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Update on the Meaning and Proper Application of Section 6(c) of the Longshore and Harbor Workers' Compensation Act

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Section 6(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.S. § 906(c), sets a cap on the amount of compensation that may be paid under the Act (33 U.S.C.S. § 901 *et seq.*) and provides for the periodic upward adjustment of the amount of compensation received by certain claimants for permanent total disability or death. Issues concerning the proper interpretation and application of this statutory section have resulted in increased litigation, culminating in a 2012 Supreme Court decision and a published, December 2013 Benefits Review Board decision. The litigation, in turn, resulted from an increase in the number of claims filed under a Longshore Act extension, the Defense Base Act (42 U.S.C.S. § 1651 *et seq.*), which provides workers' compensation benefits for U.S. government contractors injured in the course of their overseas employment.[fn1] Because these workers, often employed in Iraq and Afghanistan, receive higher wages than their stateside counterparts, the statutory cap on compensation is frequently implicated in their claims. Section 6(c) will also be the subject of future Department of Labor rulemaking. This article provides an update on section 6(c) developments.

The Language of Section 6

Through a series of interlocking cross-references, LHWCA section 6 imposes a cap on disability and death benefits. Section 6(b)(1) limits compensation payments for disability and death to an amount equal to 200 percent of the applicable national average weekly wage (NAWW) as determined each year by the Secretary in accordance with section 2(19). 33 U.S.C.S. §§ 902(19); 906(b)(1).[fn2] If two-thirds of a worker's average weekly wage exceeds 200 percent of the applicable NAWW, instead of receiving two-thirds of his average weekly wage, the beneficiary's compensation is limited to 200 percent of the NAWW. Each year, before the new fiscal year begins, the Secretary of Labor recalculates the NAWW and 200 percent of this figure becomes the next year's statutory maximum compensation rate, effective on October 1. 33 U.S.C.S. § 906(b)(3). Assuming that two-thirds of the claimant's average weekly wage continues to be greater than 200 percent of each new fiscal year's NAWW, the cap continues to prohibit payment in an amount greater than the applicable maximum rate. However, section 6(c) also entitles the recipient to the benefit of a new year's increase in the maximum rate if he is an employee or survivor "currently receiving" compensation for permanent total disability or death as provided for by section 6(c). Proper calculation of such an individual's compensation rate requires further analysis to decide which year's maximum applies.

LHWCA section 6(c) states:

> Applicability of determinations. Determinations under subsection (b)(3) of this section 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 (emphasis added).

33 U.S.C. § 906(c).

In *Director, OWCP v. Rasmussen*, 440 U.S. 29, 59 L. Ed. 2d 122, 99 S. Ct. 903, 9 BRBS 954 (1979), the Supreme Court held that the "determinations" described in section 6(c) refer to the Secretary's annual determination of the national average weekly wage.[fn3] 440 U.S. at 42. As a result, application of section 6 can have the effect of entitling qualified persons to an increased maximum compensation rate each fiscal year which corresponds with the higher national average weekly wage figure established by the Secretary.

Certain cases require examination to determine which maximum rate applies to which entitlement periods. To correctly effectuate section 6(c) requires defining both persons who are "newly awarded" and those who are "currently receiving" compensation. When applied to the facts of actual cases, that apparently simple task often becomes complicated and, as demonstrated by ongoing litigation, subject to disagreement between the parties.

Section 6's Place in The Statutory Scheme

In *Roberts v. Sea-Land Services, Inc.,* 566 U.S. ___, 182 L. Ed. 2d 341, 132 S. Ct. 1350, 46 BRBS 15(CRT) (2012), the Supreme Court held that it was necessary to consider section 6(c)'s use of the term "award" with regard to the provision's place in the overall statutory scheme.[fn4] Thus, it is important to understand how section 6 fits in the LHWCA's framework. Section 8 establishes the rate at which weekly disability benefits are paid under the LHWCA, and section 9 establishes the compensation rate for death benefits. Compensation for total disability (and death if an eligible beneficiary with a child survives the deceased worker) is paid at the rate of two-thirds of the injured worker's average weekly wage as determined under section 10. 33 U.S.C. § 908(a), (b); 909, 910. Compensation for partial disability, other than permanent partial scheduled disabilities, is paid at two-thirds of the difference between the worker's average weekly wage and post-injury earning capacity. 33 U.S.C.S. § 908(c)(21), (e).

All of these amounts, however, are subject to the maximum or minimum rates allowable under the Act. Section 906(b)(1) caps compensation at twice the applicable national average weekly wage (NAWW) as defined in section 902(19). Section 6(b)(3) instructs the Secretary to determine the NAWW before each fiscal year begins, at which time it becomes the "applicable national average weekly wage" for the coming fiscal year. See *Roberts*, 182 L. Ed. 2d at 356. And because section 6(b) applies to all disability and death claims, it only makes sense to apply section 6(c) globally as well. *Id*. at 356.

The Supreme Court's Reasoning in *Roberts* and Conclusions Regarding Section 6(c)'s "Newly Awarded" Clause

In *Roberts*, the Supreme Court noted that the word "award" in section 6(c)'s phrase pertaining to persons "newly awarded" compensation is ordinarily used (and indisputably used in several provisions of the LHWCA) to describe something given by judicial decree. The Court held, however, that the term "award" was ambiguous in the context of section 6, and could mean something other than a grant of benefits in a formal compensation order.[fn5] *Id*. at 355. The Court held that, for purposes of section 6, "newly awarded" means the point at which a person first becomes statutorily entitled to benefits, no matter whether, or when, a compensation award is entered in his favor. *Id.* at 362. As a result, the maximum compensation rate which applies to injuries sustained by workers for whom two-thirds of their average weekly wage exceeds the statutory cap is the maximum rate in effect for the period when the claimant first becomes disabled.

In so holding, the Court rejected Roberts' argument that the "newly awarded" clause should apply only to those claimants receiving compensation pursuant to a formal order. The Court reasoned that construing the phrase "newly awarded compensation" to exclude persons receiving voluntary payments and to encompass only those claimants who obtained a formal compensation order would impede the LHWCA from working in the manner that Congress intended. *Id*. at 356-357. Acting on the assumption that in the vast majority of cases, the employer pays benefits voluntarily and no formal compensation award is ever entered, accepting Roberts' position (that "awarded" could only mean "provided for in a formal compensation order") would render section 6(c) superfluous in all but the unusual instance in which a compensation order is issued.

Further, the Court expressly rejected as unsound the suggestion that a formal compensation order should issue in every case in order to trigger the application of section 6(c). Indeed, Roberts' proposed interpretation of "newly awarded" would arbitrarily treat similarly situated employees differently because "two employees who earn the same salary and suffer the same injury on the same day could be entitled to different rates of compensation based on the happenstance of their obtaining [compensation] orders in different fiscal years." *Id.* at 358. The Court believed that its interpretation would discourage gamesmanship while Roberts' position would perversely encourage employees to delay the entry of a formal compensation award to a later fiscal year to take advantage of increases in the maximum rate over time. The court declined to "reward employees with windfalls for initiating unnecessary administrative proceedings, while simultaneously punishing employers who have complied fully with their statutory obligations." *Id*. at 359.

Finally, the Court rejected Roberts' contention that where the term "award" is used in other provisions of the Act, it invariably means a formal compensation order. The Court acknowledged that it normally presumes that Congress intended identical words used in the same statute to have the same meaning but here, that presumption was overcome "because several of the provisions of the Act [including sections 10(h)(1) and 33(b)] would make no sense if 'award' were read as Roberts proposes." *Id*. Despite its detailed analysis of the LHWCA statute as a whole and section 6's place in the scheme, the Court left unanswered the meaning of the provision's "currently receiving" clause.

The Board's Construction of Section 6(c)'s "Currently Receiving" Clause in *Lake*

On December 17, 2013, the Benefits Review Board resolved one issue not addressed by the Supreme Court. The Board addressed the meaning of section 6(c)'s phrase: "employees or survivors **currently receiving** compensation for permanent total disability or death benefits during such period" (emphasis added). In *Lake v. L-3 Communications*, 47 BRBS 45 (2013), the Board held that pursuant to this language, the claimant was entitled to the fiscal year 2009 maximum compensation rate ($1,200.62) as of December 10, 2008, the date that his entitlement to permanent total disability benefits commenced and that each October 1 thereafter, the claimant was entitled to the new fiscal year's statutory maximum.

In deciding that the claimant was entitled to a new maximum compensation rate each October 1, the Board relied on the Ninth Circuit's decision in *Roberts v. Director, OWCP*, 625 F.3d 1204, 1208-1209, 44 BRBS 73(CRT) (9th Cir. 2010),[fn6] and the Eleventh Circuit's decision in *Boroski v. Dyncorp Int'l*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012), following remand from the Supreme Court. The Board adopted the rationale of these two circuits, the only courts of appeals to construe the "currently receiving" clause. The Board reasoned that it was necessary to harmonize section 6(c)'s "newly awarded" and "currently receiving" clauses by focusing on the employee's entitlement to compensation rather than either entry of a formal order or actual receipt of compensation. As a result, "newly awarded" means "newly entitled to compensation" and "currently receiving" means "currently entitled to compensation." *Lake*, 47 BRBS 45 (2013), citing *Boroski*, 700 F.3d at 451-452.

Previously, in *Reposky v. Int'l Transp. Serv.*, 40 BRBS 65 (2006), the Board had held that where a worker's disability changed from temporary total to permanent total in the middle of a given fiscal year, the compensation rate payable for permanent total disability for the remainder of that fiscal year did not increase to the fiscal year's maximum rate until the next October 1, at which point he became entitled to the new fiscal year's maximum. 40 BRBS at 77. In *Lake*, the Board overruled that holding in *Reposky*. Instead, the Board applied section 6(c)'s "currently receiving" clause so that if a worker's disability changes from temporary total to permanent total in the middle of a given fiscal year, the compensation rate payable for permanent total disability for the remainder of that fiscal year immediately increases to the current fiscal year's maximum rate. The claimant need not wait until the next October 1, because the worker is, at the moment he attains permanency, "currently receiving" permanent total disability benefits, thereby entitling him to that fiscal year's maximum.

The Interrelationship Between Sections 6(c) and 10(f)

Employers and carriers have argued that entitling high-wage persons "currently receiving" permanent total disability and death benefits to higher maximums each fiscal year under section 6(c) might be inconsistent with case law limiting "catch-up" annual increases under section 10(f). Such an argument is plausible. Indeed, the Supreme Court has recognized that section 6(c) and 10(f) "overlap substantially." *Rasmussen*, 440 U.S. at 43 n.16. Both pertain only to beneficiaries receiving (or entitled to receive) compensation for permanent total disability

and death. However, the Court has also acknowledged the obvious—that the two provisions "are not entirely duplicative." *Id*.[fn7]

Section 10(f) applies only when permanent total disability or death benefits are received during two consecutive fiscal years. It applies without regard to whether two-thirds of the worker's average weekly wage exceeds 200 percent of the national average weekly wage. Thus, section 10(f) has nothing to do with whether a beneficiary is subject to section 6(c)'s maximum cap. Moreover, failing to increase the compensation of persons entitled to a new maximum under section 6(c) would render section 6(c) a nullity. Clearly, section 6(c) cannot be ignored and given no effect whatsoever.

In *Lake*, the Board noted that it long ago rejected this very argument, *Lake*, 47 BRBS 45 (2013). And the Eleventh Circuit in *Boroski* adopted the Director, OWCP's proposed interpretation of section 6(c)'s "currently receiving" clause over the claimant's, in part, because the Director's construction was more consistent with the approach called for under section 10(f). Thus, in *Lake*, the Board held that compensation rates do not become fixed at the statutory maximum rate in effect on the date of injury. Rather, they may change during the course of eligibility for benefits for individuals receiving payments for permanent total disability and death by virtue of both section 6(c) and the annual adjustments under section 10(f). The Board also made clear that section 10(f) precedent—holding that upon becoming permanently and totally disabled a claimant is not entitled to "catch-up" adjustments that occurred during prior fiscal years when the claimant was temporarily disabled—is not only distinguishable, but irrelevant to section 6(c)'s "currently receiving" inquiry.[fn8] *Lake*, 47 BRBS 45 (2013). While additional litigation over the interpretation of section 6(c)'s "currently receiving" language is likely, the argument that section 10(f) case law has any relevance to that inquiry appears to have run its course.

Regulatory Update

On November 26, 2013, the Department of Labor released its Fall 2013 Semiannual Regulatory Agenda which projects the issuance of a notice of proposed rule-making in September 2014 on the topic "Longshore and Harbor Workers' Compensation Act: Maximum Compensation Rate Determinations." See http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=1240-AA06

The planned proposal is summarized on the website as follows:

> The Secretary of Labor determines the national average wage for each fiscal year, and that determination applies to employees or survivors "currently receiving" permanent disability compensation or death benefits as well as those "newly awarded" compensation. Litigation over which year's national average wage applies in various situations led to a recent Supreme Court decision construing the "newly awarded" phrase. The proposed rule will implement the Supreme Court's decision and clarify how the maximum compensation rate provision applies, including the "currently receiving" phrase and other portions the Court did not address.

Conclusion

The Supreme Court has definitively interpreted section 6(c)'s "newly awarded" clause, and the Board, relying on the consistent holdings of two courts of appeals, has construed section 6(c)'s "currently receiving" clause. The Department of Labor plans on issuing a regulation clarifying other issues arising under section 6(c). With these developments, litigation over section 6(c)'s interpretation and application should subside.

Footnotes:

1. The Defense Base Act, 42 U.S.C.S. §§ 1651-1655, incorporates most provisions of the LHWCA, including section 6(c).

2. The DOL website publishes a list of each fiscal year's NAWW from 1972 to the present in the form of a table of maximum (and minimum) compensation rates, and includes the percentage increase from year to year at: http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm

3. The LHWCA's regimen of maximum and minimum compensation rates was first enacted in 1972, Sec. 5(a), Pub. Law No. 92-576, 86 Stat. 1251, October 27, 1972, and codified in 33 U.S.C.S. § 906. In 1984, LHWCA section 6 was amended by renumbering and reenacting what had been section 6(d) as section 6(c). Sec. 6(b)(1), Pub. Law No. 98-426, 98 Stat. 1639, 1642, September 28, 1984. When *Rasmussen* was decided, current LHWCA section 6(c) was still codified at 33 U.S.C.S. § 906(d). The minor changes in the renumbered version are not significant here.

4. The Court limited its grant of certiorari in *Roberts* to section 6(c)'s "newly awarded" clause. 182 L. Ed. 2d at 354, 132 S. Ct. at 1355.

5. The Court cautioned against construing statutory language in a vacuum and emphasized the fundamental canon of statutory construction that the words of a statute must be read in context and with a view to their place in the overall statutory scheme. *Roberts*, 182 L. Ed. 2d at 355.

6. As mentioned above, the Supreme Court did not review the part of the Ninth Circuit's *Roberts* decision addressing section 6(c)'s other clause: "currently receiving compensation for permanent total disability…."

7. The Court found support for its conclusion that 6(c) and 10(f) were intended to operate separately in the legislative history of the 1972 Amendments which added both sections 6(c) and 10(f). 440 U.S. at 43-44, n.16. In addition, although the amount by which compensation is increased under section 10(f) and the amount by which the maximum rate under section 6(c) increases each fiscal year is frequently the same percentage (because both are measured by the NAWW increase), annual adjustments under section 10(f) are fixed at the nearest dollar, 33 U.S.C.S. § 910(g), and are held to the lesser of the NAWW increase or five percent. 33 U.S.C.S. § 910(f)(2).

8. The employer relied on a line of cases rejecting the so-called *Holliday* approach to the construction of section 10(f) including *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033 (5th Cir. 1990) (en banc) (overruling *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415 (5th Cir. 1981), *Bowen v. Director, OWCP*, 912 F.2d 348 (9th Cir. 1990), and *Lozada v. Director, OWCP*, 903 F.2d 168 (2d Cir. 1990). The Board correctly noted that of those cases only *Bowen* involved a claimant whose average weekly wage was high enough to implicate section 6 and even *Bowen* mentioned section 6 only in passing in a footnote, 912 F.2d at 349 n.1, while explicitly stating that the "case turns on the proper interpretation of § 10(f). . . ." 912 F.2d at 350.