SECTION 6

Section 6(a)

Section 6(a) provides

> No compensation shall be allowed for the first three days of the disability, except the benefits provided for in Section 7. *Provided, however*, That in case the injury results in disability of more than 14 days, the compensation shall be allowed from the date of the disability.

33 U.S.C. §906(a).

Digests

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. W. 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 held that a chest x-ray evidencing pleural thickening was insufficient to establish a 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 held 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 reversed the administrative law judge's determination that a May 6, 1983 pulmonary function study, prepared by the only physician who offered an opinion

regarding onset of disability, was not indicative of a permanent impairment under the AMA *Guides*, as the administrative law judge incorrectly interpreted claimant's pulmonary function study. The Board held that the objective medical evidence was sufficient as a matter of law to establish that claimant's pulmonary impairment commenced as of May 6, 1983. The Board consequently remanded the case for an award of benefits under Section 8(c)(23) as of that date. *Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1998), *decision after remand* 34 BRBS 34 (2000), *rev'd on other grounds sub nom. Alexander v. Director, OWCP*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002).

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*, 303 F. App'x 928 (2d Cir. 2008).

In retiree occupational disease cases, benefits commence under Section 8(c)(23) when the employee's impairment becomes permanent, because Section 2(10) as amended provides that "disability shall mean permanent impairment" in the case of certain retirees. The Board affirmed the administrative law judge's denial of compensation as claimant has not been diagnosed with a permanent impairment under the AMA *Guides*. *Gindo v. Aecon Nat'l Sec. Programs, Inc.*, 52 BRBS 51 (2018).

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 *Ingalls Shipbuilding, Inc. v. Director, OWCP [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), and the Board's decision in *Howard*, 25 BRBS 192, 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 hearing loss award under Section 8(c)(13) is the date of his last exposure to noise. The Board thus overruled *Howard*, 25 BRBS 192. The Board vacated the administrative law judge's finding that the award commences on the date of the filing audiogram and remanded the case for a finding regarding claimant's date of last exposure. *Moore v. Ingalls Shipbuilding, Inc.*, 27 BRBS 76 (1993).

Section 6(b)

Section 6(b) provides minimum and maximum rates for compensation. *See* 20 C.F.R. §§702.801-811 (2018).

Prior to the 1972 Amendments, the maximum rate for disability benefits was $70 per week and the minimum amount was the lesser of $18 or the employee's actual average weekly wage. Section 6(b)(l), as amended in 1972, raised the maximum rate for disability benefits to 200 percent of the national average weekly wage beginning October 1, 1975. The 1972 Amendments provided a series of maximums to be applied in a phase-in procedure in the years between 1972 and 1975 for injuries after the effective date. A complementary provision, Section 10(h), applicable to awards for permanent total disability or death which commenced prior to the effective date of the 1972 Amendments provided for a similar adjustment in those benefits; these increases were payable from the Special Fund and appropriations.

The Board rejected the contention that the Section 6(b) increase should be paid by the Special Fund and appropriations and held employer liable for the phase-in adjustments in a case where claimant was exposed to injurious stimuli prior to 1972, but the parties stipulated that the date of injury was in 1973. *Balderson v. Maurice P. Foley Co., Inc.*, 4 BRBS 401 (1976), *aff'd on other grounds*, 569 F.2d 132, 7 BRBS 69 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978). The increased maximum applies to temporary total as well as permanent total disability benefits, as pursuant to Section 6(d) [now (c)], it applies to those "newly awarded compensation" during a period. *Dews v. Intercounty Associates*, 14 BRBS 1031 (1982); *see Ramirez v. Lane Constr. Co.*, 9 BRBS 645 (1979); *Crawford v. Trotti & Thompson, Inc.*, 9 BRBS 685 (1979), *aff'd*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980).

The 1984 Amendments continue the 200 percent maximum, and subsection (b)(1) now states:

> Compensation for disability or death (other than compensation for death required by this Act to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

33 U.S.C. §906(b)(1).

With regard to death benefits, prior to 1972, Section 9(e) provided a maximum rate, stating that the average weekly wage of the decedent shall not be considered to be greater than $105 or less than $27, but in any event, could not exceed the decedent's actual average weekly wage. The 1972 Amendments changed this provision to state that the average weekly wage of the decedent could not be less than the national average weekly wage of Section 6(b), and that the total weekly benefits could not exceed the average weekly wage

of the decedent, but Congress neglected to include death benefits in the Section 6(b)(1) maximum. In *Director, OWCP v. Rasmussen*, 440 U. S. 29, 9 BRBS 954 (1979), the Supreme Court held that death benefits are not subject to the Section 6(b) maximum. The 1984 Amendments rectify this omission and expressly apply the maximum limit to both disability and death benefits. Consistent language was adopted in amended Section 9(e)**.**

Section 6(b)(2) sets the minimum level of benefits for total disability at 50 percent of the national average weekly wage or claimant's average weekly wage as calculated under Section 10, whichever is lower. The minimum thus applies only to total disability compensation, 33 U.S.C. §908(a),(b), and not to partial disability benefits, 33 U.S.C. §908(c), (e). *Smith v. Paul Bros. Oldsmobile Co.*, 16 BRBS 57 (1983): *Stutz v. Independent Stevedore Co.,* 3 BRBS 72 (1975). The minimum rate applies to both permanent and temporary total disability. *Brandt v. Stidham Tire Co.*, 16 BRBS 277 (1984), *rev'd on other grounds*, 785 F.2d 329 (D.C. Cir. 1986).

Section 6(b)(3) provides that prior to October 1 each year the Secretary shall determine the national average weekly wage (NAWW) for purposes of determining the maximum and minimum limitations on benefits for the following year.

Digests

Maximum Rate - *see* 20 C.F.R. §§702.805-807 (2018).

The Board held that the administrative law judge erred in applying the pre-1972 maximum rate of $70 per week to claimant's temporary total disability. While claimant was injured prior to 1972, the 1984 Amendments to Section 6(b)(1) apply to all pending disability claims, and apply here as the claim was pending before the Board on the date of enactment. While the Amendments limit the applicability of amended Section 6(b)(1) of the Act in death benefits claims to deaths after the date of enactment, this limitation does not apply to disability claims. Claimant is thus entitled to 2/3 of his average weekly wage. *Nooner v. Nat'l Steel & Shipbuilding Co.*, 19 BRBS 43 (1986).

Citing *Nooner*, the Board noted that 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 *Dews*, *Ramirez* and *Crawford*, the Board held that under Section 6(d) [now (c)], the "phase-ups" of Section 6(b)(1) of the Act as amended in 1972, 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," including those newly awarded compensation for temporary total disability. Claimant, whose temporary total disability award commenced in March 1975 was thus entitled to the new maximum effective on October 1, 1975. The Board accordingly upheld the administrative law judge's

imposition of a Section 14(e) assessment for employer's failure to increase the amount of compensation it was voluntarily paying claimant, in accordance with Section 6(b)(1). *West v. Washington Metro. Area Transit Auth.*, 21 BRBS 125 (1988).

The Board rejected the Director's contention that this case involving temporary total disability commencing in January 1984 is identical to *Dews*, 14 BRBS 1031, and that claimant was thus entitled to the new maximum compensation rate in effect on October 1, 1984. The Board stated that the phrasing of Section 6(d) changed significantly with its enactment as amended Section 6(c) in the 1984 Amendments, in that it now refers to determinations under "subsection (b)(3) with respect to a period" whereas it previously referred to determinations under "this subsection with respect to a period." Finding that this change required reconsideration of the meaning of the term "period" as used in Section 6(c), 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 subsection in 1972. Based on this reasoning, therefore, the Board held 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. 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. A claimant was "newly awarded compensation" in 1993, he was entitled to the maximum in effect at that time. As this maximum compensation rate was significantly higher than the claimant's compensation rate, claimant is entitled to calculation of his Section 8(c)(13) award based on this rate. *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997).

The Board held that claimant's temporary total disability benefits are limited to the applicable statutory maximum at the date when benefits commenced for each of her work-

related back injuries. 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. Pursuant to *Puccetti,* 24 BRBS 25, the Board also 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 during those periods. The Board further held that where claimant's temporary total disability changes to permanent total disability, the compensation rate is not increased on the date of maximum medical improvement. 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) (overruled in part by *Lake v. L-3 Communications,* 47 BRBS 45 (2013)).

The Board rejected claimant's contention that pursuant to *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT), his compensation for temporary total disability benefits is governed by the maximum compensation rate under Section 6(b) in effect on the date the administrative law judge entered the award in 2003, rather than that in effect on the date disability commenced in 1986. In this case arising in the Fifth Circuit, the Board distinguished *Wilkerson*, as the court did not analyze Section 6(c) or discuss its application to a case like the present one. Rather, *Wilkerson* addressed the applicability of the pre-1972 maximum compensation rate to a retiree's hearing loss claim that arose under the 1984 Amendments. For the reasons expressed in *Reposky*, 40 BRBS 65, the Board affirmed the district director's use of the maximum rate applicable as of the date claimant's temporary total disability benefits commenced to calculate his compensation rate for temporary total disability. Also, pursuant to *Reposky*, the Board held that the district director erred in calculating claimant's compensation rate for permanent total disability. Claimant's condition reached maximum medical improvement on July 6, 1988. Thus, claimant thereafter became entitled to the maximum compensation rate in effect on October 1, 1988 as he was "currently receiving" permanent total disability benefits at that time. *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

In this case where claimant last worked in covered employment in November 1997 but had an audiogram in 2004, the Board affirmed the administrative law judge's award of benefits based on the maximum compensation rate in effect in November 1997. Pursuant to

Reposky, 40 BRBS 65, where the Board held that a claimant is limited to the maximum compensation rate in effect when his disability commences, and *Bath Iron Works*, 506 U.S. 153, 26 BRBS 151(CRT), which holds that hearing loss disability is complete as of the date of the last exposure to injurious noise, the Board affirmed the administrative law judge's award based on the rate of $835.74 per week. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

In this case, claimant's status changed to permanent total in July 2005. The Ninth Circuit held that as the "currently receiving" clause of Section 6(c) unambiguously refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually pays it, the administrative law judge and Board erred by applying the maximum rate with respect to fiscal year 2002 (when his disability first occurred), rather than fiscal year 2005 (when claimant reached maximum medical improvement and first became entitled to permanent total disability), in calculating the applicable maximum rate under Section 6(c), for the period between July and October 2005. *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir 2010), *aff'd on other grounds sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012).

Consistent with the meaning of "awarded" in Sections 8 and 10 of the Act, the Ninth Circuit held that an employee is "newly awarded compensation" within the meaning of Section 6(c) when he first becomes entitled to compensation. Thus, as claimant became newly entitled to compensation in fiscal year 2002, the Ninth Circuit held that the administrative law judge properly applied the 2002 fiscal year maximum to claimant's compensation for temporary total disability and permanent partial disability. The court added that it was not persuaded by the position taken by the Fifth Circuit in *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT), that an employee is "newly awarded compensation" at the time of a formal compensation order, as that court neither engaged in any analysis of the text of the Act nor did it explain how its interpretation accords with the overall statutory scheme of the Act. *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012).

The Supreme Court affirmed the judgment of the Ninth Circuit and held that an employee is "newly awarded compensation" within the meaning of Section 6(c) when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when a compensation order is issued. Thus, the applicable initial maximum compensation rate is that in effect when the claimant became disabled. The Court stated that its holding coheres with the Act's administrative structure and purpose to compensate workers for disability, while avoiding disparate treatment of similarly situated employees and discouraging gamesmanship in the claims process. *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012); *see also Price v. Stevedoring Services of America*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. Cir. 2012).

Prior to the issuance of the Supreme Court's decision in *Roberts,* the Eleventh Circuit relied on the Fifth Circuit's decision in *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), and held that the maximum compensation rate for a claimant receiving "newly awarded compensation" is determined by the date on which benefits are awarded, not the date a claimant is first entitled to benefits. Thus, as claimant was awarded benefits in 2008, the Eleventh Circuit held that it was error to apply the FY2002 maximum rate to claimant's compensation. After a discussion of statutory construction, the court was not persuaded by the position taken by the Ninth Circuit in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir 2010), that an employee is "newly awarded compensation" when he first becomes entitled to compensation, stating that such interpretation was inconsistent with the ordinary and common meaning ascribed to the term "award." *Boroski v. Dyncorp Int'l*, 662 F.3d 1197, 46 BRBS 1(CRT) (11th Cir. 2011), *vacated and remanded*, 566 U.S. 1007 (2012), *decision after remand*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012).

In its decision after remand from the Supreme Court, the Eleventh Circuit affirmed the use of the maximum compensation in 2002 as of the date claimant became disabled under the "newly awarded compensation" clause of Section 6(c), pursuant to *Roberts*. With respect to the phrase "currently receiving compensation" in Section 6(c), the court held that it means "currently entitled to compensation." The court held that, in this manner, the two clauses work together: claimant is to receive benefits based on one rate in his first year of disability, and if he is "currently receiving" permanent total disability or death benefits thereafter, he is entitled to the new maximum rate, which gradually increases consistent with increases in the cost of living. This result also avoids disparate treatment of similarly situated claimants. *Boroski v. Dyncorp Int'l*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012).

In this case where claimant reached maximum medical improvement and his temporary total disability changed to permanent total disability in December 2008, the administrative law judge relied on the Board's decision in *Reposky,* 40 BRBS 65, to find that claimant's permanent total disability compensation for the period from the date of maximum medical improvement through the end of fiscal year 2009 is limited to the fiscal year 2006 statutory maximum rate that applied to his previous period of temporary total disability. The Board held that *Reposky*, which arose within the jurisdiction of the Ninth Circuit, is overruled to the extent that it is inconsistent with the Ninth Circuit's decision in *Roberts*, 625 F.3d 1204, 44 BRBS 73(CRT). The Board adopted the Ninth Circuit's interpretation of the "currently receiving" clause of Section 6(c) and, consistent with that decision, held that in cases where claimant's temporary total disability changes to permanent total disability during the fiscal year, the applicable rate for claimant's initial period of permanent total disability benefits is the rate in effect at the time claimant's entitlement to those benefits commences. The Board therefore modified the administrative law judge's decision to reflect that for the period from December 2008 through September 30, 2009, claimant's permanent total disability benefits are based on the fiscal year 2009 rate. The Board rejected employer's

assignment of error to the administrative law judge's further findings that, pursuant to Section 6(b), (c), claimant was entitled to the fiscal year 2010 maximum for the period from October 1, 2009 through September 30, 2010, and to the new maximum rate for each fiscal year thereafter until such time that the statutory maximum exceeds two-thirds of claimant's average weekly wage. 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 was rejected by the Board in *Marko,* 23 BRBS 353. Noting that the Board's reasoning in *Marko* is supported by the Ninth Circuit's decision in *Roberts,* the Board reaffirmed the *Marko* holding that in a permanent total disability case where two-thirds of claimant's actual average weekly wage exceeds the Section 6(b)(3) statutory maximum, he is entitled to the new maximum rate each fiscal year. Such a claimant is entitled to the new Section 6(b)(3) maximum rate each fiscal year until such time as two-thirds of his average weekly wage falls below 200 percent of the applicable national average weekly wage, and thereafter is entitled to annual adjustments under Section 10(f). *Lake v. L-3 Communications,* 47 BRBS 45 (2013).

The Board rejected 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 held 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 reversed the administrative law judge's finding that the statutory maximum of Section 6(b)(1) is inapplicable and held 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 pert. part on recon.*, 38 BRBS 56 (2004).

However, the Ninth Circuit held that in a case where claimant is receiving concurrent permanent partial and permanent total awards, 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 Am. v. Price,* 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *rev'g in pert. part and aff'g on other grounds* 36 BRBS 56 (2002), *cert. denied*, 544 U.S. 960 (2005).

Thereafter, on reconsideration in *Carpenter*, the Board vacated its prior holding that the statutory maximum compensation rate of Section 6(b)(1) applies to the combined concurrent awards and reinstated the administrative law judge's finding that the maximum rate does not apply to the combined award in light of the Ninth Circuit's decision in *Price*, 382 F.3d 878, 38 BRBS 51(CRT). *Carpenter v. California United Terminals*, 38 BRBS 56 (2004), *vacating in pert. part on recon.*, 37 BRBS 149 (2003).

The Second Circuit affirmed the finding that the applicable compensation rate is the one in effect at the time of the onset of disability, rejecting the applicability of *LeBlanc*, 130 F.3d 157, 31 BRBS 195(CRT) (5th Cir. 1997) (use average weekly wage on date of traumatic injury), because that is a traumatic injury case. The court characterized claimant's eye condition as an occupational disease. Moreover, the court noted that it is likely that claimant's injury occurred in the same year as the onset of his disability, in any event. *Serv. Employees Int'l, Inc. v. Director, OWCP*, 595 F.3d 447, 44 BRBS 1(CRT) (2d Cir. 2010).

The Board vacated the administrative law judge's order which accepted a stipulation that applied an incorrect compensation rate. As the parties stated that claimant's benefits would be based upon the maximum compensation rate as of January 9, 2006, but applied the maximum compensation rate from the prior year, the Board remanded the case for the administrative law judge to correct the error by making findings of fact or accepting proper stipulations that include the correct rate. *Aitmbarek v. L-3 Communications*, 44 BRBS 115 (2010).

Minimum Rate - *See* 20 C.F.R. §§702.808-811 (2018)

Where decedent became disabled in 1975 and died in 1986, the Board rejected the argument that the widow's benefits should be based on either an average weekly wage at the time of death calculated based on a comparable worker's earnings or decedent's compensation rate at the time of death or his rate as increased by Section 10(f) adjustments over the years. Pursuant to Section 9(e), as amended in 1984 to establish a minimum and maximum benefit level in computing death benefits, decedent's average weekly wage cannot be less than the national average weekly wage of Section 6(b), but the total weekly benefits may not exceed the lesser of his actual average weekly wage and the maximum under Section 6(b)(1) of 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 in 1986, the Board concluded that the deputy commissioner correctly employed the national average weekly wage figure in computing claimant's weekly death benefits. Since claimant was decedent's sole survivor pursuant to Section 9(b), she was thus entitled to 50 percent of this amount, and her total benefits were less than both decedent's average weekly wage at the time of injury and the Section 6(b) maximum, the Board held that the deputy commissioner properly awarded her 50 percent of the national average weekly wage in weekly death benefits. The Board acknowledged that this amount was a large reduction in the benefits claimant and her husband had received but found it dictated by the plain language of the Act. *Buck v. Gen. Dynamics Corp., Elec. Boat Div.*, 22 BRBS 111 (1989).

The Board, citing its decision in *Smith*, 16 BRBS 57, held 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). 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 rejected 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 affirmed the administrative law judge's finding that claimant is entitled to the minimum compensation rate of Section 6(b)(2) for FY 2007 in effect when claimant's disability commenced in November 2006, rather than the minimum compensation rate for 2006 in effect when claimant was injured in September 2006. In *Roberts v. Sea-Land Services, Inc.*, 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012), the Court noted that if the "time of injury" and the "time of onset of disability" differ, the applicable national average weekly wage is that in effect at the latter date. The Board noted that, although claimant missed time from work prior to November 2006, neither party alleged on appeal that the

administrative law judge's finding that the onset of disability was November 5, 2006, is, itself, in error. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).

Section 6(c)

Prior to the 1984 Amendments, Section 6(c) contained a separate statutory maximum and minimum applicable to the Non-Appropriated Funds Instrumentalities Act, an extension of the Longshore Act. This provision was repealed in 1984 and former Section 6(d) was amended and renumbered Section 6(c).

Section 6(c) provides that determinations under subsection (b)(3) with respect to a period shall apply to "employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period." 33 U.S.C. §906(c). Prior to the 1984 Amendments, the section referred to "determinations under this subsection," 33 U.S.C. §906(d) (1982) (amended 1984), rather than specifically referencing Section 6(b)(3).

In *Director, OWCP v. Rasmussen*, 440 U. S. 29, 9 BRBS 954 (1979), the Supreme Court interpreted the 1972 version as indicative of Congressional intent to place a minimum but not a maximum limitation on death benefits. The Court held that Section 6(d)'s reference to survivors receiving death benefits referred only to the Secretary's determination of the national average weekly wage under Section 6(b)(3) for purposes of calculating minimum death benefits. This section did not, as employer argued, make the disability benefit maximums of Section 6(b)(1) applicable to death benefits. As discussed in Section 6(b), *supra*, the lack of a maximum on death benefits was rectified by the 1984 Amendments.
.
In *Dews v. Intercounty Associates*, 14 BRBS 1031 (1982), the Board held that this section did not limit the maximum benefit phase-ups of Section 6(b)(l) in the 1972 Amendments to permanent total disability, as Section 6(d) [under the 1972 Act] makes the new maximums applicable to all claimants "newly awarded compensation" after the effective date of the 1972 Amendments.

Digests

As long as two-thirds of 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 rejected based on the plain language of Section 6(c). *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

The Board rejected the Director's contention that this case involving temporary total disability commencing in January 1984 is identical to *Dews*, 14 BRBS 1031, and that claimant was thus entitled to the new maximum compensation rate in effect on October 1, 1984. The Board stated that the phrasing of Section 6(d) changed significantly with its

enactment as amended Section 6(c) in the 1984 Amendments, in that it now refers to determinations under "subsection (b)(3) with respect to a period" whereas it previously referred to determinations under "this subsection with respect to a period." Finding that this change required reconsideration of the meaning of the term "period" as used in Section 6(c), 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 subsection in 1972. Based on this reasoning, therefore, the Board held 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. 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 applicable 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).

The Board held that claimant's temporary total disability benefits are limited to the applicable statutory maximum at the date when benefits commenced for each of her work-related back injuries. 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. Pursuant to *Puccetti,* 24 BRBS 25, the Board also 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 during those periods. The Board further held that where claimant's temporary total disability changes to permanent total disability, the compensation rate is not increased on the date of maximum medical improvement. 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) (overruled in part by *Lake v. L-3 Communications*, 47 BRBS 45 (2013).

The Board rejected claimant's contention that pursuant to *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT), his entitlement to compensation for temporary total disability benefits is restricted under Section 6(b) only by the statutory maximum compensation rate in effect when the administrative law judge entered the award in 2003, rather than the maximum rate in effect at the date disability commenced in 1986. The Board distinguished *Wilkerson* in this case arising in the Fifth Circuit, as the court in *Wilkerson* did not analyze Section 6(c) or discuss its application to a case like the present one. Rather, *Wilkerson* addressed the applicability of the pre-1972 maximum compensation rate to a retiree's hearing loss claim that arose under the 1984 Amendments. For the reasons expressed in *Reposky*, 40 BRBS 65, the Board affirmed the district director's use of the maximum rate applicable as of the date claimant's temporary total disability benefits commenced to calculate his compensation rate for temporary total disability. Also pursuant to *Reposky*, the district director erred in calculating claimant's compensation rate for permanent total disability. Claimant's condition reached maximum medical improvement on July 6, 1988. Thus, claimant thereafter became entitled to the maximum compensation rate in effect on October 1, 1988 as he was "currently receiving" permanent total disability benefits. *Estate of C. H. [Heavin] v. Chevron USA, Inc.*, 43 BRBS 9 (2009).

In this case, claimant's status changed to permanent total in July 2005. The Ninth Circuit held that as the "currently receiving" clause of Section 6(c) unambiguously refers to the period during which an employee was entitled to receive compensation for permanent total disability, regardless of whether his employer actually pays it, the administrative law judge and Board erred by applying the maximum rate with respect to fiscal year 2002 (when his disability first occurred), rather than fiscal year 2005 (when claimant reached maximum medical improvement and first became entitled to permanent total disability), in calculating the applicable maximum rate under Section 6(c), for the period between July and October 2005. *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir 2010), *aff'd on other grounds sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012).

Consistent with the meaning of "awarded" in Sections 8 and 10 of the Act, the Ninth Circuit held that an employee is "newly awarded compensation" within the meaning of Section

6(c) when he first becomes entitled to compensation. Thus, as claimant became newly entitled to compensation in fiscal year 2002, the Ninth Circuit held that the administrative law judge properly applied the 2002 fiscal year maximum to claimant's compensation for temporary total disability and permanent partial disability. The court added that it was not persuaded by the position taken by the Fifth Circuit in *Wilkerson*, 125 F.3d 904, 31 BRBS 150(CRT), that an employee is "newly awarded compensation" at the time of a formal compensation order, as that court neither engaged in any analysis of the text of the Act nor did it explain how its interpretation accords with the overall statutory scheme of the Act. *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012).

The Supreme Court affirmed the judgment of the Ninth Circuit and held that an employee is "newly awarded compensation" within the meaning of Section 6(c) when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when a compensation order is issued. Thus, the applicable initial maximum compensation rate is that in effect when the claimant became disabled. The Court stated that its holding coheres with the Act's administrative structure and purpose to compensate workers for disability, while avoiding disparate treatment of similarly situated employees and discouraging gamesmanship in the claims process. *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 46 BRBS 15(CRT) (2012); *see also Price v. Stevedoring Services of Am.*, 697 F.3d 820, 46 BRBS 51(CRT) (9th Cir. 2012).

Prior to the issuance of the Supreme Court's decision in *Roberts,* the Eleventh Circuit relied on the Fifth Circuit's decision in *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), and held that the maximum compensation rate for a claimant receiving "newly awarded compensation" is determined by the date on which benefits are awarded, not the date a claimant is first entitled to benefits. Thus, as claimant was awarded benefits in 2008, the Eleventh Circuit held that it was error to apply the FY2002 maximum rate to claimant's compensation. After a discussion of statutory construction, the court was not persuaded by the position taken by the Ninth Circuit in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), that an employee is "newly awarded compensation" when he first becomes entitled to compensation, stating that such interpretation was inconsistent with the ordinary and common meaning ascribed to the term "award." *Boroski v. Dyncorp Int'l*, 662 F.3d 1197, 46 BRBS 1(CRT) (11th Cir. 2011), *vacated and remanded*, 566 U.S. 1007 (2012), *decision after remand*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012).

In its decision after remand from the Supreme Court, the Eleventh Circuit affirmed the use of the maximum compensation in 2002 as of the date claimant became disabled under the "newly awarded compensation" clause of Section 6(c), pursuant to *Roberts*. With respect to the phrase "currently receiving compensation" in Section 6(c), the court held that it means "currently entitled to compensation." The court held that, in this manner, the two clauses work together: claimant is to receive benefits based on one rate in his first year of

disability, and if he is "currently receiving" permanent total disability or death benefits thereafter, he is entitled to the new maximum rate, which gradually increases consistent with increases in the cost of living. This result also avoids disparate treatment of similarly situated claimants. Thus, the court rejected claimant's contention that he should receive the 2008 rate to a disability that commenced in 2002. *Boroski v. Dyncorp Int'l*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012).

In this case where claimant reached maximum medical improvement and his temporary total disability changed to permanent total disability in December 2008, the administrative law judge relied on the Board's decision in *Reposky,* 40 BRBS 65, to find that claimant's permanent total disability compensation for the period from the date of maximum medical improvement through the end of fiscal year 2009 is limited to the fiscal year 2006 statutory maximum rate that applied to his previous period of temporary total disability. The Board held that *Reposky*, which arose within the jurisdiction of the Ninth Circuit, is overruled to the extent that it is inconsistent with the Ninth Circuit's decision in *Roberts,* 625 F.3d 1204, 44 BRBS 73(CRT). The Board adopted the Ninth Circuit's interpretation of the "currently receiving" clause of Section 6(c) and, consistent with that decision, held that in cases where claimant's temporary total disability changes to permanent total disability during the fiscal year, the applicable rate for claimant's initial period of permanent total disability benefits is the rate in effect at the time claimant's entitlement to those benefits commences. The Board therefore modified the administrative law judge's decision to reflect that for the period from December 2008 through September 30, 2009, claimant's permanent total disability benefits are based on the fiscal year 2009 rate. The Board rejected employer's assignment of error to the administrative law judge's further findings that, pursuant to Section 6(b), (c), claimant was entitled to the fiscal year 2010 maximum for the period from October 1, 2009 through September 30, 2010, and to the new maximum rate for each fiscal year thereafter until such time that the statutory maximum exceeds two-thirds of claimant's average weekly wage. 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 was rejected by the Board in *Marko,* 23 BRBS 353. Noting that the Board's reasoning in *Marko* is supported by the Ninth Circuit's decision in *Roberts,* the Board reaffirmed the *Marko* holding that in a permanent total disability case where two-thirds of claimant's actual average weekly wage exceeds the Section 6(b)(3) statutory maximum, he is entitled to the new maximum rate each fiscal year. Such a claimant is entitled to the new Section 6(b)(3) maximum rate each fiscal year until such time as two-thirds of his average weekly wage falls below 200 percent of the applicable national average weekly wage, and thereafter is entitled to annual adjustments under Section 10(f). *Lake v. L-3 Communications*, 47 BRBS 45 (2013).

The Board affirmed the administrative law judge's finding that claimant is entitled to the minimum compensation rate of Section 6(b)(2) for FY 2007 in effect when claimant's disability commenced in November 2006, rather than the minimum compensation rate for 2006 in effect when claimant was injured in September 2006. In *Roberts v. Sea-Land*

Services, Inc., 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012), the Court noted that if the "time of injury" and the "time of onset of disability" differ, the applicable national average weekly wage is that in effect at the latter date. The Board noted that, although claimant missed time from work prior to November 2006, neither party alleged on appeal that the administrative law judge's finding that the onset of disability was November 5, 2006, is, itself, in error. *Montoya v. Navy Exch. Serv. Command*, 49 BRBS 51 (2015).