BRB Nos. 06-0148
and 06-0148A

DEBRA REPOSKY	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL TRANSPORTATION SERVICES	)	
	)	
and	)	
	)	
RELIANCE NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATE ISSUED: 10/20/2006
	)	
Self-Insured Employer-Respondent	)	
	)	
MARINE TERMINALS CORPORATION	)	
	)	
and	)	
	)	
MAJESTIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	

Respondent) DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Amended Decision and Order Awarding Benefits and Partially Granting Claimant's Motion for Reconsideration of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan (Longshore Claimants' National Law Center), Washington, D.C., and Diane L. Middleton, San Pedro, California, for claimant.

Christopher M. Galichon (Christopher Galichon APLC), San Diego, California, for International Transportation Services and Reliance National Insurance Company.

Robert E. Babcock (Wallace, Klor & Mann, P.C.), Lake Oswego, Oregon, for Metropolitan Stevedore Company.

Maryann C. Shirvell (Laughlin, Falbo, Levy & Moresi, LLP), San Diego, California, for Marine Terminals Corporation and Majestic Insurance Company.

Matthew W. Boyle (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

International Transportation Services (ITS) appeals and claimant cross-appeals the Decision and Order Awarding Benefits and the Amended Decision and Order Awarding Benefits and Partially Granting Claimant's Motion for Reconsideration (2004-LHC-01125, 01126, 01127) 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 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).

Claimant injured her right leg and back on January 12, 1995, during the course of her employment for Metropolitan Stevedoring Company (Metropolitan). An MRI showed a four millimeter (mm) disc protrusion. Claimant returned to work without restrictions at her request on September 1, 1995. Claimant stopped working due to back pain brought on from driving a UTR on September 10, 1995. She was employed that day by Marine Terminals Corporation (MTC). Claimant returned to work on October 4, 1995, at various clerk and signal jobs. She stopped working on October 23, 1995, due to leg and back pain. Claimant was employed that day by ITS as a key clerk/floor runner. Her duties included driving a small pick-up truck. An MRI on December 5, 1995, showed an eight mm disc extrusion and a swollen S1 nerve root. Claimant returned to work on January 7, 1996. She worked until January 15, 1996, when she stopped working due to back pain. Claimant was employed that day by ITC as a signal person.

Claimant underwent an unsuccessful discectomy on February 27, 1996. She began experiencing left leg pain in addition to her back and right leg pain. On March 26, 1997, claimant returned to work at her request. She stopped working on June 21, 1997, due to her back condition. Claimant was employed that day by MTC. On July 6, 1998, claimant underwent a two-level spinal fusion at L4-L5 and L5-S1. The fusion was unsuccessful at L4-L5. She subsequently underwent two surgeries at L4-L5 on July 6, 1998, and April 20, 1999. Claimant returned to work at her request in April 2003 as a flex clerk. She received an accommodation from her union in May 2004, pursuant to the Americans with Disabilities Act. Claimant currently works an average of two to three days per week as a kitchen tower clerk. She requires daily pain medication under the supervision of a pain management specialist. Metropolitan voluntarily provided medical benefits and compensation for temporary total disability during all periods claimant was unable to work from January 13, 1995, to April 18, 2003.

The administrative law judge found that claimant sustained work-related injuries on January 12, 1995, with Metropolitan, on September 10, 1995, with MTC, on October 23, 1995, with ITS, and on January 15, 1996, with ITS. She found that claimant did not aggravate her back condition when she worked from March 26 to June 21, 1997. Accordingly, the administrative law judge determined that Metropolitan is the responsible employer from January 12 to September 9, 1995, MTC is the responsible employer from September 10 to October 22, 1995, and ITS is the responsible employer for claimant's continuing compensation and medical benefits from October 23, 1995. Metropolitan was found entitled to reimbursement from MTC and ITS for compensation and medical benefits it provided claimant after September 9, 1995. The administrative law judge found that claimant's timely notice of injury and claim designating Metropolitan as the responsible employer, pursuant to Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, rendered timely the subsequent inclusion of MTC and ITS as potentially responsible employers, and that the doctrine of laches is inapplicable to bar Metropolitan from joining ITS and MTC to the proceedings. The administrative law

judge rejected the assertion by ITS that claimant's prior statement to ITS that she did not sustain an injury while employed there was tantamount to a refusal to allow medical treatment, pursuant to Section 7(d) of the Act, 33 U.S.C. §907(d). The administrative law judge credited the medical opinions of Drs. Ravessoud and Lanman to find that claimant's back condition reached maximum medical improvement on August 13, 2003. The administrative law judge found that the applicable average weekly wage should be based on claimant's wages before her January 12, 1995, work injury; the parties agreed that claimant's average weekly wage at this date was $1,259.64. In addition, ITS stipulated that this is the applicable average weekly wage if it is designated the responsible employer. The administrative law judge found that claimant is currently making "extraordinary efforts" to work as a kitchen tower clerk two days a week with considerable pain, which is managed by pain medication daily, and that claimant, therefore, is totally disabled. Accordingly, the administrative law judge awarded claimant compensation for temporary total disability at the maximum compensation rate in effect in January 1996 of $760.92 from April 19 to August 12, 2003, and ongoing compensation for permanent total disability from August 13, 2003. ITS was found entitled to Section 8(f) relief, 33 U.S.C. §908(f).

On reconsideration, the administrative law judge modified her decision to award claimant permanent total disability from the date of maximum medical improvement in August 2003 at her full compensation rate under Section 8(a), 33 U.S.C. §908(a), of $839.76, as she was "newly awarded" permanent total disability compensation at that time. *See* 33 U.S.C. §906(c). Claimant also contended that she is entitled to her full compensation rate of $839.76 for temporary total disability from the date of injury, January 12, 1995. The administrative law judge rejected claimant's argument based on the Board's decision in *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990). The administrative law judge thus modified her decision to award claimant compensation for temporary total disability at the rate of $760.92, payable by Metropolitan from January 12 to September 9, 1995, and by MTC from September 10 to October 22, 1995. Claimant was awarded compensation for temporary total disability at the maximum rate in effect for fiscal year 1996 of $782.44, payable by ITS from October 23, 1995, to August 12, 2003, and permanent total disability commencing August 13, 2003, at claimant's full compensation rate pursuant to Section 8(a) of $839.76.

On appeal, ITS challenges the administrative law judge's findings that the "claim" against ITS is not time-barred pursuant to Sections 12 and 13 of the Act, and that Metropolitan is not barred by the doctrine of laches from joining additional employers. ITS also challenges the administrative law judge's responsible employer finding. If ITS is the responsible employer, then, pursuant to *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002), ITS argues that Metropolitan is liable for a portion of claimant's disability benefits. ITS challenges the administrative law judge's finding that claimant's back condition reached maximum

medical improvement in August 2003, and her finding that claimant is entitled to compensation for permanent total disability notwithstanding her successful return to work part-time in April 2003. Finally, ITS argues that the administrative law judge erred by finding the maximum compensation rate in effect for fiscal year 2003 applicable to claimant's award of permanent total disability benefits commencing on the date of maximum medical improvement.

The Director, Office of Workers' Compensation Programs (the Director), responds to ITS's last contention. The Director agrees that the administrative law judge erred, contending that claimant is entitled to compensation for permanent total disability from August 13 to September 30, 2003, at her temporary total disability rate of $782.44. On October 1, 2003, when the maximum compensation rate under Section 6 increased to $1,047.16, the Director contends that claimant is entitled to compensation for permanent total disability under Section 6(c) and Section 8(a) at a rate of $839.76. Metropolitan responds, urging affirmance of the administrative law judge's Section 12 and 13 findings, her finding that the doctrine of laches is inapplicable, and the finding that ITS is the responsible employer. Metropolitan also urges affirmance of the administrative law judge's maximum medical improvement finding, but agrees with ITS that the administrative law judge erred by awarding claimant compensation for permanent total disability, and in finding the maximum compensation rate in effect in fiscal year 2003 applicable to claimant's compensation rate from the date of maximum medical improvement. MTC responds, urging affirmance of the administrative law judge's responsible employer finding. MTC agrees with ITS that the claim against ITC (and MTC) is barred by Sections 12 and 13, and that Metropolitan's joining of ITC and MTC is barred pursuant to the doctrine of laches. MTC further responds that the administrative law judge erred by awarding compensation for permanent total disability and in her calculation of the applicable compensation rate as of the date of maximum medical improvement. Claimant responds, urging affirmance of the administrative law judge's findings in this regard and the rejection of ITS's assertion regarding the applicability of *Benjamin*, 297 F.3d 797, 36 BRBS 28(CRT).

In her cross-appeal, claimant argues that, pursuant to Section 6(c), the administrative law judge's decision should be modified to award her compensation for temporary total disability payable at her maximum compensation rate under Section 8(b), 33 U.S.C. §908(b), of $839.76 from the date of her initial work injury on January 12, 1995, inasmuch as claimant was "newly awarded compensation" on July 27, 2005, when the maximum compensation rate pursuant to Section 6(b), 33 U.S.C. §906(b), was $1,047.16. Alternatively, claimant argues that her compensation for temporary total disability should increase each fiscal year from January 12, 1995, to October 1, 1998, when the maximum rate in effect under Section 6(b) of $871.76 first exceeded her compensation rate under Section 8(b) of $839.76.

The Director, ITS, Metropolitan, and MTC respond, urging affirmance of the administrative law judge's finding that claimant's temporary total disability award is subject to the maximum compensation rate under Section 6 of $760.92 from January 12, to October 22, 1995, and of $782.44 from October 23, 1995, to August 12, 2003. Claimant filed a reply to the Director's brief.

TIMELINESS

The parties stipulated that claimant provided timely notice of injury and timely filed her claim against Metropolitan. 33 U.S.C. §§912, 913; Decision and Order at 2. ITS argues there is no evidence that claimant gave it timely notice of her injury, and that she did not file a claim naming ITS as the responsible employer. In this regard, ITS argues it was prejudiced, in part, because its adjuster specifically contacted claimant after the last day she worked for ITS in January 1996 and was informed by claimant that she would not file a claim against it. *See* Tr. at 293.

Section 12(a) of the Act requires that claimant must, in a traumatic injury case, give employer written notice of her injury within 30 days of the injury or of the date claimant is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the injury and employment. 33 U.S.C. §912(a); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), *cert. denied*, 459 U.S. 1034 (1982); *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990). Section 13(a) applies in traumatic injury cases and provides that the right to compensation shall be barred unless the claim is filed within one year of the time claimant is aware, or in the exercise of reasonable diligence should have been aware, of the relationship between the injury and the employment. 33 U.S.C. §913(a); *Abel v. Director, OWCP*, 932 F.2d 819, 24 BRBS 130(CRT) (9th Cir. 1991); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991). The parties stipulated that claimant's notice of injury and claim were timely filed as to Metropolitan. Decision and Order at 2.

In her decision, the administrative law judge found that, pursuant to *Smith v. Aerojet-General Shipyards, Inc.*, 647 F.2d 518, 13 BRBS 391 (5th Cir. 1981), and *Osmundsen v. Todd Pacific Shipyard*, 18 BRBS 112 (1986), the time limitations of Sections 12 and 13 do not begin to run against subsequent employers until Metropolitan, against which claimant timely filed, was found to be not liable for claimant's benefits. We agree. In *Smith*, the Fifth Circuit held that, in an occupational disease claim, the statute of limitations does not begin to run against earlier potentially liable employers where claimant timely filed against his last longshore employer. The court held that Section 13 should not be interpreted to impose onerous filing requirements on claimants, or to create a deluge of claims. *Smith*, 647 F.2d at 523-524, 13 BRBS at 395. In *Osmundsen*, another occupational disease claim, the Board applied the rationale in *Smith* and held that the statute of limitations does not begin to run against a subsequent

employer when claimant filed a timely claim against a prior employer.[1] *Osmundsen*, 18 BRBS at 115. Although *Smith* and *Osmundsen* involved occupational diseases, the administrative law judge rationally found the reasoning of these cases applicable as claimant sustained subsequent aggravating traumatic injuries to the same body part. In cases involving sequential traumatic injuries, as well as in occupational disease cases, the employer against whom a claimant files her claim must be able to join other potentially responsible employers in order to defend itself against the claim. *See generally New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003). Thus, we hold that the administrative law judge properly found that claimant need not give notice of her injury or file her claim against subsequent employers until the responsible employer is identified. Although ITS asserts that claimant never filed a claim naming ITS as the potentially responsible employer, the documents surrounding ITS's joinder to the claim are sufficient to fulfill the notice and claim requirements. *See generally Bath Iron Works Corp. v. Director, OWCP [Jones]*, 193 F.3d 27, 34 BRBS 1(CRT) (1st Cir. 1999); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994); *see also Osmundsen*, 18 BRBS at 115 n. 7; ITS EX 25; *see also* MTC EX 1. Accordingly, we reject ITS's contention that Sections 12 and 13 bar claimant's claim against it.

ITS also argues that the doctrine of laches bars Metropolitan from shifting liability for claimant's work-related disability inasmuch as Metropolitan waited four years from the date of claimant's initial injury to join ITS to the claim. Laches precludes the prosecution of stale claims if the party bringing the action lacks diligence in pursuing the claim and the party asserting the defense has been prejudiced by the same lack of diligence. *Costello v. United States*, 365 U.S. 265 (1961); *Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20, 24 BRBS 98(CRT) (4th Cir. 1991). The Board has held that this doctrine cannot be applied against a claimant because the Act contains specific statutes of limitations for filing notices of injury and claims. 33 U.S.C. §§912, 913; *see, e.g., Simpson v. Bath Iron Works Corp.*, 22 BRBS 25 (1989). The administrative law judge found the doctrine inapplicable to the issue of joinder of employers as well because laches is an equitable doctrine and, as such, is not applicable to the Act.

[1] In *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004), the Board held that a claimant need not file an additional claim or provide notice to a subsequent carrier joined to the claim by employer because the employer, who had successive carriers, had been properly notified. *Id.*, 38 BRBS at 31-32.

We affirm the administrative law judge's finding that the doctrine of laches is inapplicable to bar Metropolitan's joinder of ITS and MTC.[2] The only "claim" under the Act is claimant's; her claim was not stale, and in fact, was stipulated to be timely filed against Metropolitan. *See generally Logara v. Jackson Engineering Co.*, 35 BRBS 83 (2001) (request for commutation is not a "claim"). In contrast, the responsible employer doctrine is merely one of liability allocation, *see Schuchardt v. Dillingham Ship Repair*, 40 BRBS 1, *modifying in part on recon.* 39 BRBS 64 (2005), and, generally an employer may defend the claim by asserting the liability of another employer and by joining that employer to the proceedings. ITS has not demonstrated error in the administrative law judge's finding that laches is inapplicable, and therefore we reject its contention.

RESPONSIBLE EMPLOYER

ITS contends the evidence establishes that claimant's back disability was caused solely by the initial work injury with Metropolitan on January 12, 1995. Alternatively, ITS asserts that if there is substantial evidence that claimant sustained aggravating injuries to her back during the course of her employment with ITS, then claimant must have also sustained an aggravating back injury during her return to work from March 26 to June 21, 1997, when she was last employed by MTC. The Ninth Circuit, within whose jurisdiction the instant case arises, has stated that the rule for determining which employer is liable for the totality of claimant's disability in a case involving cumulative traumatic injuries is applied as follows: if the disability results from the natural progression of an initial injury and would have occurred notwithstanding a subsequent injury, then the initial injury is the compensable injury, and, accordingly, the employer at the time of that injury is responsible for the payment of benefits. If, on the other hand, the subsequent injury aggravates, accelerates, or combines with 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); *see also 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). The Ninth Circuit has emphasized that a

[2] Contrary to Metropolitan's assertion in response, *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004), does not provide direct support for this result. The inapplicability of laches in that case was based on the fact that the case arose under the Outer Continental Shelf Lands Act. Under this statute, any third-party action is governed by state law, and thus the doctrine of laches is not applicable if state law provides otherwise. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999).

subsequent employer may be found responsible for an employee's benefits even when the aggravating injury that 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 Lopez v. Stedoring Services of America*, 39 BRBS 85 (2005); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem. sub nom. Willamette Iron & Steel Co. v. Director, OWCP*, 698 F.2d 1235 (9th Cir. 1982). Accordingly, in the case at bar, ITS must establish that claimant's disability is due solely to the natural progression of her prior work injuries with Metropolitan (and/or MTC) in order to prove that it is not the responsible employer. *See Buchanan*, 33 BRBS at 36; *see generally General Ship Serv. v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

In her decision, the administrative law judge credited the opinion of Dr. Thomas, as supported by the opinion of Dr. Ravessoud, to find that claimant sustained work-related aggravations of her back condition after she returned to work in September 1995. Decision and Order at 17-18. Dr. Thomas opined, based on the objective MRI studies showing the progression of a disc protrusion from 4 mm to 8 mm, that claimant's driving activities at work aggravated her back condition. MSX 8 at 29-40, 50-56, 66, 70-71; *see also* MSXs 1, 2. Dr. Ravessoud concurred that the progression of claimant's back condition was due to a variety of activities such as sitting, bending, and lifting, and that claimant's work activities after January 12, 1995, "probably did contribute in some way to the progression of her condition." Tr. at 239, 264-266, 275-276; *see also* Tr. at 79-81, 156.

The administrative law judge found insufficient evidence that claimant sustained a work-related aggravation of her back condition after undergoing back surgery on February 27, 1996. The administrative law judge found that the testimony of Drs. Thomas and Ravessoud was limited to claimant's pre-surgical condition. *See* Tr. at 281; MSX 8 at 67-70. The administrative law judge found there is no evidence that the activities that aggravated claimant's back condition before her surgery would also aggravate her back after the surgery. The administrative law judge credited the testimony of Dr. Vance that claimant's post-surgical employment did not aggravate her condition inasmuch as her MRI test results were unchanged, her symptoms remained consistent, and there was no specific report of injury or aggravation during this time. *See* Tr. at 400-403. The administrative law judge found this opinion supported by the opinions of Drs. Ravessoud, Miller, Haldeman, and Cerverha that claimant's work activities in 1997 did not aggravate her back condition. Decision and Order at 19; Tr. at 281; MTC EX 7 at 36; ITS EX 2 at 32.

The Board is not empowered to reweigh the evidence, but must accept the rational inferences and findings of fact of the administrative law judge which are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS

1(CRT) (9th Cir. 1999); *Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In this case, the administrative law judge rationally credited the opinions of Drs. Thomas and Ravessoud to find that claimant's work injuries with ITS aggravated her back condition, and the opinion of Dr. Vance, as supported by other medical opinions of record, to find that claimant's subsequent work activities in 1997 did not aggravate her back condition. Thus, substantial evidence supports the administrative law judge's determination that claimant sustained employment-related aggravations after she returned to work on October 4, 1995, up to her last work for ITS on January 15, 1996, that increased the extent of claimant's disability and contributed to her need for surgery. *See Metropolitan Stevedore Co.*, 339 F.3d 1102, 37 BRBS 89(CRT); *Buchanan*, 33 BRBS 32. Accordingly, we affirm the administrative law judge's finding that ITS is the responsible employer, as this finding is rational and supported by substantial evidence. *Id.*

CONCURRENT AWARDS

ITS contends that claimant sustained a permanent reduction in her wage-earning capacity after her first work injury with Metropolitan on January 12, 1995. ITS therefore argues that Metropolitan should be held responsible for the extent of disability attributable to the initial injury, pursuant to *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002). In its post-hearing brief to the administrative law judge, ITS, while conceding that claimant's average weekly wage should be calculated based on her earnings with Metropolitan, argued that claimant had no residual wage-earning capacity after she returned to work in September 1995 because she was able to work only through the beneficence of a sympathetic employer and by extraordinary effort. ITS asserted that it therefore had no liability for any permanent disability. ITS Br. at 18-19. Thus, while ITS raised Metropolitan's liability for claimant's loss of wage-earning capacity due to the first injury, ITS did not raise the possibility of concurrent awards.[3] *See generally Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995). Inasmuch as the issue of concurrent awards was not raised before the administrative law judge, and, moreover, ITS stipulated that, "[I]f ITS is found liable, claimant's average weekly wage would be $1,259.64," Decision and Order at 3, which is claimant's average weekly wage at the time of the injury with Metropolitan, ITS may not raise the applicability of concurrent awards for the first time on appeal. *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Maples v. Texports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Texports*

[3] Nor did claimant raise the applicability of concurrent awards. *See* Claimant's Post-Hearing Brief at 4-6.

Stevedores Co. v. Director, OWCP, 931 F.2d 331, 28 BRBS 1(CRT) (5th Cir. 1991); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

MAXIMUM MEDICAL IMPROVEMENT

ITS challenges the administrative law judge's finding that claimant's back condition reached maximum medical improvement on August 13, 2003. ITS contends that claimant's back condition reached maximum medical improvement on April 27, 1997, based on the opinion of Dr. Greaney that any subsequent treatment and surgery would be only palliative, rather than curative. A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement, *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997), or where it has continued for a lengthy period and appears to be of lasting or infinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Moreover, if a physician believes that further treatment should be undertaken, then a possibility of success exists, and even if, in retrospect, it was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *See Louisiana Ins. Guaranty Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994), *aff'g* 27 BRBS 192 (1993); *Diosdado*, 31 BRBS 70; *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200 (1986).

In her decision, the administrative law judge rejected the opinions of claimant's treating physicians, Drs. Ceverha and Roe, that claimant's back reached maximum medical improvement in early 1997. Decision and Order at 22; *see* MTC EX 16 at 222; ITS EX 4 at 62. She found that these conclusions were premature inasmuch as a subsequent MRI ordered by Dr. Ceverha documented the findings leading to claimant's second surgery and, thereafter, claimant underwent three additional surgeries. CX 1; ITS EX 16. The administrative law judge credited the opinion of Dr. Lanman, who was claimant's treating physician from October 1997, and the concurring opinion of Dr. Ravessoud, that claimant's back condition reached maximum medical improvement on August 13, 2003. CXs 3 at 17-18, 5 at 32. The administrative law judge found that this date is well after claimant's fourth and final surgery, and there is no evidence that claimant's condition will further improve.

We hold that the administrative law judge acted within her discretion as fact-finder to accord the greatest weight to the opinion of claimant's treating physician after October 1997, Dr. Lanham. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999). Moreover, the testimony of Dr. Lanham, the concurring opinion of Dr. Ravessoud, and the fact that claimant had four operations after 1997, constitutes substantial evidence from which the administrative law judge rationally concluded that

claimant's work injury reached maximum medical improvement on August 13, 2003. *See SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 30 BRBS 57(CRT) (5th Cir. 1996); *Care v. Washington Metropolitan. Area Transit Auth.*, 21 BRBS 248 (1988). Therefore, we affirm this finding. *See generally Carlisle v. Bunge Corp.*, 33 BRBS 133 (1999), *aff'd*, 227 F.3d 934, 34 BRBS 79(CRT) (7th Cir. 2000).

SUITABLE ALTERNATE EMPLOYMENT

ITS challenges the administrative law judge's award of compensation for total disability after claimant returned to part-time work on April 14, 2003. ITS contends that the administrative law judge's finding is not supported by substantial evidence inasmuch as claimant is working within Dr. Lanman's restrictions, and claimant's testimony and the medical evidence do not establish that claimant is unable to work at her post-injury job as a kitchen tower clerk.

Once, as here, a claimant establishes that she cannot return to her usual work, the burden shifts to her employer, ITS, to demonstrate the availability of suitable alternate employment. In order to meet this burden, ITS must show the availability of job opportunities within the geographic area where claimant resides, which claimant, by virtue of her age, education, work experience, and physical restrictions, is capable of performing. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *see also Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988). ITS may fulfill its burden by showing that claimant is actually working within her work restrictions. *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). Claimant may nonetheless be found entitled to total disability benefits if she works only with extraordinary effort and in spite of excruciating pain, or is provided a position only through employer's beneficence, although an award of total disability while working is to be the exception, rather than the rule. *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 7 BRBS 838 (4th Cir. 1978), *aff'g* 5 BRBS 62 (1976); *Dodd v. Crown Central Petroleum Corp.*, 36 BRBS 85 (2002).

In her decision, the administrative law judge found that claimant is working through "extraordinary effort." Decision and Order at 25. She credited the opinion of Dr. Ravessoud that claimant is not capable of performing as much activity as allowed by Dr. Lanman, that he would impose greater work restrictions, and that he would support claimant if she believed she was unable to work. Tr. at 250-251; CX 5 at 32; MSX 9 at 105-106. The administrative law judge also credited the testimony of Dr. Rodriquez, claimant's treating pain management physician, who stated he does not understand how claimant is able to work given her injury, surgeries, and back condition. CX 9 at 63-64. The administrative law judge also credited, presumably as further evidence of her

extraordinary effort, claimant's undergoing four back surgeries, the last taking seven and a half hours during which Dr. Lanman installed screws. The administrative law judge credited claimant's taking 10 milligrams of Methadone daily, and her unsuccessful attempt to cut down on her medication after she returned to work.[4] CX 9 at 51-52. Finally, the administrative law judge relied on claimant's consistently pushing her physicians to release her to work, from which the administrative law judge concluded that claimant strongly desires to continue working in spite of considerable pain and diminished capacity. Tr. at 66-67, 72-73, 90-93, 127-130.

ITS's contention that claimant's working within Dr. Lanman's restrictions should be given greater weight than the opinions of Dr. Rodriquez, claimant's treating pain management physician, and Dr. Ravessoud, whose testimony specifically addressed Dr. Lanman's work restrictions, is without merit as such an assertion is tantamount to a request that the Board reweigh the evidence of record, a role outside of the Board's scope of review. *See generally Duhagon*, 169 F.3d 615, 33 BRBS 1(CRT); *Goldsmith*, 838 F.2d 1079, 21 BRBS 30(CRT). Consequently, in light of the credited opinions of Drs. Rodriquez and Ravessoud, we affirm the administrative law judge's conclusion that claimant is only able to work part-time as a kitchen tower clerk through extraordinary effort as it is supported by substantial evidence and rational. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT) (1st Cir. 1991); *Patterson*, 846 F.2d 715, 21 BRBS 51(CRT). Accordingly, we affirm the administrative law judge's award of compensation for total disability after claimant returned to part-time work on April 14, 2003.

SECTION 6

ITS appeals the administrative law judge's finding that claimant is entitled to compensation for permanent total disability at her full weekly rate, pursuant to Section 8(a), of $839.76 commencing August 13, 2003, and claimant appeals the awarded compensation rates for temporary total disability of $760.92 from January 12 to September 9, 1995, and of $782.44 from October 23, 1995, to August 12, 2003. Claimant argues that she is entitled to compensation for temporary total disability at her full rate of $839.76 pursuant to Section 8(b) commencing on January 12, 1995. Alternatively, claimant argues that her compensation rate for temporary total disability should increase yearly, pursuant to the annual increase in the maximum compensation rate pursuant Section 6(b).

[4] In fact, claimant takes 10 milligrams of Methadone six to seven times a day, as well as Oxycodone for "breakthrough pain." Decision and Order at 7; Tr. at 140; CX 9 at 51-52, 60.

The parties stipulated that claimant had an average weekly wage of $1,259.64 at the time of her January 12, 1995, work injury. The parties also stipulated that claimant's compensation rate at the date of her injury is $760.92, which is the maximum rate in effect under Section 6(b)(1), 33 U.S.C. §906(b)(1), at the time her January 12, 1995, work injury, and that this rate applies to all periods of temporary total disability.[5] Decision and Order at 3. In her initial decision, the administrative law judge awarded claimant compensation for temporary total disability at the stipulated rate of $760.92 from January 12, 1995, to August 12, 2003. She awarded claimant compensation for permanent total disability from the date of maximum medical improvement on August 13, 2003, at the same compensation rate with subsequent yearly adjustments, pursuant to Section 6(b). *Id*. at 28. In her Amended Decision and Order, the administrative law judge modified her decision to award claimant compensation for temporary total disability payable at the maximum rate of $782.44, in effect for fiscal year 1996, from October 23, 1995, to August 12, 2003.[6] Amended Decision and Order at 7. The administrative law judge found the maximum rate in effect for 2003 of $996.54

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[5] Section 6(b) provides in pertinent part:

> (b)(1) 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 NAWW, as determined by the Secretary under paragraph (3).
>
> * * *
>
> (3) As soon as practicable after June 30 of each year, and in event prior to October 1 of such year, the secretary shall determine the NAWW of the three consecutive calendar quarters ending June 30. Such determination shall be the applicable NAWW for the period beginning with October 1 of that year and ending September 30 of the next year….

[6] The administrative law judge implicitly found that claimant is entitled to the maximum rate in effect in fiscal year 1995 of $760.92 for her work injuries that occurred on January 12, 1995, when she was injured in the course of her employment with Metropolitan, and on September 10, 1995, during the course of her employment with MTC. The administrative law judge modified her decision to find that claimant is entitled to the maximum rate in effect in fiscal year 1996 of $782.44 for her work injuries that arose on October 23, 1995, and January 15, 1996, during the course of her employment with ITS. ITS and the Director agree that these compensation rates are correct.

applicable to claimant's compensation for permanent total disability commencing on August 13, 2003. Inasmuch as claimant's compensation rate of two-thirds of her average weekly wage, $839.76, is less than this maximum rate, the administrative law judge further modified her decision to award claimant compensation for permanent total disability at a rate of $839.76 from August 13, 2003.

Pursuant to Section 8(a) and (b) of the Act, compensation for total disability is paid at the rate of two-thirds of the claimant's average weekly wage. 33 U.S.C. §908(a), (b). The award, however, is subject to the maximum or minimum rate allowable under the Act. 33 U.S.C. §906; *see* n. 5, *supra.* We first address claimant's contention that she is entitled to a compensation rate of $839.76 for temporary total disability from the date of her first work-related injury on January 12, 1995. Metropolitan voluntarily paid claimant compensation for all periods she was unable to work from January 13, 1995, to April 18, 2003. Decision and Order at 3. Claimant first obtained a compensation award when the administrative law judge issued her decision in July 2005. Claimant argues that, pursuant to Section 6(c), compensation for disability other than permanent total disability is limited by the maximum rate in effect at the time such compensation is "newly awarded," which she asserts is at the time the initial decision is issued.[7] Thus, claimant asserts the maximum rate in effect in July 2005, when the administrative law judge issued her decision, applies to claimant's award for temporary total disability from January 12, 1995, to August 12, 2003. Inasmuch as the maximum rate of $1,047.16 is greater that claimant's compensation rate under Section 8(b) of $839.76, claimant asserts that she is entitled to compensation of $839.76 per week from the date of injury.

In her decision on reconsideration, the administrative law judge rejected claimant's contention. The administrative law judge initially found that claimant may raise this argument on reconsideration notwithstanding her stipulating to a compensation rate of $760.92 for all periods of temporary total disability. The administrative law judge found that a stipulation regarding legal issues may be challenged if the stipulation is not supported by the law. *See Puccetti*, 24 BRBS 25. The administrative law judge found, however, that the Board rejected an argument similar to claimant's in *Puccetti*, and that this decision is controlling. Amended Decision and Order at 6-7.

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[7] Section 6(c) 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).

In *Puccetti*, the claimant had an average weekly wage of $1,076. The maximum rate in effect under Section 6(b)(1) at the time of the injury on February 8, 1984, was $548.34. Claimant was found to be temporarily totally disabled from February 1984 to January 1986. The Board rejected the Director's contention that claimant's compensation rate for temporary total disability should increase on October 1, 1984, to the maximum rate of $579.66 in effect from October 1, 1984 through September 30, 1985, and subsequently to the maximum rate of $595.24 in effect from October 1, 1985 through January 19, 1986, when claimant's shoulder injury reached maximum medical improvement. The Board held that, pursuant to Section 6(c), only claimants receiving permanent total disability or death benefits receive the new maximum rate in effect each October. *See* n. 7, *supra*. The Board held that those receiving compensation for temporary total disability are considered to have been "newly awarded compensation" when benefits commence, generally at the time of injury. *Puccetti*, 24 BRBS at 31-32. The Board found support for its interpretation of Section 6(c) in the legislative history to the 1972 Amendments, which stated that those "newly awarded compensation" are "'those who begin receiving compensation for the first time during the period.'" *Id*., *quoting* S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 18 (1972). Accordingly, a claimant receiving temporary total disability compensation remains at the maximum rate in effect when benefits commence because, on the following October 1, he would not be receiving benefits for permanent total disability or death and is therefore not entitled to the new maximum rate. *Id*. at 32.

Claimant argues that the Board should overrule its holding in *Puccetti*, contending that the subsequent decision of *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150(CRT) (5th Cir. 1997), supports her contention in this regard. In *Wilkerson*, the claimant retired in 1972. Audiometric testing in 1992 revealed a binaural hearing impairment of 19.23 percent. Claimant filed a claim, which employer voluntarily paid based on claimant's average weekly wage in 1972. The administrative law judge found that claimant was entitled to benefits at the statutory maximum rate in effect at the time of claimant's retirement in 1972 of $70. This decision was administratively affirmed by the Board. On appeal, the Fifth Circuit summarily held that Section 6(c) "makes plain that compensation is governed by the maximum rate in effect at the time of an award," which the court stated is "an unequivocal statutory imperative." *Wilkerson*, 125 F.3d at 906, 31 BRBS at 151-152(CRT). The court stated that claimant was "newly awarded compensation" in 1993, and that his actual compensation rate was well below the 1993 maximum rate. Claimant was awarded compensation for scheduled permanent partial disability based on his two-thirds of his average weekly wage in 1972 of $111.80, rather than on the statutory maximum in effect in 1972 of $70.

We reject claimant's assertion that *Wilkerson* mandates that we overrule *Puccetti*. *Wilkerson* is a Fifth Circuit case and is not binding authority, inasmuch as this case arises in the Ninth Circuit, which has not addressed this issue. More importantly, the issue

before the court was the applicability of the maximum compensation rate under the pre-1972 Act as opposed to the compensation scheme provided by the 1972 Amendments. It was well established that the pre-1972 Act limits on awards for permanent disability did not apply to cases decided after enactment of the 1972 Amendments. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *Simpson,* 22 BRBS 25; *see generally Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974) (an appellate court must apply the law in effect at the time it renders its decision, unless such application would work a manifest injustice or there is statutory direction or legislative history to the contrary). Thus, in *Wilkerson,* claimant's award was entered after the effective date of the 1972 Amendments and the prior maximum compensation rate thus was not applicable as a matter of law. There was no issue regarding the statutory interpretation of Section 6(c) before the court. Under these circumstances, the single sentence in *Wilkerson* is not persuasive authority for overruling *Puccetti.*

Claimant next contends that, in fact, *Puccetti,* as well as *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), state that the applicable maximum rate is the rate in effect at the time that entitlement to compensation commences. In *Kubin,* the claimant had a traumatic back injury in 1981. Claimant's disability did not commence until 1986 when he retired due to this injury. The Board rejected employer's contention that the award for permanent partial disability based on a loss of wage-earning capacity is limited to the statutory maximum in effect at the time of claimant's back injury in 1981, and held that claimant is entitled to the statutory maximum in effect on August 1, 1986, when claimant was first disabled by his injury, *Kubin*, 29 BRBS at 122. Claimant herein thus argues that this result is inconsistent with the Board's reliance on the legislative history in *Puccetti* inasmuch as the claimant in *Kubin* did not begin receiving compensation from the date of injury.

We reject claimant's contention that the decision in *Puccetti* and *Kubin* are inconsistent. Both cases hold that the applicable maximum rate is the one in effect when the disability commences. In *Puccetti,* the Board commented that this *generally* is when the injury occurs, but these cases, as well as the legislative history, provide that the applicable maximum rate is determined by the date benefits commence. *Kubin,* 29 BRBS at 122; *Puccetti,* 24 BRBS at 31-32.

Claimant next contends that the Board erred in its interpretation of the phrase "those newly awarded compensation during such period" as the Board did not apply the unambiguous plain meaning of the term "awarded." Claimant contends that the Act explicitly premises certain provisions on "entitlement" or on the commencement of benefits, *see* 33 U.S.C. §§910(h), 933(g), but does not do so in Section 6(c). Claimant thus asserts that the plain meaning of the phrase "newly awarded compensation during such period" is that the applicable statutory maximum is the maximum compensation rate

in effect when a compensation order is issued because the word "entitlement" or "commences" is not utilized here as elsewhere in the Act.[8]

In response, the Director states that "during" is the key word to defining the scope of Section 6(c) when the claimant is "newly awarded compensation during such period." Whereas claimant interprets "during" to mean "in," the Board, in effect, in *Puccetti* and *Kubin* has interpreted it to mean "for." The Director states that either interpretation of "during" is definitionally correct. However, the Director asserts that the Board's interpretation maintains consistency in the statute and yields rational results.[9] The Director contends that the applicable maximum rate should not be based on the date a compensation order is entered.

We affirm the administrative law judge's finding that claimant's temporary total disability awards are subject to the maximum rates in effect in 1995 and 1996. Her finding is consistent with the Board's holdings in *Puccetti* and *Kubin*, and we decline to overrule these cases. In 2005, claimant was "newly awarded compensation during" the periods commencing in January 1995 and October 1, 1995. Moreover, the Director's interpretation of Section 6(c) is consonant with the Board's holdings in *Puccetti* and *Kubin*, and provides the additional rationale of achieving consistent results for all claimants. *See generally Briskie v. Weeks Marine, Inc.*, 38 BRBS 61, 65-66 (2004), *aff'd mem.*, 161 Fed.Appx. 178 (2d Cir. 2006). Accordingly, we reject claimant's contention that she is entitled to compensation for temporary total disability at her full compensation rate of two-thirds of her average weekly wage of $839.76 from the date of injury on January 12, 1995.

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[8] Claimant also argues that the word "award" is equated in the Act to a compensation order and nowhere in the Act to the date claimant becomes entitled to compensation. *See* 33 U.S.C. §§914(a), (e); 919(e).

[9] The Director contends that similarly situated claimants will be subject to disparate treatment should the Board overrule *Puccetti* and adopt claimant's interpretation of Section 6, which would allow her to receive compensation for disability in 1995 using the maximum rate for 2005. For example, a worker with the same average weekly wage who is injured at the same time as claimant in 1995 but awarded compensation in 1996, would be limited to the maximum rate in effect at that time for temporary total disability benefits from 1995 to 2003, whereas claimant, who is awarded compensation in 2005, would receive compensation from the date of injury at the higher maximum rate in effect in 2005.

Alternatively, claimant contends that her temporary total disability compensation should increase to the maximum rate each fiscal year from the date of injury in January 1995 to October 1, 1998, when the maximum rate of $871.76 first became greater than claimant's full compensation rate of $839.76 under Section 8(b). Claimant argues that *Dews v. Intercounty Associates*, 14 BRBS 1031 (1982), is supportive of her assertion that the new maximum rate each fiscal year governs the maximum compensation rate for temporary total disability and that the rate is not limited by that in effect at the time the disability began. The Director responds that, 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 for those periods. *See* n.7, *supra*.

In *Puccetti*, 24 BRBS at 29-32, the Board fully addressed the contention claimant raises in this case and rejected the applicability of *Dews*, a case applying Section 6 of the 1972 Act to cases under Section 6, as amended in 1984. In *Dews*, the Board affirmed the administrative law judge's finding that under Section 6(b)(1) of the 1972 Act, the maximum compensation rate governs compensation awarded for temporary total disability only until the next October 1, when the benefits increased to the new maximum rate in effect. Section 6 was added to the Act by the 1972 Amendments to increase the maximum compensation rate. The increase was implemented incrementally during a phase-up period from the effective date of the 1972 Amendments to September 30, 1976, by increasing the maximum compensation rate yearly in 25 percentage point increments from 125 percent of the average weekly wage to 200 percent of the national average weekly wage. *See West v. Washington Metropolitan Area Transit Authority*, 21 BRBS 125 (1988). The Board held in *Dews* that, pursuant to Section 6(d) of the 1972 Act, the yearly incremental increase applied to newly awarded compensation for temporary total disability during the phase-up period from 1972 to 1976. Section 6(d) was amended and renumbered Section 6(c) in 1984. In *Puccetti*, the Board addressed the relevant statutory language and legislative history, and held that, under the amended Section 6(c), claimants receiving temporary total disability remain at the maximum compensation rate in effect during the period when benefits commence, which is generally at the time of injury. *Puccetti*, 24 BRBS at 30-32. The holding in *Dews* was limited to cases arising under the 1972 Amendments, and is therefore inapplicable to this case. In this case, claimant was neither currently receiving compensation for permanent total disability nor newly awarded compensation after October 1, 1995. Pursuant to *Puccetti*, claimant is not entitled to the new maximum in effect each fiscal year during her period of temporary total disability. Accordingly, we affirm the administrative law judge's award of compensation for temporary total disability from January 12 to October 23, 1995, at the maximum rate in effect at that time of $760.93, and from October 24, 1995, to August 12, 2003, at the maximum rate in effect in fiscal year 1996 of $782.44.

Finally, ITS appeals the administrative law judge's award for permanent total disability as of August 13, 2003, at claimant's full compensation rate of $839.76, under Section 8(a). The administrative law judge found the maximum rate in effect for fiscal year 2003, $996.54, applicable to this award. As this rate is greater than claimant's Section 8(a) compensation rate, the administrative law judge awarded claimant permanent total disability compensation of $839.76 from the date of maximum medical improvement on August 13, 2003. 33 U.S.C. §908(a). ITS contends that the maximum compensation rate at the date of claimant's last work injury on January 15, 1996, of $782.44 remains applicable until October 1, 2003, when claimant's compensation rate is governed by the new Section 6(b) statutory maximum in effect at that date of $1,030.78. At this time, claimant, who is currently receiving permanent total disability benefits, is entitled to the new maximum rate for fiscal year 2004. The Director agrees with ITS's contention that Section 6(c) does not provide that a given period's maximum rate is applicable when the *nature* of claimant's disability changes. The Director contends that as claimant was neither newly awarded compensation nor currently receiving compensation for permanent total disability in August 2003, she is not entitled to the statutory maximum rate in effect in August 2003 when her award for permanent total disability commenced. Rather, claimant remains subject to the maximum rate of $782.44 in effect during 1996. The Director contends that on October 1, 2003, claimant's permanent total disability award is subject to the statutory maximum in effect for fiscal year 2004 of $1,030.78 because on that date she is currently receiving compensation for permanent total disability. Because this rate is higher than claimant's compensation rate of $839.76, she is entitled to her full weekly rate of $839.76 beginning on October 1, 2003. Finally, the Director asserts that, thereafter, claimant is entitled to annual Section 10(f) adjustments each subsequent October 1, beginning in 2004. 33 U.S.C. §910(f).

As previously noted, the plain language of Section 6(c) states that the Section 6(b) statutory maximum applies 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." We conclude that under this provision in cases where claimant's temporary total disability changes to permanent total disability during the fiscal year, the compensation rate for permanent total disability remains the same at the date of maximum medical improvement as the rate in effect for the preceding period of temporary total disability. 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. Accordingly, we hold that the statutory maximum rate in effect during the fiscal year that claimant reached maximum medical improvement is inapplicable to increase claimant's compensation rate for permanent total disability. Claimant is entitled to the new statutory maximum on October 1, as she was "currently receiving" permanent total disability benefits at that time. We, therefore, modify the administrative law judge's Amended Decision and Order to award claimant compensation for permanent total disability from the date of maximum

medical improvement on August 13, 2003, to September 30, 2003, at a rate of $782.44. We agree with the Director that claimant is entitled to compensation at her Section 8(a) rate of $839.76 commencing on October 1, 2003, with yearly adjustments under Section 10(f) commencing on October 1, 2004, and we so modify the administrative law judge's decision. *See Marko v. Morris Boney Co.*, 23 BRBS 353, 361 (1990).

Accordingly, the administrative law judge's Amended Decision and Order Awarding Benefits and Partially Granting Claimant's Motion for Reconsideration is modified to award claimant compensation for permanent total disability from August 13 to September 30, 2003, at a rate of $782.44, and from October 1, 2003, to September 30, 2004, at a rate of $839.76; thereafter, commencing October 1, 2004, claimant's compensation rate is subject to yearly adjustments pursuant to Section 10(f). In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Amended Decision and Order Awarding Benefits and Partially Granting Claimant's Motion for Reconsideration are affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge