

ANDREW W. OSBORN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DYNCORP INTERNATIONAL)	DATE ISSUED: 03/29/2012
)	
and)	
)	
CONTINENTAL INSURANCE)	
COMPANY/CNA INTERNATIONAL)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order, the Order Amending Decision and Order, and the Order Denying Second Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz , Portland, Oregon, for claimant.

Jennifer J. Nobley (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order, the Order Amending Decision and Order, and the Order Denying Second Motion for Reconsideration (2009-LDA-00363) of Administrative Law Judge Gerald M. Etchingham 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance

with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole issue raised on appeal is whether claimant’s compensation rate is limited to the maximum compensation rate in effect at the time his disability commenced or at the time the administrative law judge issued an order awarding benefits to claimant. 33 U.S.C. §906(b)(1), (c). Claimant sustained injuries when his vehicle was struck by an improvised explosive device during the course of his employment in Iraq on August 31, 2007. Claimant returned to full-duty work three days later. Claimant returned to the United States on or about September 20, 2007 for scheduled leave. He underwent a medical examination and an MRI revealed a herniated disc, for which claimant underwent surgery on November 5, 2007. The parties stipulated that claimant is entitled to temporary total disability benefits from October 2, 2007 to June 9, 2008, to permanent total disability benefits from June 10, 2008 to November 2, 2008, and to ongoing permanent partial disability benefits for a loss of wage-earning capacity at various rates commencing November 3, 2008. 33 U.S.C. §908(a), (b), (c)(21), (h). The administrative law judge found that claimant’s disability commenced on October 2, 2007, and that, pursuant to the *Reposky v. Int’l Transp. Services*, 40 BRBS 65 (2006), the maximum compensation rate to which claimant is entitled is that which was in effect as of October 2, 2007, the date claimant’s disability commenced, which was \$1,160.36 per week.¹

On appeal, claimant contends the administrative law judge erred in limiting his award to the maximum compensation rate in effect on October 2, 2007, when he first became disabled. Claimant avers that the administrative law judge should have used the rate in effect as of September 24, 2010, the date the administrative law judge issued his order approving the parties’ stipulations and awarding benefits. Employer responds, urging affirmance of the administrative law judge’s award.

In an Order dated September 30, 2011, the Board granted claimant’s unopposed motion to hold this appeal in abeyance pending a ruling by the Supreme Court in the case of *Roberts v. Sea-Land Services, Inc.*, No. 10-1399. The Supreme Court issued a decision in *Roberts* on March 20, 2012; thus, the abeyance is lifted.² The Court held that an employee is “newly awarded compensation” under Section 6(c) of the Act when he first becomes disabled, irrespective of whether, or when, a compensation order issues on his

¹The administrative law judge gave claimant the benefit of the new maximum rate on his permanent total disability award commencing October 1, 2008. 33 U.S.C. §906(c).

²Additional briefing by the parties is not required in this case.

claim. Thus, the Court held that the maximum compensation rate of Section 6(b)(1) of the Act is the one in effect on the date the employee's disability commences. *Roberts v. Sea-Land Services, Inc.*, No.10-1399, 566 U.S. ___, 2012 WL 912953 (March 20, 2012).³ Therefore, for the reasons set forth in *Roberts*, we affirm the administrative law judge's finding that the initial award of benefits is limited by the maximum rate in effect as of the date claimant first became disabled, October 2, 2007.⁴

Accordingly, we affirm the administrative law judge's Decision and Order, the Order Amending Decision and Order, and the Order Denying Second Motion for Reconsideration.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

³The Supreme Court affirmed the decision of the United States Court of Appeals for the Ninth Circuit in *Roberts v. Director, OWCP*, 625 F.3d 1204, 44 BRBS 73(CRT) (9th Cir. 2010), and rejected the approach of the United States Court of Appeals for the Eleventh Circuit in *Boroski v. Dyncorp Int'l*, 662 F.3d 1197 (11th Cir. 2011).

⁴See 33 U.S.C. §§906(c), 910(f), providing for subsequent increases for those receiving permanent total disability and death benefits.