll emitted a lot of diesel fumes.

Mr. Strader testified that there is a twenty foot high canopy over the various toll booths. The fumes would gather under this canopy and there was no fan or vacuum system to dissipate the fumes and they could only be dissipated by the weather. The fumes would hang under the canopy and come down to the area of the booth where he was working. Petitioner stated that approximately 100 times over a given summer the fumes would be very concentrated under the canopy and would enter his booth at higher than normal levels. Nevertheless he was simply too busy and too hot to close the door on his booth, even when the fumes were this bad.

Mr. Strader testified that because interchange 9 was located in a valley, there was really no place for the fumes to go other than into the canopy. He indicated that he could see fumes from the exhaust system from the vehicles. During the course of his work day it was very rare for there to be a time when there was no exposure or a limited exposure to fumes.

About the fall of 2001 the petitioner began to develop a cough that would not subside and it became increasingly difficult to breathe. These symptoms were particularly bad while he was on the job. The inhalation of fumes seemed to intensify his symptoms greatly.

About November of 2001 Mr. Strader consulted with his family physician, Dr. Paul Triolo in Toms River, New Jersey. Dr. Triolo sent petitioner for chest x-rays and thereafter referred him to Dr. Dewil, a pulmonologist. Mr. Strader received diagnostic studies including bronchoscopy at Community Medical Center, Toms River in December, 2001. He was diagnosed with lung cancer and had right lung surgery by Dr. Weinstein. He remained under active medical care through April of 2002 when he returned to work for the NJTA. During the time that he was out with lung surgery, the petitioner's

prior transfer request was approved and he was assigned to the maintenance department of the NJTA

As a maintenance worker, Mr. Strader works on the road doing guard rail repair, pothole repair and other similar duties. He was mostly outside and he felt the exposure was considerably less.

As a toll collector the fumes from motor vehicles came directly into his booth while he was working. He would be breathing these fumes throughout the course of his work day.

Mr. Strader testified that he had a recurrence of symptoms in and about November of 2004 and returned to active medical care. He was admitted to the hospital in Mt. Holly, New Jersey because he was having difficulty breathing along with a cough. He came under the care of an oncologist, Dr. Cirulli, at Fox Chase Cancer Center. They did perform diagnostic studies and he was advised that there was a recurrence of pulmonary cancer in the same right lung. Treatment commenced with chemotherapy.

Medical, treating, and hospital records concerning treatment of the petitioner from and after October 26, 2001 through his hospital admission of December 12, 2001 through December 15, 2001 are in evidence and reflect diagnosis of mucinous bronchioloalveolar carcinoma of the lung with focal anthracosis of the pulmonary parenchymal tissue and he did undergo right middle lobectomy.

The petitioner returned to work for the NJTA in April of 2002, following the treatment referred to herein, but has had to undergo another right lung surgery which was performed at the University of Pennsylvania Medical Center in Philadelphia in June of 2005.

Petitioner testified that he began to suspect that his pulmonary pathology may have been as a result of his work exposure. He consulted with counsel who filed a Claim Petition on his behalf. The uncontradicted testimony in this case indicates that respondent was notified of this claim appropriately and in a timely manner.

**Dr. Steven Klein** testified that he examined petitioner on January 31, 2005. The doctor took a history from the petitioner who indicated that he had been exposed to motor vehicle exhaust fumes from diesel and gasoline engines at least seven hours in the toll booth each and every day of his employment. The doctor noted the petitioner's medical treatment and past medical history. Petitioner told the doctor that he was unable to run or jump or play sports. That he developed shortness of breath when walking short distances of three to four blocks or when climbing stairs and would have to rest at least ten minutes before continuing. **Doctor Klein** ultimately testified that petitioner's complaints were consistent with his diagnoses. The doctor indicated that he reviewed treating records including hospital charts and agreed with the diagnoses of the treating physicians which included mucinous bronchoalveolar carcinoma of the lung as well as focal anthracosis of pulmonary parenchymal tissue. **Dr. Klein** concluded that petitioner was disabled to the extent of 75% of partial total from the lung cancer requiring lobectomy along with obstructive and restrictive lung disease.

**Dr. Klein** responded to the hypothetical question by opining with reasonable medical probability that the petitioner's disability and the diagnoses were related to his work exposure to diesel exhaust particulates, and what is contained therein, along with asbestos.

**Dr. Klein** testified that he arrived at the level of disability by considering the type of cancer petitioner suffered from and the fact that once a person is exposed to these chemicals the problem is that the exposure effects do continue. The doctor felt that there would be a high rate of recurrence. He considered what the petitioner was able to do, indicating that this forty-nine year old could not run and that he could walk only three to four blocks and then had to stop. He considered the AMA guidelines.

The doctor clearly found objective medical evidence sufficient to substantiate the diagnoses and the extent of disability including his own testing which included spirometry. The doctor felt that these findings were consistent with restrictive lung disease and his work exposure. He testified that spirometry showed petitioner's lung age to be 64 when he was actually 49 years of age.

The doctor opined with reasonable medical probability that the petitioner's disability and pathology including the lung cancer were as a direct result of his work related toxic exposures. Regarding his rationale as to causation the doctor stated "The toxins that he respired in the course of

his employment each and every day, without any benefit of any respiratory protection, and breathing in these known toxins to induce and promote lung cancer, on the basis of that, this is why I concur with the diagnosis and firmly believe that his exposure at work was the direct cause of this cancer that has now unfortunately recurred."

The doctor went on to state that chemicals can either initiate or promote a cancer. That asbestos and diesel particulate matter are carcinogenic and target the lung. Dr. Klein's opinion that asbestos and diesel particulate matter are carcinogenic is based on numerous scientific studies.

The hypothetical that the doctor was presented referred to P8 through P11 included various sections of the 11<sup>th</sup> Report on Carcinogens from 2004, United States Department of Health and Human Services, Public Health Service, National Toxicology Program, prepared pursuant to Section 301 (b) 4 of the Public Health Service Act as amended by Section 262, PL 95-622 and a study by the United States Environmental Protection Agency entitled Health Assessment for Diesel Engine Exhausts from May of 2002.

Dr. Klein did refer to individual susceptibility in explaining his opinion on causation but ultimately indicated that he had no doubt about his opinion as to causation in petitioner's case. He went on to indicate that he completely agreed with the 11<sup>th</sup> Report on Carcinogens which state that diesel exhaust particulates are considered likely to account for human lung cancer findings because they are almost all of the size small enough to penetrate to the alveolar region of the lungs.

Dr. Klein further testified that if an individual is standing all day in proximity to diesel and gasoline operated vehicles that are braking, then that individual would be exposed to asbestos as well as diesel exhaust, including nitroarenes and polycyclic aromatic hydrocarbons contained in diesel particulate matter, all of which is cancer causing.

Dr. Ila Segal testified for respondent that he did not believe that petitioner's diagnosis was caused by any known occupational environmental substance or agent. The doctor relied for this conclusion upon various texts, including American Review of Respiratory and Critical Care Medicine, (Crawford & Douglas) Occupational Lung Disease. He was unable to conclude from these texts that there was any causation between the petitioner's diagnoses and his work exposure.

In his testimony, Dr. Segal admitted "I don't say that alveolar cell carcinoma cannot be caused by carcinogen or potential carcinogen, that would be foolish to say. Maybe there is not enough information because it's a more rare form of cancer, it's possible."

Dr. Segal did admit that he recognized the 11<sup>th</sup> Report on Carcinogens as (P8-P10) as an authoritative text in connection with carcinogens. He stated that he was aware that asbestos was listed as a known human carcinogen and that diesel particulate matter from diesel exhaust and its contents were reasonably anticipated to be a human carcinogen by that text. When asked whether he knew anything about diesel or exhaust particulates, the doctor responded by indicating that he knew that they did exist. The doctor was asked on cross examination if he agreed with a statement from the 11<sup>th</sup> Report on Carcinogens 2004 that diesel exhaust particles are considered likely to account for human lung cancer findings because they are so small that they can penetrate all the way into the alveolar region of the lung. The doctor stated that he disagreed with the 11<sup>th</sup> Report on Carcinogens and their opinions as to causation because "An inert material can penetrate into the alveolar and not cause any damage. You have to prove that the particle that goes into the alveolar is able to cause mutation in the cells and cause cancer. That they cannot prove this and that is why this part of their statement can be and will be criticized as not based on scientific knowledge."

Dr. Segal was then advised, on cross examination, that the 11<sup>th</sup> Report on Carcinogens refers to mutagenic and carcinogenic activity in the alveolar area due to diesel fume particulate matter. He then testified that he disagreed with test results because tests were performed on animals and not on humans.

The doctor attempted to further refute Dr. Klein's opinion by attacking articles and studies in occupational and environmental medicine by claiming that these were heavily influenced by

environmental activists.

Dr. Segal did concede that diesel particulate matter from exhaust and some of the substances in diesel particulate matter could reasonably be expected to be carcinogenic. He also conceded that five or six polycyclic aromatic hydrocarbons contained in diesel exhaust could reasonably be expected to be carcinogenic. Finally, he conceded that the nitoarenes contained in the diesel particulate matter were also likely to be human carcinogens.

When confronted on cross examination with a United States Environmental Protection Agency article on carcinogenicity of diesel particulate matter, the doctor stated that he could not agree that it was directly causative, although he would have agreed if the agency put its opinion in terms of realm of possibility, rather than probability.

Later in cross examination Dr. Segal testified that he was not familiar with the National Toxicology Program and apparently had little respect for California's Environmental Protection Agency. But he did recognize some of the reports from the International Agency for Research on Cancer and ultimately agreed with their statement that diesel exhaust was a potential occupational carcinogen. It appears uncertain as to whether he agreed with a quote from IARC in 1989 indicating diesel exhaust was probably carcinogenic to humans.

Question 2 of petitioner's Interrogatories, served upon respondent, inquired as to petitioner's exposure during his work. When an Order was entered requiring answers, the respondent provided hundreds of pieces of paper involving studies performed at the request of the respondent concerning substances to which toll collectors may have been exposed. None of the studies concerned tests performed at a place where petitioner worked. Respondent neither admitted nor denied the exposure in its interrogatory answers.

Petitioner filed a Motion for more Specific Answers. In response to which this Court indicated it would enter an Order allowing testing at the location where petitioner worked. Respondent objected and instead produced Sheldon Rabinovitz, Ph. D., a toxicologist, for testimony regarding the issue.

When Dr. Rabinovitz testified, petitioner's attorney again asked for test results for interchange 9 where petitioner worked (see transcript of Dr. Rabinovitz P. 42 L. 22 to 24.) The respondent again declined.

The Court, in considering Dr. Rabinovitz's testimony, and his study, makes the following findings:

1. That he was hired by respondent (P. 27, Line 1-4) and prepared a report known as Exposure Profile of New Jersey Turnpike Authority Toll Booth Operators from 1970 through 1990. It does appear there have been no new tests since 1990.
2. That toll booth operators are exposed to a number of different toxic substances. These substances are the result of car and truck emissions, as well as existing ambient pollution from various sources, including industry. The types of substances monitored at the New Jersey Turnpike Authority do include ozone, sulfur dioxide, hydrogen sulfide, nitrogen dioxide, nitric oxide, carbon monoxide, diesel exhaust, polynuclear aromatic hydrocarbons, volatile organic compounds, lead, asbestos and particulates.
3. That a number of factors may influence employee exposure in toll booths including traffic volume, mix of vehicles, such as gasoline or diesel engines, time of day, ventilation conditions in the booth, work practices, changes in vehicle emissions over time, meteorological conditions, ambient airborne contamination from other sources, smoking in the toll booth.
4. That the petitioner worked in high volume traffic site at Interchange 9.
5. That Dr. Rabinovitz was not in a position to testify as to causation (P. 26, L. 1 to 3).
6. That toll collectors are exposed to carcinogens which include asbestos and diesel exhaust particulates (P. 61, L. 1 to 6), (P. 60, L. 3 to 9) and (P. 36, L. 21 through 23).
7. That Dr. Rabinovitz testified he could disregard all of the factors referred to in 3 and 4 above with the exception of volume in order to come to a conclusion that tests conducted at one interchange

showing low level exposure to carcinogens could be used elsewhere by way of extrapolation.

It is noted that in arriving at this conclusion, Dr. Rabinovitz disregards the multiple factors he himself suggests would influence employee exposure. He gives no consideration to the fact that the Interchange 9 toll booths were located in a valley which created a situation where fumes from the vehicles could not disburse rapidly without wind. He also completely disregarded petitioner's testimony that during summer months, he was exposed to high concentrations of diesel and gas fumes at least 100 times. That of course was over and above his usual daily exposure. The studies offered by respondent revealed that exhaust fumes were actually observed at different places and times where petitioner was not present. Finally, in response to the Court's inquiry, Dr. Rabinovitz indicated that he was not aware of any air testing conducted during the summer.

This Court will disregard Dr. Rabinovitz's testimony wherein he stated that tests at one interchange could be used to determine the level of carcinogenic exposure at another site. The doctor's opinion was based on a number of assumptions that he made in connection with other tests and an extrapolation.

The Court is mindful that Dr. Rabinovitz was presented by the respondent in connection with a Motion for More Specific Answers to Interrogatories regarding exposure. What becomes apparent from his testimony is that toll booth operators were in fact exposed to pulmonary carcinogens including asbestos and diesel exhaust particulates.

The petitioner testified that he was exposed to what was coming from heavy traffic, including exhaust, for 8 or more hours per day as a toll collector from 1985 through the fall of 2001. I note that petitioner worked in the exposure for at least 10 years after the testing cited by Dr. Rabinovitz was conducted.

I accept petitioner's testimony that there was little if any ventilation, no air conditioning, no filtration of air, no fans, that it was difficult to breathe and that he would find himself choking on fumes from buses and trucks and cars and that some of the vehicles had poorly operating emissions systems. Also, that there were fumes in the toll booth all day long and there was no place for the fumes to go. The petitioner's breathing difficulty and coughing were made worse as a result of this exposure.

I was impressed with **Dr. Klein's** testimony about his experience with diesel engines as well as his medical qualifications. He indicated that a toll collector would be exposed to diesel particulate matter and asbestos. The doctor opined that petitioner's lung cancer was due to his occupational exposure and gave good reason to support that opinion.

The testimony of the petitioner in conjunction with **Dr. Klein's** makes good common sense. It should be noted that respondent never rebutted petitioner's testimony about his exposure.

Respondent's test findings made prior to 1990 have little credence in light of the hundreds of studies by scientific organizations in connection with diesel exhaust particulate matter.

It is difficult to imagine an occupation where there could be a greater exposure to diesel exhaust particulate matter than a toll collector's position.

The 11<sup>th</sup> Report on Carcinogens satisfies me that asbestos is a human carcinogen and that diesel exhaust particulates can be reasonably anticipated to be a human carcinogen. That report shows that asbestos studies in humans that have demonstrated exposure to asbestos causes respiratory tract cancer, pleural and peritoneal mesothelioma and other cancers. Other case reports and epidemiological studies show that occupational exposure to various mixtures of asbestos increases the risk of lung cancer. The report further shows that the International Agency for Research on Cancer concluded that there was sufficient evidence for the carcinogenicity of asbestos in humans. The primary source of potential human exposure to asbestos is inhalation and ingestion. The report further shows that releases from asbestos materials in buildings and vehicle brake linings account for substantial emissions of asbestos into the air. Finally, it shows that environmental asbestos concentrations vary widely; therefore, it is not possible to accurately calculate human exposure levels except on a site by site basis.

The foregoing paragraph would seem to lead to the conclusion that one should not and cannot

extrapolate in these cases nor can one use a test from one site to explain an exposure in some other interchange.

The Report on Carcinogens from 2004 shows that diesel exhaust particulates can reasonably be anticipated as being human carcinogens. It indicates that this finding is based upon limited evidence of carcinogenicity from studies in humans which indicates elevated lung cancer rates in occupational groups exposed to diesel exhaust (IARC 1989, Cohen and Higgins 1995, Bhatia Et Al 1998) and Supporting Animal and Mechanistic Studies. An increased risk of lung cancer is found in the majority of human studies. Thereafter the document states that diesel exhaust contains identified mutagens and carcinogens both in the vapor phase and associated with respirable particles. Diesel exhaust particles are considered likely to account for the human lung cancer findings because they are almost all of a size small enough to penetrate to the alveolar region. The document states further that in general, the organic compounds identified in diesel exhaust emissions contain hydrocarbons, hydrocarbon derivatives, PAHs, PAH derivatives, multi-functional derivatives of PAHs, heterocyclic compounds and derivatives and multi-functional derivatives of heterocyclic compounds. The organic fractions consist of soluble organic and compound such as aldehydes, alkanes, alkenes and high molecular weight PAH's, and PAH derivatives. Because of their high surface area, diesel exhaust particulates are capable of absorbing relatively large amounts of organic material. The absorbed elements come from unburned fuel, lubricating oil and pro-synthesis during fuel combustion. A variety of mutagens and carcinogens such as PAH and nitro-PAH are absorbed by the particulates. There is sufficient evidence for carcinogenicity for 15 PAHs (a number of these PAHs are found in diesel exhaust particulate emissions) in experimental animals. The nitroarenes meet the established criteria for listing as reasonably anticipated to be human carcinogens based on carcinogenicity experiments with laboratory animals.

The report on carcinogens from 2004 does go on to indicate that three studies reviewed by IARC (1989) found the toll booth operators had elevated levels of exposure to carbon monoxide and diesel exhaust particulates.

The United States Environmental Protection Agency has prepared and published a health assessment document for diesel exhaust which is dated May of 2002 (P11). This assessment concludes that chronic inhalation exposure is likely to pose a lung cancer hazard to humans, as well as cause damage to the lung in other ways depending on exposure. Chapter 7 of the assessment is entitled Carcinogenicity of Diesel Exhaust. That chapter concludes that environmental exposure to diesel exhaust may present a lung cancer hazard to humans. The particulate phase appears to have the greatest contribution to the carcinogenic effect; both the particle core and the associated organic compounds have demonstrated carcinogenic properties, although a roll for the diesel exhaust gas phase components cannot be ruled out. The article refers to various other organizations that have performed evaluations of diesel exhaust and have determined it to be either a potential or probable carcinogen to humans. These include NIOSH (1988), IARC (1989), ICPS (1996), NTP (2000.)

The Court notes that NIOSH stands for National Institute for Occupational Safety and Health, IARC represents International Agency for Research on Cancer and NTP represents National Toxicology Program. These organizations were recognized by the petitioner's medical expert and the respondent's expert as scientifically reliable and respected.

N. J. S. A. 34:15-31 defines compensable occupational disease "arising out of and in the course of employment, which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment."

In Lindquist vs. City of Jersey City Fire Department, 175 N.J. 244 (2003), The Supreme Court discusses the law in New Jersey as it deals with occupational disease. Lindquist states at page 16, "It is sufficient in New Jersey to prove that the exposure to a risk or danger in the workplace was in fact a contributing cause of the injury. That means proof that the work-related activities probably caused or contributed to the employee's disabling injury as a matter of medical fact. Coleman v Cycle Transformer Corp., 105 N. J. 285, 290-91 (1985). Direct causation is not required; proof establishing that the exposure caused the activation, acceleration or exacerbation of the disabling symptoms is sufficient. C. W. Page Keeton et al., Prosser and Keeton on the law of torts 268 (5<sup>th</sup> Ed. 1984).

At Page 21, the court states: "The petitioner has the burden to demonstrate by a preponderance of the evidence that his or her environmental exposure while fighting fires was a substantial contributing cause of his or her occupational disease. Such a petitioner is not required to prove that the nexus between the disease and the place of employment is certain." (Citing cases).

Later on at Page 23, the court states: "Petitioner had the burden to demonstrate by a preponderance of the evidence that his environmental exposure while fighting fires was a substantial contributing cause or aggravation of his emphysema. To satisfy that obligation, he was not required to prove that his work exposure exceeded the exposure caused by smoking cigarettes, nor was he required to prove that the nexus between the disease and the place of employment is certain because that would violate the preponderance of the evidence standard. (Citing cases).

At Page 19 the court refers to the case of Rubanick vs. Witco Chemical Corporation, 125 N. J. 421 (1991) in connection with the issue of admissibility of scientific evidence. The court indicates that the Rubanick standard governing admissibility and reliability of medical causation evidence should be applied in workers compensation cases as well.

The court in Linguist referring to the Rubanick standard at Page 20 stated:

"In toxic tort litigation, a scientific theory of causation that has not yet reached general acceptance may be found to be sufficiently reliable if it is based on a sound, adequately founded scientific methodology involving data and information of the type reasonably relied on by experts in the scientific field. The evidence of such scientific knowledge must be proffered by an expert who is sufficiently qualified by education, knowledge, training and experience in the specific field of science. The expert must possess a demonstrated professional capability to assess the scientific significance of underlying data and information, to apply the scientific methodology, and to explain the basis for the opinion reached."

In Fiore v Consolidated Freightways, 140 N. J. 452 (1995). The Court states at Page 476:

"Generally, moreover, the parties should adduce reliable scientific evidence about exposure to fumes in the workplace. Here, the record does not reflect any test of petitioner's work environment. Petitioner's testimony provided the only evidence about diesel fumes. In most cases, employers are better situated than employees to test the workplace for exposure to harmful substances. If, as may be the case here, the employer has not conducted such tests, or if the Judge finds that the tests are unreliable, the employee's testimony may suffice. An injured worker should not be denied recovery because the employer has failed to determine whether the workplace is safe."

In this case, I find that there were no tests of the petitioner's particular work environment and no tests at all after 1990. Therefore, I rely upon petitioner's testimony and that of Dr. Klein as far as exposure is concerned.

It is also to be noted that petitioner has testified that he had no other exposure to lung carcinogens or any carcinogens but for his exposure as a toll collector with respondent. He specifically testified that he has never smoked and never lived with anyone who smoked. No one in his family has cancer and no one in his family has had cancer to the best of his knowledge. He has never owned a diesel vehicle and as far as he knows, has never worked in any other environment where there would be an exposure.

Neither the statute nor the Linguist decision requires certainty. The petitioner's burden of proof is to show the elements of N. J. S. A. 34:15-31 by a preponderance of the evidence.

The testimony of Dr. Segal, Respondent's expert, leads to the conclusion that the doctor felt that asbestos is in fact a lung carcinogen but that diesel exhaust particulates can only reasonably be anticipated to be a human carcinogen.

What has been proven is that asbestos is a known human carcinogen and that diesel exhaust particulates are reasonably anticipated to be a human carcinogen. This is the finding of the United States Department of Health and Human Services, Public Health Services, National Toxicology Program in its 11<sup>th</sup> Report on Carcinogens. Findings by numerous other respected scientific organizations

including the National Institute for Occupational Safety and Health and the International Agency for Research on Cancer indicate that carcinogenicity is highly probable.

Probability is defined in the Black's Law Dictionary Sixth Edition as "likelihood; appearance of reality or truth; reasonable ground of presumption; ...a condition or state created when there is more evidence in favor of a given proposition than there is against it. Showing that causation is a likelihood or probable by showing that there is more evidence in favor of the existence of causation than there is against it does satisfy the petitioner's burden of proof by a preponderance of the evidence as long as there is a showing that the disease was due in a material degree to causes and conditions characteristic to a particular occupation or place of employment."

This Court gives great weight to the testimony of **Dr. Klein** who has, in some detail, clearly related the petitioner's workplace exposure to potential carcinogens as the cause of his lung cancer and disability.

Therefore, for the reasons set forth herein, I find that the aforementioned complaints, findings, and diagnoses are causally related to the occupational exposure from 1985 through 2001 and are permanent and partial in nature.

I further find that the petitioner has sustained his burden of proof by demonstrable objective medical evidence of restriction of function and lessening to a material degree of his working ability and that the petitioner does have permanent disability. In determining the percentage of disability the Court did consider the report of Dr. Ilia Segal dated February 10, 2006 submitted into evidence, without objection, after trial. The Court notes Dr. Segal's opinion of disability regardless of cause to be 10% of partial total, while **Dr. Klein's** opinion as to disability was 75% of partial total, all related to the work exposure. In reviewing Dr. Segal's estimate of disability of 10% he seems to focus mainly on the possibility of recurrence of the cancer and the surgical procedure for resection of the right middle lobe. **Dr. Klein** however also determined that as a result of the cancer and the surgery that the petitioner has restrictive lung disease and that testing showed his lung age to be that of a 64 old man when he was actually 49 years of age at the time. **Dr. Klein** also went into much greater detail concerning the daily limitations regarding the petitioner's lifestyle. Therefore, I give greater weight to the opinion of **Dr. Klein** regarding his disability estimate.

While a Judge of Compensation must consider demonstrable objective medical evidence, a Compensation Judge is not bound by the opinions of the experts. The Judge does not have to choose or determine, for that matter, which is right. The Court in reaching a determination of disability need only apply the Court's experience and expertise in such matters. After careful consideration, the Court finds that the petitioner, due to his work exposures, treatment, surgery, restrictive lung disease as well as changes in his everyday lifestyle, is permanently and partially disabled to the extent of 55 % of total. Based on 2001 rates, this would entitle the petitioner to 330 weeks at \$433.00 for a balance due of \$142,890.00.

The following fees and costs are allowed: **Dr. Klein** for his examination, report and testimony is allowed \$800.00 payable one-half by each party. Petitioner shall reimburse his attorney for the reasonable and necessary cost of medical records and trial transcripts. The costs shall be identified when the judgment is submitted. The Law Office of Frank S. Salzer, Esquire is allowed an attorney fee of \$28,578.00, payable \$17,146.00 by respondent and \$11,432.00 by petitioner. The Court reserves and shall consider a legal fee to the Law Office of Frank S. Salzer, Esquire for Temporary and Medical benefits. Said fee to be based, in part, on all monies paid or due and owing for all reasonable and necessary medical treatment to the petitioner. Respondent shall pay a stenographic fee to Jersey Shore Reporting of \$450.00. Counsel for the petitioner shall submit a Judgment consistent with this decision and all stipulations.

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**Bradley W. Henson, Sr., J.W.C**

**March 20, 2006**

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