

BRB Nos. 05-0578
and 05-0578A

ROBERT RAMEY)
)
 Claimant-Respondent)
 Cross-Petitioner)
)
 v.)
)
JONES STEVEDORING COMPANY) DATE ISSUED: 03/30/2006
)
 Self-Insured)
 Employer-Petitioner)
 Cross-Respondent)
)
STEVEDORING SERVICES OF)
AMERICA)
)
 and)
)
EAGLE PACIFIC INSURANCE)
COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
STEVEDORING SERVICES OF)
AMERICA)
)
 and)
)
HOMEPORIT INSURANCE COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)

Appeals of the Decision and Order Awarding Benefits and the Amended Decision of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston Bunnell & Flynn, LLP), Portland, Oregon, for claimant.

William M. Tomlinson and Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for Jones Stevedoring Company.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Stevedoring Services of America/Homeport Insurance Company.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Stevedoring Services of America/Eagle Pacific Insurance Company.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Jones Stevedoring Company (Jones), appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits and the Amended Decision and Order (2003-LHC-02643 and 2004-LHC-02382) of Administrative Law Judge Anne Beytin Torkington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a longshoreman since 1969, dislocated his left shoulder in 1980. He dislocated it again on September 27, 1988, while working for Stevedoring Services of America/Eagle Pacific Insurance Company (SSA/Eagle), but returned to work without restrictions after a short period of disability. In 1996, claimant experienced pain in his left shoulder, so he began working in a less physically challenging job for the Port of Longview, a non-covered employer.¹ However, he continued to work on the weekends for covered

¹ Apparently, the Port of Longview is a noncovered employer because it is a government entity and claimant is a governmental employee, excluded from the Act's

employers. On October 26, 1996, claimant last worked as a “boom man/raft man” for Stevedoring Services of America/Homeport Insurance Company (SSA/Homeport). On November 23, 1996, claimant last worked as a “tractor semi dock” operator for Jones.

In 2001, claimant sought medical care for his left shoulder injury, and was restricted to light-duty work on September 23, 2002, by his treating physician, Dr. Lamoreaux, who subsequently performed surgeries on claimant’s left shoulder on November 6, 2002, and January 17, 2003. Claimant sought temporary total disability benefits from September 23, 2002, through October 26, 2003, because of his inability to work. Claimant also sought ongoing partial disability benefits from October 27, 2003, upon his return to work. In 2002, claimant filed a claim against SSA/Eagle, and SSA/Eagle joined SSA/Homeport and Jones as parties in 2004.

The administrative law judge found that Jones is the responsible employer. The administrative law judge found that claimant’s last day of covered employment on November 23, 1996, was with Jones, and she credited the testimony of Dr. Lamoreaux, whose deposition was admitted into evidence over Jones’s objection, that claimant’s longshore work aggravated his pre-existing left shoulder condition. The administrative law judge also found that SSA/Eagle’s “claim” joining other employers is not time-barred, that claimant’s average weekly wage is \$1,273.50 based on claimant’s stipulated average weekly wage calculated as of November 23, 1996, and that claimant reached maximum medical improvement on November 18, 2003. Consequently, the administrative law judge awarded claimant temporary total disability benefits from September 23, 2002, through October 26, 2003, at the maximum compensation rate of \$801.06 in effect at the time of the November 23, 1996, aggravation, temporary partial disability benefits from October 27 through November 17, 2003, and ongoing permanent partial disability benefits from November 18, 2003. The administrative law judge found that Jones is entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

On appeal, Jones challenges the administrative law judge’s decision to admit Dr. Lamoreaux’s deposition into evidence, the administrative law judge’s finding that SSA/Eagle’s “claim” is not time-barred, and the finding that it is the responsible employer. SSA/Eagle responds in support of the administrative law judge’s decision. SSA/Homeport responds, agreeing with Jones that SSA/Eagle’s “claim” is time-barred and that the administrative law judge misapplied the aggravation rule. Claimant asserts that any timeliness problem regarding subsequent employers is eliminated because his claim against SSA/Eagle was timely filed, and that one of the covered employers must be held liable for the totality of his condition. In his cross-appeal, claimant contends that the administrative law judge erred in calculating his average weekly wage and applying the maximum

coverage. *See* 33 U.S.C. §903(b); *Keating v. City of Titusville*, 31 BRBS 187, 188-189 (1997); Decision and Order at 14; Cl. Resp. Br. at 2; Cl. Cross-Pet. For Review at 3.

compensation rate as of his November 23, 1996, injury. Jones responds in support of the administrative law judge's average weekly wage finding if her responsible employer finding is affirmed.

We first address Jones's appeal. Jones initially contends that the administrative law judge erred in finding that SSA/Eagle's "claim" against it is not time-barred pursuant to Section 13 of the Act, 33 U.S.C. §913. Section 13(a) requires that a claimant file his claim within one year from the time he becomes aware, or in the exercise of reasonable diligence, should have been aware of the relationship between his traumatic injury and employment. 33 U.S.C. §913(a). In *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004), the Board stated that, "Sections 12 and 13 apply to a claimant's notice of injury and claim for compensation due to his injury; these sections do not apply to a carrier seeking a determination that another carrier is responsible for claimant's benefits." *Kirkpatrick*, 38 BRBS at 31. The administrative law judge relied on *Kirkpatrick* to find that SSA/Eagle's "claim" against Jones is not time-barred.

We affirm this finding as it is in accordance with law. The administrative law judge accurately noted that Jones did not assert that claimant's claim was untimely filed against any employer. Because SSA/Eagle is not a claimant in this matter, and only a claimant's claim is subject to the Act's statutes of limitations, the administrative law judge properly concluded that SSA/Eagle's joinder of additional potentially liable employers and carriers was not untimely. *Id.*; see generally *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

Jones next contends that the administrative law judge erred in admitting the deposition of Dr. Lamoreaux, claimant's treating physician, over its objection at the hearing. The administrative law judge has great discretion concerning the admission of evidence, and any such decisions are reversible only if they are shown to be arbitrary, capricious, or an abuse of discretion. *Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002); 20 C.F.R. §§702.338, 702.339. Dr. Lamoreaux was deposed on December 16, 2003, before Jones was joined to the proceedings. At the hearing, the administrative law judge admitted Dr. Lamoreaux's deposition over the objection by Jones's counsel, finding

that Jones had sufficient time to depose Dr. Lamoreaux or could have called her as a witness at the hearing.

We affirm the administrative law judge's admission of Dr. Lamoreaux's deposition as Jones has not shown that the administrative law judge abused her discretion in this regard. *See Burley*, 35 BRBS 185; Tr. at 22-24, 33-37. Specifically, Jones has not shown that it did not have time to depose Dr. Lamoreaux after it was joined as a party on February 3, 2004, seven months prior to the hearing on September 1, 2004, or that it was unable to ensure her availability at the hearing. Indeed, SSA/Eagle points out that Jones was able to depose claimant after it was joined as a party even though claimant also had been deposed prior to its joinder and in its absence. *See* Cl. Exs. 37, 47 at 19; SSA/Eagle's Resp. Br. at 17. We reject Jones's reliance on 29 C.F.R. §18.23(a) for the proposition that a deposition may be used only against a party who was present or represented at the taking of the deposition or who had due notice of it. That regulation also provides that physicians' depositions may be used by any party for any purpose and that a party's substitution does not affect the right to use depositions previously taken. 29 C.F.R. §18.23(a)(2), (6).² Moreover, the administrative law judge's authority to admit evidence cannot be limited by these regulations in view of the specific provision of the Act stating that the factfinder may "make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a); 20 C.F.R. §§702.338, 702.339; 29 C.F.R. §18.1 (rules are inapplicable if inconsistent with specific statutory or regulatory provision). As the admission of Dr. Lamoreaux's deposition did not violate Jones's due process rights, we reject Jones's assertion of error in this regard. *See generally Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4th Cir. 1999)(table).

² Section 18.23(a) states, in pertinent part:

a) *Generally.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(2) The deposition of expert witnesses, particularly the deposition of physicians, may be used by any party for any purpose, unless the administrative law judge rules that such use would be unfair or a violation of due process.

(6) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

Jones also contends that the administrative law judge erred in finding that it is the responsible employer as Dr. Lamoreaux's deposition testimony does not establish that claimant's last day of employment with Jones on November 23, 1996, aggravated his left shoulder condition. If claimant's disability is the result of the natural progression of his initial traumatic injury and would have occurred notwithstanding a subsequent injury, the first employer is liable for claimant's disabling condition. If, however, the disability is due at least in part to a subsequent injury that aggravated, accelerated or combined with the prior injury, the subsequent employer is liable for the entire resulting disability. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004);³ *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *Lopez*, 39 BRBS 85; *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hosp., Inc.*, 7 Fed.Appx. 547 (9th Cir. 2001). Based on Dr. Lamoreaux's testimony, the administrative law judge found that claimant's post-1988 work activities aggravated his left shoulder condition. Since claimant last worked in covered employment for Jones, the administrative law judge found that Jones is the employer liable for the payment of claimant's disability and medical benefits.

The administrative law judge weighed the evidence and credited the opinion of Dr. Lamoreaux, as the treating physician, over the opinions of Drs. Vessely, Gripekoven and Farris that claimant's left shoulder condition was caused by his 1980 and 1988 left shoulder dislocations and not his post-1988 work activities. Jones does not challenge the administrative law judge's weighing of this evidence but asserts that Dr. Lamoreaux's

³ Jones also contends that the administrative law judge erred in stating at the hearing that the holding in *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004), eliminates the natural progression theory of the responsible employer rule. Emp. Pet. for Review at 23-25; *see* Tr. at 56-57. Jones correctly asserts that the holding in *Price* did not eliminate the natural progression theory in two injury cases but rather held that work on a single day may be sufficient to cause an aggravation of the claimant's physical condition, even in the absence of decreased wage-earning capacity. Any error in the administrative law judge's characterization of the holding in *Price* is harmless, however, as she correctly applied its holding to the instant case.

testimony is insufficient to establish that claimant's one day of work for Jones aggravated his left shoulder condition. Dr. Lamoreaux testified by deposition that the work claimant performed subsequent to his 1988 left shoulder dislocation contributed to the degeneration of the shoulder joint, Cl. Ex. 41 at 13-15, and moved the degenerative process along "at a little bit faster clip." *Id.* at 42. Moreover, Dr. Lamoreaux testified that even lifting an arm could cause claimant additional trauma.⁴ *Id.* at 26-27. The administrative law judge found that Dr. Lamoreaux's testimony supports a finding that claimant's degenerative joint disease progressed naturally from the shoulder dislocation, but that claimant's work activities accelerated the process.⁵ *See Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez*, 39 BRBS 85; Decision and Order at 11-13. Substantial evidence supports this finding. Cl. Ex. 41 at 14-15, 26-27, 42.

Jones contends, however, that Dr. Lamoreaux erroneously assumed that claimant's work for Jones was of the type that could put stress on claimant's shoulder. We reject this contention as the administrative law judge adequately addressed this concern and substantial evidence supports her finding that claimant engaged in activities on November 23, 1996, that could have aggravated his shoulder condition. Claimant testified at length concerning the usual duties of the "tractor semi dock" operator job he was performing on November 23, 1996, although he had no independent memory of the duties of the job he was performing on that day. Tr. at 69-70, 75-76, 88-89, 135. Claimant testified that this job required that he throw and pull 15-pound binders over the top of stacked logs. *Id.* at 75-76, 135. He stated that this type of work bothered his left shoulder because he was constantly moving it, and, in addition, that he had to climb up into a rig. *Id.* at 88-89. Jones did not offer any evidence contradicting claimant's recitation of his job duties. Based on claimant's testimony concerning the usual job duties of his last covered employment for Jones on November 23, 1996, and in light of Dr. Lamoreaux's testimony which establishes that claimant's left shoulder condition was aggravated by his post-1988 work activities, we affirm the administrative law judge's finding that Jones is liable for the payment of claimant's benefits

⁴ Dr. Lamoreaux also testified that both claimant's 1980 and 1988 left shoulder dislocations played a significant role in his left shoulder condition and that claimant's degenerative joint disease was a "natural progression and unavoidable consequence of the dislocations." Cl. Ex. 41 at 34, 36-37.

⁵ The administrative law judge's initial use of the Section 20(a) presumption to resolve the responsible employer issue is harmless error in that she ultimately weighed all the evidence. Section 20(a) is inapplicable because there was no issue regarding whether claimant's injury is work-related, but only which employer is liable for claimant's disabling condition. *See generally McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *see also Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, ___ BRBS ___, No. 05-0125 (Nov. 30, 2005).

as the responsible employer as it is rational, supported by substantial evidence and in accordance with law. See *Price*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez*, 39 BRBS 85.

Jones further contends that the administrative law judge erred in finding that claimant's employment for the Port of Longview is not an intervening cause of claimant's disability which relieves it of liability. Where claimant's disability is the result of an intervening cause, employer is relieved of liability for that portion of the disability attributable to the intervening injury. See *Plappert v. Marine Corps Exchange*, 31 BRBS 13, *aff'd on recon. en banc*, 31 BRBS 109 (1997); see *Cyr v. Crescent Wharf & Warehouse*, 211 F.2d 454 (9th Cir. 1954); *Leach v. Thompson's Dairy, Inc.*, 13 BRBS 231 (1981). In *Plappert*, the claimant sustained a work-related neck injury which required surgery. Claimant left her employer for other employment and she suffered additional neck problems. The medical evidence established that the claimant's disabling neck condition was due to both the work-related injury and to an injury occurring in her subsequent non-covered employment. The Board affirmed the administrative law judge's finding that the covered employer was liable for benefits for the claimant's entire disability as there was no evidence of record apportioning the disability between the injury in covered employment and the injury in non-covered employment. *Plappert*, 31 BRBS at 15-16, 31 BRBS at 109-110.

We reject Jones's contention of error. In this case, the administrative law judge held Jones liable for claimant's entire disability. Although there is evidence that claimant's post-1996 work activities with the Port of Longview could have aggravated claimant's left shoulder condition, the administrative law judge found that Jones produced no evidence apportioning claimant's disability between aggravations occurring in covered employment and those occurring in subsequent non-covered employment. Thus, the administrative law judge's finding that Jones is liable for claimant's entire disabling condition is in accordance with law. *Plappert*, 31 BRBS at 109-110; Decision and Order at 14.

We next address claimant's appeal. Claimant first contends that the administrative law judge erred in basing the award of benefits on his average weekly wage of \$1,273.50 at time of his 1996 aggravating injury.⁶ Claimant contends that the administrative law judge

⁶ The parties stipulated that if Jones is the responsible employer, then claimant's average weekly wage is \$1,273.50, calculated as of 1996. Tr. at 9, 12-13; Decision and Order at 3. Claimant attempted to withdraw this stipulation in his closing argument. Decision and Order at 3 n. 2; ALJ Ex. 8 at 1 n. 1. The administrative law judge held claimant is bound by the stipulation, and moreover, rejected his contention regarding the applicability of *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). Claimant's stipulation as to his average weekly wage does not render the issue raised moot, as it involves a legal determination of the proper time period. The administrative law judge properly addressed this legal argument. Moreover, a stipulation is not binding if it evinces an incorrect application of the law. See *Puccetti v.*

erred in finding inapplicable the holding in *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991). The Act provides that compensation shall be based on the injured worker’s average weekly wage at the time of the injury. 33 U.S.C. §§908(a), 910. Unlike the provisions for occupational diseases, the Act does not define “time of injury” for accidental injuries. *See* 33 U.S.C. §910(i). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has recognized that in most cases of traumatic injury, the date of injury and the date of disability coincide. *See Johnson*, 911 F.2d at 249, 24 BRBS at 5-6(CRT). However, in *Johnson*, claimant was injured in 1979 but was not disabled due to this injury until 1983. The court held that in latent traumatic injury cases the date of claimant’s disability and not the date of accident controls the average weekly wage determination, as one is not “injured” within the meaning of the Act until one is disabled. *Johnson*, 911 F.2d at 248, 24 BRBS at 4(CRT).⁷

The administrative law judge rejected claimant’s assertion that *Johnson* applies such that claimant’s average weekly wage should be calculated based on his earnings prior to his period of disability commencing in 2002. The administrative law judge relied on the holding in *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991), to find that claimant’s average weekly wage should be calculated at the time of his 1996 aggravation.

We cannot affirm the administrative law judge’s finding that *Johnson* is inapplicable in this case, as *Merrill* is distinguishable on its facts. In *Merrill*, 25 BRBS 140, the claimant sustained a work-related back injury in 1985, resulting in a five-month period of total disability. He returned to work, but was laid off in February 1987. He sustained additional disabling back pain in April 1987. The administrative law judge awarded claimant permanent total disability benefits commencing in April 1987, based on his average weekly wage in the year preceding that date. Claimant appealed, contending that his average weekly wage should be calculated as of the date of the initial injury in 1985.

Ceres Gulf, 24 BRBS 25 (1990); *cf. Brown v. Maryland Shipbuilding & Drydock Co.*, 18 BRBS 104 (1986) (Board declines to address average weekly wage issue on appeal as parties stipulated to it below).

⁷ The Ninth Circuit found *Johnson* inapplicable in *DeWeert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002) and *Port of Portland v. Director, OWCP*, 192 F.3d 933, 33 BRBS 143(CRT) (9th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000). In *DeWeert*, the court held that the claimant’s disabling injury was not “latent and unknown” because claimant immediately felt discomfort, and because *DeWeert* was not the “exceptional case” where much time had elapsed between the claimant’s accident and the onset of his disability. In *Port of Portland*, the court held that *Johnson* was not applicable because the claimant was immediately disabled by a knee injury and his eventual total disability was due to the natural progression of the knee injury as it affected his back.

The Board acknowledged the court's holding in *Johnson*, and held that resolution of the average weekly wage issue depended upon whether the claimant's condition was the natural and unavoidable result of only one injury, resulting from claimant's 1985 accident, or is the result of subsequent aggravations at work through 1987. If the administrative law judge found on remand that claimant sustained work-related aggravations through 1987, the Board held that claimant's average weekly wage must be computed at the time of the 1987 aggravation. If, however, claimant's disability was the result of his 1985 injury, then claimant's average weekly wage must be determined at that time. The Board held that under this scenario, *Johnson* was distinguishable in that the claimant's initial disability was not latent. Claimant sustained an immediate period of disability such that the use of the average weekly wage at the time of the initial injury was appropriate.⁸ *Merrill*, 25 BRBS at 150; see also *DeWeert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002).

In this case, the administrative law judge relied on *Merrill* to foreclose the applicability of *Johnson* solely because claimant sustained an aggravating injury in 1996. Decision and Order at 15. The administrative law judge read *Merrill* as requiring the computation of average weekly wage at the time of the aggravating injury. While this proposition is generally true, see, e.g., *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980), *Merrill* does not foreclose the applicability of *Johnson* merely because the claimant sustains an aggravating injury. The key to *Johnson*'s applicability is the existence of a latent disability, whether that disability is in relation to an initial injury or to an aggravating injury. See *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995) (Board affirmed administrative law judge's average weekly wage calculation based on claimant's 1985 earnings as a football player where his back injury occurred in 1981 but did not become disabling until 1986). The administrative law judge did not address whether claimant's disability in this case was latent and therefore we must remand this case for findings in this regard. Consequently, we vacate the administrative law judge's finding that claimant's average weekly wage is \$1,273.50, calculated as of the date of his 1996 aggravation, and we remand the case to the administrative law judge to reconsider whether *Johnson* is applicable. *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT). If, on remand, the administrative law judge finds that *Johnson* applies, she should re-calculate claimant's average weekly wage based on his earnings preceding his 2002 disability, consistent with Section 10 of the Act, 33 U.S.C. §910.

Claimant also contends that the administrative law judge erred in limiting his award of temporary total disability benefits to the maximum compensation rate of \$801.06 in effect at the time of the 1996 aggravation instead of the maximum compensation rate which was in

⁸The Board also noted that *Johnson* was premised on the claimant's wages increasing between the injury and the latent disability, whereas *Merrill*'s average weekly wage decreased between the 1985 injury and his 1987 disability. *Johnson*, 25 BRBS at 150.

effect at the time of the 2002 award. Section 6(b)(1) of the Act provides that the maximum compensation payable is 200 percent of the national average weekly wage. 33 U.S.C. §906(b)(1); *see generally Stevedoring Services of America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 125 S.Ct. 1724 (2005). In her decision, the administrative law judge initially awarded claimant temporary total disability benefits from September 23, 2002, through October 26, 2003, at two-thirds of claimant's 1996 average weekly wage of \$1,273.50, which yielded a compensation rate of \$849. Decision and Order at 16, 18. She subsequently amended her decision to limit claimant's award of temporary total disability benefits for this period to the maximum compensation rate of \$801.06 in effect on November 23, 1996. Amended Decision and Order at 2. The maximum compensation rate in effect at the time the award of benefits commenced on September 23, 2002, award was \$966.08. *See* A BRBS 3-155 (Notice No. 99, Sept. 18, 2001).

Claimant relies on *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997) and *Kubin*, 29 BRBS at 122, to support his position. The United States Court of Appeals for the Fifth Circuit held in *Wilkerson* that the claimant was entitled to the maximum compensation rate in effect at the time he received his award of permanent partial disability benefits for his occupational hearing loss rather than that in effect as of his date of last exposure in 1972. In *Kubin*, the Board held that the applicable statutory maximum compensation rate is to be determined at the time the award of benefits commenced in 1986, rejecting employer's argument that it should be determined as of the time of the 1981 injury. *See* 33 U.S.C. §906(b)(3), (c) (maximum applies to those "newly awarded compensation").

We agree with claimant that the holdings in *Wilkerson* and *Kubin* apply to this case. Inasmuch as claimant's award of temporary total disability benefits commenced on September 23, 2002, we hold that, pursuant to Section 6(b)(1), claimant's benefits are limited to the statutory maximum compensation rate in effect at that time. Consequently, we modify the administrative law judge's award of temporary total disability benefits to reflect that claimant is subject to the statutory maximum compensation rate in effect at the time of the award in 2002, which is \$966.08. *See generally Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).

Accordingly, the administrative law judge's finding that claimant's average weekly wage is \$1,273.50 based on his 1996 earnings is vacated, and the case is remanded to the administrative law judge for reconsideration of whether *Johnson*, 911 F.2d 247, 24 BRBS 3(CRT) is applicable to this case. Claimant's award of temporary total disability benefits is modified to reflect that it is subject to the statutory maximum compensation rate of \$966.08 in effect at the time the award commenced in 2002. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and Amended Decision and Order are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge