

SECTION 6

Digests

Section 6(a)

In occupational disease cases, benefits under Section 8(c)(23) of the Act commence when the employee's impairment becomes permanent. Section 6(a) provides that benefits commence on the date of disability, and in a Section 8(c)(23) case, that is the date the employee's impairment became permanent. The date of awareness under Section 10(i) is not controlling as an employee may be permanently impaired prior to being "aware." In this case, the date claimant's asbestosis was diagnosed reasonably represents the date his impairment became permanent in the absence of evidence of an earlier onset date. Barlow v. Western Asbestos Co., 20 BRBS 179 (1988).

Following Barlow, the Board held that the administrative law judge erred in commencing benefits on the date of awareness under Section 10(i). An employee may be permanently impaired from an occupational disease before becoming aware of the impairment's cause. Thus, benefits commenced on December 6, 1982, the date of the first medical evidence of permanent impairment, rather than January 13, 1983, when claimant's doctor advised him of the test results and related his condition to asbestos exposure. Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78 (1989).

The Board holds that chest x-ray evidencing pleural thickening was insufficient to establish commencement date for decedent's permanent partial disability award under Section 8(c)(23) since evidence of pleural thickening alone is not a basis for permanent impairment under the *AMA Guides*. However, the Board holds that a physician's report stating that decedent had disability of his lungs related primarily to bronchitis and to a lesser extent to pulmonary asbestosis which was sufficient to permit a rating established the commencement date for the Section 8(c)(23) award as a matter of law. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

The Board rejected claimant's assertion that the administrative law judge erred in determining that his disability commenced in 1993 rather than in 1985. The Board had previously held that claimant was a voluntary retiree and that the evidence did not support a finding that there was a permanent respiratory impairment in 1985. On remand, the administrative law judge used a 1999 medical report in conjunction with a 1993 report to conclude that claimant's disability commenced in 1993, as the impairment was essentially the same at both times. The Board affirmed, as the finding is rational and supported by substantial evidence. *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), *aff'd mem.*, No. 07-3575, 2008 WL 5381273 (2d Cir. Dec. 24, 2008).

The Board held that benefits are payable to voluntary retirees in hearing loss cases arising under Section 8(c)(23) as of the date on which the employee's hearing impairment becomes permanent. In this case, that date was based on the date the first medical evidence of record established a permanent impairment to claimant's hearing under the *AMA Guides* which was the date of the first audiogram which indicated that claimant suffered a binaural hearing loss. In so holding, the Board noted that the Fifth Circuit, in *Fairley*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990) stated that all retiree occupational disease claims are to be treated under a single scheme regardless of the nature of the occupational disease, and this is consistent with the onset of other occupational diseases. *Howard v. Ingalls Shipbuilding, Inc.*, 25 BRBS 192 (1991) (decision on recon.).

Pursuant to the Fifth Circuit's decision in *Fairley*, 898 F.2d 1088, 23 BRBS 61 (CRT) (5th Cir. 1990), and the Board's decision in *Howard*, 25 BRBS 192 (1991), the Board modified the retiree's award for a binaural hearing loss under Section 8(c)(13) to one for an impairment to the whole man under Section 8(c)(23), commencing on the date the evidence first demonstrated a permanent hearing loss, which in this case was the first audiogram of record. *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (decision on remand).

Pursuant to the Supreme Court's decision in *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), in which the Court held that an occupational hearing loss injury is complete when the exposure ceases, the onset date of a claimant's permanent partial disability award under Section 8(c)(13) is the date of his last exposure to noise. The Board overrules *Howard*, 25 BRBS 192 (1991). The Board vacates the administrative law judge's finding that the award commences on the date of the filing audiogram, and remands the case for a finding regarding claimant's date of last exposure. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Section 6(b)

Amended Section 6(b)(1) applies to all pending disability claims, but applies to death benefits only when the employee died after the date of enactment of the 1984 Amendments. The pre-1972 \$70/wk maximum does not apply to the instant pre-1972 injury due to amendments subsequent to 1972 which remove this maximum. Nooner v. Nat'l Steel & Shipbuilding Co., 19 BRBS 43 (1986).

The 1984 Amendments to Section 6 of the Act have rendered the pre-1972 Act's maximum compensation rate inapplicable in pending cases. MacLeod v. Bethlehem Steel Corp., 20 BRBS 234 (1988).

Following prior decisions, the Board holds that under Section 6(d) of the Act as amended in 1972, the "phase-ups" of Section 6(b)(1), under which the maximum amount of weekly compensation to which a claimant is entitled is increased each year, are applicable to all claimants "newly awarded compensation," *i.e.*, to all claimants awarded compensation after Section 6(d)'s enactment date, including those newly awarded compensation for temporary total disability. Board accordingly upholds administrative law judge's imposition of a Section 14(e) assessment for employer's failure to increase the amount of compensation it was paying claimant, in accordance with Section 6(b)(1), during the period that it was making voluntary payments. West v. Washington Metropolitan Area Transit Authority, 21 BRBS 125 (1988).

Pursuant to Section 9(e) as amended in 1984 which establishes a minimum and maximum benefit level in computing death benefits, the average weekly wage and the total benefits awarded may not exceed the lesser of the actual average weekly wage of decedent or the maximum benefit which an employee is eligible to receive under 33 U.S.C. §906(b)(1)(1988). In addition, Section 6(b)(1) imposes a cap on disability and death benefits equivalent to 200 percent of the national average weekly wage. Because decedent's average weekly wage at the time of injury was less than the applicable national average weekly wage at the time of his death, Board concludes that deputy commissioner correctly employed the national average weekly wage figure in computing claimant's weekly death benefits. Board further determines that since claimant was decedent's sole survivor pursuant to Section 9(b), deputy commissioner correctly concluded that claimant was entitled to 50 percent of the applicable national average weekly wage and that since that amount was less than both decedent's average weekly wage at the time of injury and the maximum benefit level available under Section 6(b)(1), the deputy commissioner correctly determined that claimant was entitled to 50 percent of the national average weekly wage in weekly death benefits. Buck v. General Dynamics Corp. Electric Boat Div., 22 BRBS 111 (1989).

The Board rejected the Director's contention that this case is identical to *Dews*, 14 BRBS 1031 (1982), and that it should modify claimant's rate of temporary total disability compensation because the administrative law judge failed to provide for the new maximum rate allowable pursuant to Section 6(b)(1) (*i.e.*, 200 percent of the NAWW). The Board noted that the phrasing of Section 6(d) changed significantly with the enactment of amended Section 6(c) pursuant to the 1984 Amendments [*i.e.*, by now referring to determinations under subsection (b)(3)], a change which required reconsideration of the meaning of the term "period" as used in that subsection. The Board reasoned that since subsection (c) refers to determinations under subsection (b)(3) regarding the yearly calculation of the national average weekly wage, it follows that the "period" referred to in subsection (c) must be the yearly period from October 1 to September 30 during which a given national average weekly wage is in effect, and not, as suggested in *Dews*, the period following the enactment of the section in 1972. Based on this reasoning, therefore, the Board holds that during a yearly period when a given national average weekly wage is in effect, those "currently receiving" benefits for permanent total disability or death are entitled to that year's new maximum, as are those "newly awarded" compensation during that period. Thus, claimants receiving temporary total disability benefits must be considered to have been "newly awarded compensation" when benefits commence, generally at the time of injury, and thus they receive the maximum in effect at this time. The Board held that temporarily totally disabled claimants thereafter would remain at the maximum in effect at this time; the following October 1, because they would not be "currently receiving" permanent total disability or death benefits under Section 6(c), they would not be entitled to the new maximum. The Board thus rejected Director's contention that claimants receiving temporary total disability at the maximum level are entitled to the new maximum each year [up to 66 2/3 percent of their actual average weekly wage] as contrary to the language of Section 6(c). *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

In a case where claimant retired in 1972 but learned of and filed a claim for a work-related hearing loss in 1992, the Fifth Circuit held that the administrative law judge erred in reducing claimant's compensation award to reflect the statutory maximum in effect in 1972. Rather, compensation is governed by the maximum rate in effect at the time of the award of benefits. Therefore, as the maximum compensation rate permissible in 1993 when the award was made was significantly higher than the amount of benefits to which claimant is entitled under Section 8(c)(13), the court held that he is entitled to the full amount of his scheduled benefits. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

Claimant is limited to the applicable statutory maximum at the date of each of her work-related back injuries. The pertinent maximum rate is determined by the date benefits commence. In 2005, claimant was "newly awarded compensation during" the periods commencing in January 1995 and October 1, 1995. Accordingly, claimant's temporary total disability awards are subject to the maximum rates in effect in 1995 and 1996. The Board rejected claimant's contention that the statutory maximum as of the date the administrative law judge issued her decision in July 2005 should apply to all periods of temporary total disability from January 12, 1995, to August 12, 2003. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Pursuant to *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990), the Board rejected claimant's contention that her temporary total disability compensation should increase each fiscal year from the date of injury in January 1995 to October 1, 1998, when the maximum rate first became greater than claimant's full compensation rate under Section 8(b). Under the plain language of Section 6(c), claimant is not entitled to a new maximum rate each fiscal year because she was neither currently receiving compensation for permanent total disability nor newly awarded compensation for those periods. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

The Board holds that in cases where claimant's temporary total disability changes to permanent total disability the compensation rate for permanent total disability remains the same at the date of maximum medical improvement as the rate in effect for the preceding period of temporary total disability. The date of maximum medical improvement changes the nature of claimant's disability, but as she was continuously receiving benefits, she was not "newly awarded" compensation at that time. Claimant is entitled to the new statutory maximum in effect on October 1 following the date of maximum medical improvement, as she was "currently receiving compensation for permanent total disability" at that time. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

The Board, citing its decision in *Smith*, 16 BRBS 57 (1983), holds that the plain language of the statute specifically limits application of the minimum benefit provision of Section 6(b)(2) to "compensation for total disability." The Board therefore rejected claimant's contention that he is entitled to benefits for his hearing loss based on the minimum compensation rate of Section 6(b)(2). Moreover, as the Act delineates four types of disability awards, and as the schedule defines the level of partial disability compensation to which an injured worker is automatically entitled for the injuries enumerated therein, see 33 U.S.C. §908(c)(1)-(20), the Board rejects claimant's contention that a schedule award is tantamount to a total disability award for a limited period of time for purposes of Section 6(b)(2). *Steevens v. Umpqua River Navigation*, 35 BRBS 129 (2001).

The Board rejects the administrative law judge's interpretation, and the Director's position, that, with regard to concurrent awards, the maximum compensation rate of Section 6(b) must be separately considered in terms of each award of benefits. Specifically, observing that the term "disability" must be similarly construed in Section 6(b)(1) as it is in Section 8(a), the Board holds that "disability" under Section 6(b)(1) means, in instances of concurrent awards, the overall disability resulting from both injuries. The Board further recognized that its approach precludes the anomaly discussed in *Hastings*, 628 F.2d 85, 14 BRBS 345, whereby a twice-injured, totally disabled worker might receive a larger award than a worker who became totally disabled in a single injury, particularly in instances where the concurrent awards aggregate to an amount greater than the Section 6(b) maximum for a single totally disabling injury, and that provision is applied to limit the single injury worker but not the twice-injured worker. Consequently, the Board reverses the administrative law judge's finding that the statutory maximum of Section 6(b)(1) is inapplicable and holds that claimant's total award of benefits is limited to this applicable maximum. On remand, the administrative law judge must adjust claimant's overall award of benefits downward so that it does not exceed the statutory maximum set out by Section 6(b)(1). *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated in part on recon.*, 38 BRBS 56 (2004).

On reconsideration, the Board's holding that the statutory maximum compensation rate of Section 6(b)(1) applies to the combined concurrent awards is vacated, and the administrative law judge's finding that the maximum rate does not apply to the combined award is reinstated in light of the Ninth Circuit's decision in *Price*, 366 F.3d 1045 (9th Cir. 2004) (Section 6(b)(1) delineates the maximum compensation that an employee may receive from each disability award, rather than from all awards combined). *Carpenter v. California United Terminals*, 38 BRBS 56 (2004), *vacating in part on recon.*, 37 BRBS 149 (2003).

In a case where claimant is receiving concurrent permanent partial and permanent total awards, the Ninth Circuit holds that Section 6(b)(1), limiting claimant's compensation to 200% of the applicable national average weekly wage, establishes the maximum amount of each of claimant's awards individually; it does not apply to the total amount of both awards combined. *Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *rev'g in part and aff'g on other grounds* 36 BRBS 56 (2002), *cert. denied*, 125 S.Ct. 1724 (2005).

Section 6(c)

As long as claimant's actual average weekly wage remains higher than 200 percent of the current national average weekly wage, a claimant receiving permanent total disability or death benefits is entitled to receive the new maximum compensation rate each year pursuant to Section 6(c). Employer's argument that the maximum rate in effect at the time of the injury remains constant, subject only to Section 10(f) adjustments on that rate is therefore rejected. *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Board rejected the Director's contention that this case is identical to *Dews*, 14 BRBS 1031 (1982), and that it should modify claimant's rate of temporary total disability compensation because the administrative law judge failed to provide for the new maximum rate allowable pursuant to Section 6(b)(1) (*i.e.*, 200 percent of the NAWW). The Board noted that the phrasing of Section 6(d) changed significantly with the enactment of amended Section 6(c) pursuant to the 1984 Amendments [*i.e.*, by now referring to determinations under subsection (b)(3)], a change which required reconsideration of the meaning of the term "period" as used in that subsection. The Board reasoned that since subsection (c) refers to determinations under subsection (b)(3) regarding the yearly calculation of the national average weekly wage, it follows that the "period" referred to in subsection (c) must be the yearly period from October 1 to September 30 during which a given national average weekly wage is in effect, and not, as suggested in *Dews*, the period following the enactment of the section in 1972. Based on this reasoning, therefore, the Board holds that during a yearly period when a given national average weekly wage is in effect, those "currently receiving" benefits for permanent total disability or death are entitled to that year's new maximum, as are those "newly awarded" compensation during that period. Thus, claimants receiving temporary total disability benefits must be considered to have been "newly awarded compensation" when benefits commence, generally at the time of injury, and thus they receive the maximum in effect at this time. The Board held that temporarily totally disabled claimants thereafter would remain at the maximum in effect at this time; the following October 1, because they would not be "currently receiving" permanent total disability or death benefits under Section 6(c), they would not be entitled to the new maximum. The Board thus rejected Director's contention that claimants receiving temporary total disability at the maximum level are entitled to the new maximum each year [up to 66 2/3 percent of their actual average weekly wage] as contrary to the language of Section 6(c). *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

Inasmuch as claimant's award of permanent partial disability compensation commenced on August 1, 1986, the Board held that pursuant to Section 6(c) claimant is limited to the statutory maximum available at that time. The Board rejected employer's contention that it should apply the statutory maximum as of the date of the accident in 1981 which caused the disability. *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995).

Claimant is limited to the applicable statutory maximum at the date of each of her work-related back injuries. The pertinent maximum rate is determined by the date benefits commence. In 2005, claimant was "newly awarded compensation during" the periods commencing in January 1995 and October 1, 1995. Accordingly, claimant's temporary total disability awards are subject to the maximum rates in effect in 1995 and 1996. The Board rejected claimant's contention that the statutory maximum as of the date the administrative law judge issued her decision in July 2005 should apply to all periods of temporary total disability from January 12, 1995, to August 12, 2003. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Pursuant to *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990), the Board rejected claimant's contention that her temporary total disability compensation should increase each fiscal year from the date of injury in January 1995 to October 1, 1998, when the maximum rate first became greater than claimant's full compensation rate under Section 8(b). Under the plain language of Section 6(c), claimant is not entitled to a new maximum rate each fiscal year because she was neither currently receiving compensation for permanent total disability nor newly awarded compensation for those periods. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

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