TOPIC 6 COMMENCEMENT OF COMPENSATION

6.1 THREE-DAY WAITING PERIOD

Section 6(a) of the LHWCA 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 fourteen days, the compensation shall be allowed from the date of the disability.**

33 U.S.C. § 906(a).

For a discussion of Section 6(a), see generally Barlow v. Western Asbestos Co., 20 BRBS 179, 182-83 (1988). See also Adams v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 78, 82 (1989) (in permanent partial disability cases due to occupational diseases that become manifest after voluntary retirement, the date of disability is the date the impairment became permanent); Shimp v. Ingalls Shipbuilding, Inc., (BRB No. 96-1409)(June 23, 1997)(Unpublished) (a worker who failed to return for a follow up appointment two days after his injury was deemed to have returned to work, and thus failed to have three consecutive days missed).

6.2 MINIMUM AND MAXIMUM LIMITS

6.2.1 Maximum Compensation for Disability and Death Benefits

Section 6(b)(1) of the LHWCA provides:

> **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).

Section 6(b) provides minimum and maximum compensation limits. The 1972 Amendments raised the maximum under Section 6(b)(1) to 200 percent of the national average weekly wage. Prior to the 1972 Amendments, the maximum rate for disability benefits was $70 per week. The 1972 Amendments provided a series of maximums to be applied through a phase-in procedure in the years between 1972 and 1975.

By October 1, 1975, the phase-up maximum rate reached 200 per cent of the national average weekly wage. See Director, OWCP v. Bath Iron Works Corp., 885 F.2d 983, 985 (**1st Cir.** 1989), cert. denied, 494 **U.S.** 1091 (1990). The employer is liable for the phase-in adjustments. Balderson v. Maurice P. Foley Co., 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).

These adjustments only apply to permanent total disability benefits. Puccetti v. Ceres Gulf, 24 BRBS 25 (1990). See also Marko v. Morris Boney Co., 23 BRBS 353, 361-62 (1990) (claimant is entitled to cost of living allowance under § 10(f) when yearly adjustments reach 66 2/3 of claimant's former average weekly wage).

In Director, OWCP v. Rasmussen, 440 **U.S.** 29, 9 BRBS 954 (1979), the **United States Supreme Court** held that death benefits are not subject to the maximum limitations placed on disability payments by Section 6(b)(1). The 1984 Amendments, however, expressly apply the maximum limit to both disability and death benefits. (See Topic 9, infra).

In Nooner v. National Steel & Shipbuilding Co., 19 BRBS 43, 45-46 (1986), the Board held that the claimant, who was injured before 1972, was entitled to 66 2/3 per cent of his average weekly wage, rather than $70 per week, since the claimant's appeal to the Board was pending on the effective date of amended Section 6(b)(1). Amended Section 6(b)(1) applies to death benefits only when an employee dies after the date of enactment of the 1984 Amendments. Id.

The 1984 Amendments continued the 200 percent maximum. See Buck v. General Dynamics Corp. Elec. Boat Div., 22 BRBS 111, 114 (1989)(where the employee survives for a number of years after the injury, the date of death is Not treated as a distinct and separate injury; the computation of death benefits is not to be based on the AWW of the injured at the time of death.)

[ED. NOTE:** A policy argument, such as that made by the claimant in White, above, cannot take precedence over the express language of the statute.**]

6.2.2 Minimum Compensation for Total Disability

Section 6(b)(2) of the LHWCA reads:

> **Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.**

33 U.S.C. § 906(b)(2).

Under Section 6(b)(2), the minimum level of benefits is the claimant's average weekly wage or 50 percent of the national average weekly wage, whichever is less. The basic formula for calculating benefits, namely 66 2/3 per cent of the worker's actual average weekly wage, remains unchanged. Bath Iron Works Corp., 885 F.2d at 991. This minimum applies only to total disability compensation. 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, 18 BRBS 73 (CRT) (**D.C. Cir.** 1986).

In Steevens v. Umpqua River Navigation, ___ BRBS ___, (BRB Nos. 00-1027 and 00-1027A)(July 17, 2001), the Board held that a scheduled award of permanent partial disability is not, for purposes of Section 6(b)(2) equivalent to an award of total disability for a limited time.

6.2.3 Determining the National Average Weekly Wage

Section 6(b)(3) of the LHWCA provides:

> **As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such**

> **determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.**

33 U.S.C. § 906(b)(3).

Thus, each year the Secretary shall determine the national average weekly wage for purposes of determining the maximum and minimum limitations on benefits.

Section 6(c) of the LHWCA provides:

> **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).

Section 6(d) was amended in 1984 and renumbered Section 6(c). 33 U.S.C.A. § 906(c) (West 1986). Section 6(c) provides that determinations under subsection 6(b)(3) with respect to a period shall apply to those currently receiving permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period. Prior to the 1984 Amendments, the section referred to "determinations under this subsection." 33 U.S.C. § 906(d) (1982) (amended 1984).

In Rasmussen, 9 BRBS at 962-65, the **Supreme Court** interpreted the 1972 version of Section 6(b)(1) 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" refers only to the Secretary's determination of national average weekly wage under Section 6(b)(3) for purposes of calculating **minimum** death benefits. Section 6(d) did not, as the employer argued, make the disability benefits maximums of Section 6(b)(1) applicable to death benefits.

In Dews v. Intercounty Associates, 14 BRBS 1031 (1982), the Board held that Section 6(c) does not limit the maximum benefit phase-ups of Section 6(b)(1), as enacted in 1972, to permanent total disability, and further concluded that the 1972 Amendment phase-up provisions apply to all claimants whose compensation is determined after the effective date of the 1972 Amendments.

In West v. Washington Metropolitan Area Transit Authority, 21 BRBS 125, 128 (1988), the Board reaffirmed the rule enunciated in Dews that not only those newly awarded compensation but

all claimants granted benefits after the enactment of Section 6(b)(1), including those granted temporary total disability, are entitled to adjustments. In Dews and West, the term "period" in Section 6(c) was construed to be that period after the effective date of the 1972 Amendments.

In Puccetti v. Ceres Gulf, 24 BRBS at 29-32, however, the Board reconsidered its rationale regarding the meaning of "period" in Section 6(c). Since "period" relates to yearly calculations of the national average weekly wage under Section 6(b)(3), the Board concluded that "period" referred to the yearly period from October 1 to September 30 and not, as suggested in Dews and West, the period following the enactment of Section 6(d) in 1972.

Thus, only those "currently receiving" permanent total disability or death benefits and those newly awarded compensation (to include temporarily totally disabled claimants) during that period would be entitled to receive the maximum rate **for that year**. Thereafter, however, temporarily totally disabled claimants would not be entitled to adjusted maximums because they would not be "currently receiving" permanent total disability or death benefits.