BRB Nos. 11-0694 and
11-0694A

LEONARD A. WEIMER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED: 06/28/2012
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Russell D. Pulver, Administrative Law Judge, United States Department of Labor.

Robert H. Madden, Seattle, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for Todd Shipyards Corporation.

John Dudrey (Williams Fredrickson, LLC), Portland, Oregon, for Liberty Northwest Insurance Company.

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

PER CURIAM:

Claimant appeals, and Liberty Northwest Insurance Company (Liberty) cross-appeals, the Decision and Order (2010-LHC-0471, 1608) of Administrative Law Judge Russell D. Pulver 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 which are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained injuries as a result of accidents which occurred in the course of his work for employer as a marine electrician on October 27, 1999 and May 16, 2005.[1] Claimant injured his back and left shoulder as a result of the initial accident and missed substantial periods of work as he went through a series of procedures ultimately resulting in the permanent implantation of a dorsal column stimulator on February 4, 2002. On April 3, 2002, claimant's treating physician, Dr. Massey, released him to return to work with significant restrictions. Dr. Massey informed employer, on October 1, 2002, that claimant had reached maximum medical improvement but was not able to return to his regular job as a marine electrician. Claimant thereafter resumed light-duty work with employer as a marine electrician but continued significant back pain forced him to stop working as of January 23, 2004. Dr. Massey opined that claimant's back symptoms had escalated to the point where he could no longer perform his work as a marine electrician.

On June 17, 2004, Dr. Nelson opined, based on claimant's experiencing recurrent shocks and persistent pain in his lower back, that claimant's spinal cord stimulator was malfunctioning. Dr. Nelson performed surgery to replace the radiofrequency passive receiver and subsequently released claimant to return to light-duty work on January 10, 2005. Claimant returned to work for employer but sustained a back injury on May 16, 2005. Claimant stated that he felt a sharp pain in his upper back between his shoulder blades as he attempted to lift a cable. He reported the incident, stopped working, and obtained chiropractic manipulations. Claimant also saw Dr. Nelson on June 16, 2005. At that time, Dr. Nelson indefinitely suspended claimant from working because bending, lifting and twisting placed him at risk of further injury. Dr. Nelson also recommended that claimant either find a sedentary job or retire. Claimant has not worked since the May 16, 2005, work incident. Claimant continued to voice back pain complaints and subsequent testing led Dr. Nelson to recommend, on February 26, 2009, that claimant

[1]At the time of the October 27, 1999 accident, employer was insured by Fremont Industrial Indemnity Group (Fremont). Fremont became insolvent and employer was self-insured until September 30, 2002, when Liberty became its carrier. This relationship remained in place until September 28, 2007.

undergo additional surgery to convert the power source of his spinal stimulator from an RF receiver to an implantable pulsed generator (IPG) with a rechargeable battery.

Claimant filed a claim seeking disability benefits, as well as an order requiring employer and Liberty to authorize and pay for the IPG surgical procedure recommended by Dr. Nelson. The parties stipulated that claimant has been permanently totally disabled since May 16, 2005, and the Director, Office of Workers' Compensation Programs, conceded employer's entitlement to Section 8(f) relief relating to permanent disability arising from the October 27, 1999 work injury, 33 U.S.C. §908(f). A controversy, however, arose as to whether employer or Liberty is liable for claimant's disability and medical benefits.

The administrative law judge found that claimant's work-related duties subsequent to his October 27, 1999 work injury aggravated his existing medical condition to the point of permanent total disability. He therefore found that Liberty, as the carrier on the risk at the time of claimant's aggravation, is responsible for disability benefits and medical expenses as of the date of aggravation in 2003. The administrative law judge found that claimant is entitled to temporary total and permanent partial disability benefits payable by employer until November 18, 2003,[2] and thereafter to permanent partial and permanent total disability benefits payable by Liberty,[3] subject to assumption of that responsibility by the Special Fund pursuant to Section 8(f).[4] Lastly, the administrative law judge ordered Liberty to pay medical expenses relating to claimant's requested IPG surgery and to reimburse employer for disability payments it made after November 18, 2003.

On appeal, claimant challenges the administrative law judge's average weekly wage and wage-earning capacity determinations, and corresponding award of benefits. BRB No. 11-0694. In its cross-appeal, Liberty challenges the administrative law judge's finding that employer's liability for benefits ceased, and thus that its liability for benefits

[2]The administrative law judge ordered employer to pay claimant temporary total disability benefits from October 27, 1999 through October 7, 2002, and permanent partial disability benefits from October 8, 2002 through November 18, 2003.

[3]The administrative law judge ordered Liberty to pay claimant permanent partial disability benefits from November 19, 2003 through May 16, 2005, and permanent total disability benefits thereafter subject to the provisions of Section 8(f).

[4]In a letter dated April 5, 2011, the Director, Office of Workers' Compensation Programs, conceded entitlement to Section 8(f) relief for permanent disability relating to the October 27, 1999 work injury.

commenced, as of November 18, 2003, as well as his average weekly wage determination for purposes of the May 16, 2005 work injury. BRB No. 11-0694A. Claimant, employer and Liberty have each filed response briefs, and claimant and Liberty have additionally filed reply briefs.

Claimant initially contends that the administrative law judge's calculation of his average weekly wage for the October 27, 1999 injury is flawed. Claimant contends that the administrative law judge erred in including 17.5 "zero-earning" weeks in calculating his average weekly wage, i.e., dividing claimant's earnings from 32 weeks of actual work in the year immediately preceding his October 27, 1999 injury by 49.5 weeks rather than by the actual weeks he worked.

Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. The parties do not dispute the administrative law judge's finding that the record does not contain adequate payroll information to conduct an average weekly wage analysis under either Section 10(a) or (b), and thus that Section 10(c), 33 U.S.C. §910(c), applies.[5] The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Healy Tibbitts*, 444 F.3d 1095, 40 BRBS 13(CRT); *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). It is well established that an administrative law judge has broad discretion in determining an employee's average weekly wage under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). Pursuant to Section 10(c), the administrative law judge may account for a claimant's intermittent work history, a raise in pay he received prior to the injury, and, if appropriate, circumstances existing after the date of injury. *See Rhine v. Stevedoring*

[5]Section 10(c), 33 U.S.C. §910(c), provides:

> If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Services of America, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *Healy Tibbitts*, 444 F.3d 1095, 40 BRBS 13(CRT); *Palacios*, 633 F.2d 840, 12 BRBS 806.

The administrative law judge found that claimant worked 32 weeks in the year immediately preceding his October 27, 1999 work injury for which he earned $28,417.63. Addressing the non-work weeks, the administrative law judge found that while it is appropriate to discount the 2.5 weeks which claimant missed due to a lung condition, the remaining 17.5 weeks should be reflected in the average weekly wage calculation because periodic layoffs were a regular and normal part of claimant's work for employer. Thus, the administrative law judge calculated claimant's average weekly wage for the October 27, 1999, at $574.09, by dividing claimant's total earnings in that time period by 49.5 weeks.

Claimant's employment records with employer covering the years 1989-2003, document that between May 1991 and October 1999, claimant was laid off and rehired on seven separate occasions, and that between March 2001 and June 2003, claimant was laid off and rehired five more times. CX 2. This evidence thus supports the administrative law judge's statement that "periodic layoffs were a regular and normal part of claimant's employment with employer," as well as his consequent decision to include the 17.5 weeks which claimant did not work because of such layoffs in the year immediately preceding his October 27, 1999 injury in the calculation of claimant's average weekly wage. As the administrative law judge's calculation of average weekly wage under Section 10(c) thus accounts for claimant's work history of intermittent employment and reasonably approximates his annual earning capacity at the time of injury, it is affirmed, as it is rational and supported by substantial evidence. *See Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT); *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999).

In its cross-appeal, Liberty contends that the administrative law judge's finding that employer's liability for permanent partial disability benefits ceased as of November 18, 2003, is contrary to law and arbitrary as nothing of legal consequence happened that day to transfer liability for those benefits to Liberty. Employer responds, contending that the administrative law judge properly found Liberty liable for an award of permanent partial disability benefits from November 18, 2003, as claimant's continued work for employer, including during the period of Liberty's coverage, aggravated his October 27, 1999 work injury.

The rule for determining which carrier is liable for the totality of a claimant's disability in a case involving cumulative traumatic injuries is the same as the rule for ascertaining the responsible employer. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL

1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has stated that, in allocating liability between successive employers in cases involving traumatic injury, the employer at the time of the original injury remains liable for the full disability resulting from the natural progression of that injury. If, however, the claimant sustains a subsequent injury which aggravates, accelerates, or combines with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is fully liable. *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); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Where claimant's work results in an exacerbation of his symptoms, the carrier at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986); *see also Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 241, 35 BRBS 154, 160(CRT) (3d Cir. 2002). In this regard, the Ninth Circuit has emphasized that a subsequent employer may be found responsible for an employee's benefits even when the aggravating injury incurred with that employer is not the primary factor in the claimant's resultant disability. *See Foundation Constructors*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *see also Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453, 456 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982).

The administrative law judge found that claimant sustained a work-related aggravation of his October 27, 1999 work injury sometime around November 18, 2003. Decision and Order at 10-12. In reaching this conclusion, he relied on the opinions offered by claimant's treating surgeon, Dr. Baker, from May to November 2003.[6] CX 7 at 91-92. Specifically, the administrative law judge observed that Dr. Baker's May 22, 2003 chart note stated that claimant "continues to do extremely well," and that he was working full time with a low pain level, but that the physician's November 13, 2003 chart note stated that the required bending, twisting and lifting of claimant's job was further

[6]In part of his decision, the administrative law judge inadvertently identified Dr. Nelson as the author of chart notes dated November 13, 2002 and November 13, 2003. *See* Decision and Order at 11. As the administrative law judge's record citations, *see* Decision and Order at 11 *citing* CX 6 at 89 and CX 7 at 92, reflect that these are, as he had previously identified, *see* Decision and Order at 4-5, the statements of Dr. Baker, we hold that any error is harmless.

exacerbating his condition, prompting the physician to recommend, at that time, that claimant be "pensioned." *Id.* at 91. The administrative law judge thus found that since Liberty was the carrier at the time of this aggravation, it is liable for an award of permanent partial disability benefits from November 18, 2003 to June 17, 2005.

The administrative law judge's finding that claimant sustained an aggravation of his October 27, 1999 work injury on or around November 18, 2003, while Liberty was employer's carrier, is supported by substantial evidence. Dr. Baker's chart notes document a significant deterioration of claimant's October 27, 1999 work-related condition as a result of his continued light-duty work for employer. Specifically, Dr. Baker's November 13, 2003 chart note documents claimant's statement that "every month that goes by, his pain is slightly worsened and his ability to work is less." CX 7 at 92. Additionally, Dr. Baker observed that claimant's nearly constant exposure to metal in his work environment was causing his spinal cord stimulator to "literally turn off" thereby causing significant pain. *Id.* Moreover, as noted above, Dr. Baker explicitly opined that claimant's work "exacerbates his condition." *Id.* We, therefore, affirm the administrative law judge's finding that claimant sustained a work-related aggravation of his October 27, 1999 work injury on or around November 18, 2003, as it is supported by substantial evidence and in accordance with law. Therefore, we affirm the finding that Liberty, as the carrier at the time of the aggravation, is liable for permanent partial disability benefits for the period between November 18, 2003 and May 16, 2005, the date upon which claimant sustained another work-related injury which resulted in his permanent total disability for which Liberty is liable.[7] *Price,* 339 F.3d 1102, 37 BRBS 89(CRT).

[7]Liberty contends that if the Board concludes that the administrative law judge correctly found that November 18, 2003, is the date upon which its liability for benefits commenced, then the 104-week period for purposes of Section 8(f) relief should began as of that date, rather than on May 17, 2005. The administrative law judge found, without explanation, that Liberty's liability for permanent total disability benefits from May 17, 2005, was "subject to assumption of that responsibility by the Special Fund pursuant to Section 8(f) of the Act." Decision and Order at 23. In cases where permanent partial disability is followed by permanent total disability due to the same injury, and Section 8(f) is applicable to both periods of disability, employer may be liable for only one period of 104 weeks. *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985). However, where claimant sustains two separate unrelated injuries to which Section 8(f) applies, employer is liable for two periods of benefits. *Matson Terminals, Inc. v. Berg*, 279 F.3d 694, 35 BRBS 152(CRT) (9th Cir. 2002); *see also Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000) (employer must establish that Section 8(f) applies to each successive type of benefits sought). On remand, the administrative law judge

Claimant next contends, and Liberty agrees, that the administrative law judge did not sufficiently explain how he determined claimant's post-1999-injury wage-earning capacity for purposes of calculating his permanent partial disability awards. Moreover, claimant and Liberty contend that the administrative law judge erred by not entering concurrent permanent partial and permanent total disability awards. Specifically, Liberty maintains that the administrative law judge erred by not accounting for the loss in wage-earning capacity attributable to the 1999 injury prior to computing claimant's average weekly wage for the subsequent injuries.

An award for partial disability for a back injury is based on two-thirds of the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Id.* In making this determination, relevant considerations include the employee's physical condition, age, education, industrial history, claimant's earning power on the open market, and any other reasonable variable that could form a factual basis for the decision. *See Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The objective of the inquiry under Section 8(h) is to determine claimant's wage-earning capacity in his injured state. *Long*, 767 F.2d 1578, 17 BRBS 149(CRT); *see also Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2001).

In determining the compensation rate for claimant's award of benefits, the administrative law judge found that claimant's 2005 average weekly wage "best approximates" his wage-earning capacity following the period of aggravation beginning in November 2003. However, without further explanation, the administrative law judge ordered employer to pay permanent partial disability benefits for the period from October 8, 2002 through November 18, 2003, at the rate of $144.29. While the administrative law judge's decision includes the calculation of how he arrived at the dollar figure of that award, i.e., "employer is ordered to pay permanent partial disability at the rate of $144.29 (2/3 ($574.09 (1999 AWW) - $357.65 (2003 WEC)) from October 8, 2002 through November 18, 2003," Decision and Order at 22, there is no specific discussion as to how he arrived at the 2003 wage-earning capacity figure. Instead, the administrative law judge observed that claimant's wage-earning capacity steadily declined between 2003 and June 16, 2005, when he became completely incapacitated, such that he concluded

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must provide a rationale for his determination as to the date upon which the Special Fund shall assume liability in this case.

that the aggravation of claimant's condition began to affect his ability to work sometime around November 18, 2003.

Reducing claimant's earnings of $11,541.20, in the year immediately preceding June 16, 2005, to reflect what claimant would have earned at the time of his October 27, 1999 injury, the administrative law judge found that claimant's average weekly wage/wage-earning capacity as of the date of his 2005 work injury is $183.28. Subtracting claimant's 2005 wage-earning capacity ($183.28) from his average weekly wage at the time of his 2003 aggravation ($536.47), the administrative law judge concluded that claimant is entitled to an award of permanent partial disability benefits for the period from November 18, 2003, through May 16, 2005, at a weekly rate of $235.46. Lastly, the administrative law judge concluded that Liberty, as the responsible carrier at the time of the aggravation and at the time claimant stopped working on June 17, 2005, is liable to claimant for permanent total disability benefits at the rate of $357.65 based on his 2003 average weekly wage of $536.47 (claimant's earnings in the preceding year of $27,896.43 divided by 52 weeks).

As claimant and Liberty argue in their respective appeals, the administrative law judge's findings regarding average weekly wage and wage-earning capacity, with the exception of claimant's average weekly wage at the time of his October 27, 1999 work injury, are sufficiently vague as to require that we remand this case. Specifically, on remand the administrative law judge must first calculate claimant's wage-earning capacity upon his return to work after the October 27, 1999 work injury, presumably as of October 8, 2002. The administrative law judge must compare that figure to claimant's average weekly wage of $574.09 to arrive at claimant's loss in wage-earning capacity, and corresponding award of permanent partial disability benefits for which employer is liable, as a result of the October 27, 1999 work injury. Next, the administrative law judge must calculate claimant's average weekly wage at the time of the November 18, 2003 aggravating work injury, which usually is the residual wage-earning capacity after the first injury, *see Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995), as well as his wage-earning capacity subsequent to that date in order to discern claimant's entitlement to permanent partial disability benefits, attributable to that aggravation, for which Liberty is responsible.

Claimant may receive concurrent permanent partial disability awards, or concurrent permanent partial disability and permanent total disability awards, provided that the total award is not in excess of the statutory maximum compensation allowable for permanent total disability.[8] *See Brady-Hamilton Stevedore Co.*, 58 F.3d 419, 29 BRBS

[8]Under Section 8(a), the amount of concurrent awards combined is limited by the 66 2/3 percent rate for permanent total disability. *Brady-Hamilton Stevedore Co. v.*

101(CRT); *Hastings v. v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Where, as here, the preceding 1999 injury results in a loss of wage-earning capacity such that claimant's later average weekly wage, based on the residual wage-earning capacity, at the time of the subsequent aggravations is lower than at the time of previous injuries, claimant is entitled to concurrent awards in order to be fully compensated for the full loss in wage-earning capacity due to all his injuries. *See Brady-Hamilton*, 58 F.3d 419, 29 BRBS 101(CRT); *Hastings*, 628 F.2d 85, 14 BRBS 345; *Lopez*, 23 BRBS 295. Thus, on remand, the administrative law judge should, upon making the requisite average weekly wage and wage-earning capacity calculations, consider whether concurrent awards are necessary in order to fully compensate claimant's loss in wage-earning capacity and to reflect the continuing loss attributable to the October 27, 1999 work injury.

Director, OWCP, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997). Claimant's combined awards cannot exceed the amount prescribed for total disability under Section 8(a). Moreover, 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 America v. Price*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

Accordingly, the administrative law judge's calculation of claimant's average weekly wage at the time of his October 27, 1999 work injury and his finding that claimant sustained an aggravation of that injury as of November 18, 2003, for which Liberty is liable, are affirmed. The administrative law judge's awards of disability and medical benefits are affirmed. However, the administrative law judge's calculations of those awards are vacated, and the case is remanded for further consideration consistent with this decision.[9]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[9]Specifically, the ongoing award of permanent total disability benefits to claimant shall continue at the rate specified by the administrative law judge unless and until the administrative law judge modifies the award on remand.