BRB Nos. 03-0213
and 03-0213A

RICHARD CARPENTER	)	
	)	
Claimant-Respondent	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CALIFORNIA UNITED TERMINALS	)	
	)	
and	)	
	)	
AMERICAN HOME INSURANCE	)	DATE ISSUED: Nov. 25, 2003
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 Decision and Order Partly Granting and Partly Denying Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Wm. Patrick Muldoon (Law Offices of Pranin & Muldoon), Wilmington, California, for claimant.

Roy D. Axelrod, Solana Beach, California, for California United Terminals and American Home Insurance.

James P. Aleccia and Lisa M. Conner (Aleccia & Conner), Long Beach, California, for Stevedoring Services of America and Homeport Insurance Company.

Peter B. Silvain, Jr. (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting 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:

California United Terminals (CUT) appeals, and Stevedoring Services of America (SSA) cross-appeals, the Decision and Order Awarding Benefits and the Decision and Order Partly Granting and Partly Denying Motion for Reconsideration (2001-LHC-2288 and 2289) of Administrative Law Judge Paul A. Mapes rendered on claims 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 began working as a longshoreman in 1959. In 1980, he sustained a work-related back injury which prevented him from working until the middle of 1984. Around that time, he transferred to the International Longshore and Warehouse Union (ILWU) Local 63, where he received daily job assignments as a marine clerk.[1] While working in this capacity, claimant sustained additional injuries to his back in 1991 and

[1] Claimant stated that he transferred to the ILWU so that he could work as a marine clerk and thereby avoid the more physically strenuous waterfront jobs. Hearing Transcript (HT) at 63.

1995, but upon his return to work in January 1996, he was able to perform all of the jobs available to marine clerks.

With regard to the instant case, claimant allegedly sustained separate injuries while working as a marine clerk for two different employers. The first accident, which occurred while he was employed as a floor-runner clerk for SSA on March 10, 1998, resulted in injuries to his back, left arm, and right thumb. In addition, claimant alleged that the March 10, 1998, accident resulted in an injury to his cervical spine. Claimant, as authorized by Drs. O'Hara and London, returned to work as a marine clerk on December 12, 1998, with restrictions on repetitive bending, stooping and walking. On July 1, 1999, Dr. O'Hara opined that claimant reached maximum medical improvement for the work injuries sustained on March 10, 1998, with permanent impairments of his neck and back, and concluded that claimant could work as a marine clerk so long as he worked within the aforementioned restrictions. Claimant's Exhibit (CX) 29. Claimant continued to work as a marine clerk although he stated that the number of jobs available to him, given his condition, gradually decreased over time.

On July 29, 2000, claimant, while working as a gate clerk for CUT, experienced immediate and excruciating pain in his back and right leg which Dr. O'Hara subsequently attributed to a probable herniated disc at L4-5 or L5-S1. Dr. O'Hara removed claimant from work immediately, opined that claimant's present symptoms were "reasonably associated" with his July 29, 2000, work injury, and recommended physical therapy with the possible goal of returning claimant to his usual work. *Id.* Dr. London, who examined claimant on October 30, 2000, opined that the work incident of July 29, 2000, aggravated the pre-existing conditions in claimant's back and he concluded that claimant is permanently and totally disabled. CX 34. On November 21, 2000, Dr. O'Hara opined that claimant reached maximum medical improvement with regard to his July 29, 2000, work injury, and that his condition precluded him from performing "any meaningful work activity." CX 54. Claimant did not return to work following the July 29, 2000, incident and retired from the ILWU in December 2000. As a result of his condition, claimant filed claims against SSA, seeking temporary total and permanent partial disability benefits, and CUT, seeking an award of permanent total disability benefits, and both employers controverted the claims.

In his decision, the administrative law judge initially determined that claimant sustained injuries to his back, right thumb, left elbow and neck while working for SSA on March 10, 1998, and that he subsequently aggravated, accelerated, or otherwise permanently worsened his back condition while working for CUT on July 29, 2000. With regard to the injuries sustained on March 10, 1998, the administrative law judge determined that claimant is entitled to, and that SSA is liable for, temporary total disability benefits from March 10, 1998, until December 11, 1998, temporary partial disability benefits from December 12, 1998, through June 30, 1999, and permanent partial disability benefits thereafter from July 1, 1999, as well as all medical benefits associated with those injuries. As for the July 29, 2000, back injury, the administrative

law judge found that claimant is entitled to, and that CUT is liable for, temporary total disability benefits from July 29, 2000, until November 20, 2000, and permanent total disability benefits from November 21, 2000, as well as medical benefits associated with that injury.[2]

On appeal, CUT challenges the administrative law judge's calculation of claimant's average weekly wage for the injury sustained on July 29, 2000, as well as his findings that the statutory maximum compensation rate set out by Section 6(b)(1) of the Act, 33 U.S.C. §906(b)(1), is inapplicable to this case, and that CUT is not entitled to a credit for the payment of permanent partial disability benefits made by SSA after July 29, 2000. BRB No. 03-0213. On cross-appeal, SSA challenges the administrative law judge's findings that claimant sustained a cervical spine injury as a result of the work accident on March 10, 1998, that claimant sustained a loss of wage-earning capacity as a result of said accident, that claimant is entitled to concurrent awards for his two work accidents and medical benefits for his March 10, 1998, injuries, and that SSA is liable for claimant's attorney's fees and costs. BRB No. 03-0213A. CUT responds to the cross-appeal, urging rejection of SSA's arguments on appeal. Claimant responds to both appeals, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief urging affirmance of the administrative law judge's average weekly wage calculation and concurrent awards.

Average Weekly Wage as of July 29, 2000

CUT asserts that the administrative law judge's determination of claimant's average weekly wage at the time of the July 29, 2000, injury is erroneous as, in contrast to the administrative judge's findings, claimant's actual wages between March 1998, and July 29, 2000, did not fairly and reasonably represent his average weekly wage at the time of his injury. CUT further asserts that the administrative law judge's findings of a pre-injury average weekly wage on July 29, 2000, of $1,874.68, and a residual wage-earning capacity of $1,797.22 following the March 10, 1998, injury, are inconsistent and unexplained. CUT therefore maintains that the lesser figure, $1,797.22, should reflect claimant's average weekly wage at the time of the July 29, 2000, injury.

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[2] In addition, the administrative law judge determined that both SSA and CUT are entitled to Section 8(f) relief, 33 U.S.C. §908(f), with regard to their respective liabilities for permanent disability benefits. SSA thereafter filed a motion for reconsideration withdrawing its request for Section 8(f) relief and asserting that the administrative law judge erred in finding it liable for any permanent partial disability benefits. The administrative law judge granted SSA's request for withdrawal of its claim for Section 8(f) relief, but otherwise affirmed the award of benefits against SSA, including the award of permanent partial disability benefits from July 1, 1999.

Under the Act, permanent partial disability compensation is determined by computing two-thirds of the difference between claimant's pre-injury average weekly wage and post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h). Section 10 of the Act, 33 U.S.C. §910, provides several formulas for determining claimant's average weekly wage at the time of his injury, with the principal factor being the wages earned by the claimant prior to the injury. When, as in the instant case, a claimant who sustains an injury which results in an award of permanent partial disability compensation subsequently suffers a second injury which results in permanent total disability compensation, his residual wage-earning capacity at the time of that second injury must be used in computing the total disability award for that injury. *See Brady-Hamilton Stevedore Co. v. Director, OWCP* [*Anderson*], 58 F.3d 419, 29 BRBS 101(CRT) (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989).

In general, following an initial injury resulting in permanent partial disability, claimant's earnings thereafter should reflect claimant's reduced wage-earning capacity. *See Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Crum v. General Adjustment Bureau*, 16 BRBS 101 (1983), *aff'd in pert. part and rev'd and rem. on other grounds,* 738 F.2d 474, 16 BRBS 115(CRT) (D.C. Cir. 1984). If the finding regarding wage-earning capacity in an initial award of permanent partial disability accurately reflects claimant's earning potential, the same figure will be claimant's average weekly wage if a second injury occurs. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57 (1991). The party seeking to prove that claimant's actual post-injury wages are not representative of claimant's wage-earning capacity bears the burden of proof. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992); *see also Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 23 BRBS 127(CRT) (9th Cir. 1990).

In his decision, the administrative law judge simultaneously considered the issues of claimant's residual wage-earning capacity following the March 10, 1998, accident with SSA, and claimant's pre-injury average weekly wage at the time of his July 29, 2000, accident with CUT. In so doing, he explicitly addressed and rejected CUT's contention that claimant's actual post-injury wages following the March 10, 1998, accident are not representative of his true earning capacity. The administrative law judge found that the weight of the evidence establishes that claimant was "carried" by his co-workers until he decided to limit his work activities to gate and tower jobs. The administrative law judge found from that point, which happened around September 12, 1999, claimant's actual wages fairly represented his true wage-earning capacity. In this regard, the administrative law judge relied on claimant's statements that once he limited himself to gate and tower jobs, he was no longer being "carried" by his co-workers and that he could specifically perform this work if he took his pain medication. HT at 120,

220-222. The administrative law judge rejected CUT's assertion that the fact that claimant used some medications and experienced some pain while working as a gate or tower clerk precludes the use of the wages earned in those positions as claimant's true earning capacity. The administrative law judge rationally found this does not establish that claimant is capable of this employment only through extraordinary effort and thus that these jobs were not representative of his true earning capacity. The administrative law judge therefore concluded that CUT did not establish an alternative, reasonable wage-earning capacity. Consequently, he relied on the actual wages claimant earned in the 46 weeks between September 12, 1999, and July 29, 2000, to calculate claimant's residual wage-earning capacity following the March 10, 1998, accident, and therefore his average weekly wage at the time of his July 29, 2000, work injury. Specifically, he divided claimant's earnings during that time, $86,235.15, by 46 weeks to arrive at a post-March 10, 1998, injury wage-earning capacity/pre-July 29, 2000, injury average weekly wage of $1,874.68. The administrative law judge then adjusted claimant's residual wage-earning capacity in 2000 to its March 1998 equivalent, $1,797.22, for purposes of comparison with the pre-injury average weekly wage for the March 10, 1998, injury.

The administrative law judge's finding that claimant's actual wages from September 12, 1999, to July 29, 2000, reasonably and fairly represent his residual wage-earning capacity for the March 10, 1998, injury, is affirmed as it is rational and supported by substantial evidence. *See Guthrie v. Holmes & Narver, Inc*., 30 BRBS 48, 52 (1996), *rev'd on other grounds sub nom. Wausau Ins. Companies v. Director, OWCP,* 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997); *Grage*, 21 BRBS at 69. Moreover, we affirm the administrative law judge's finding that claimant's average weekly wage at the time of the July 29, 2000, accident corresponds with claimant's residual wage-earning capacity as of July 2000, as it too is rational, supported by substantial evidence and in accordance with law. *Anderson*, 58 F.3d 419, 29 BRBS 101(CRT); *Hastings*, 628 F.2d 85, 14 BRBS 345. We reject, however, CUT's assertion that claimant's average weekly wage should be reduced to 1998 levels so as to actually equate to claimant's wage-earning capacity. In order to compare post-injury wage-earning capacity and pre-injury average weekly wage on an equal basis, the wages earned in a post-injury job must be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691 (1980). There is no such requirement in making a determination regarding claimant's average weekly wage, as claimant's actual earnings form the basis for his average weekly wage in this instance. 33 U.S.C. §910(c).

Sections 8(a), 6(b)(1)

CUT next contends that the administrative law judge's finding that the combined awards for permanent partial disability against SSA and permanent total disability against CUT are not subject to the statutory maximum of Section 6(b)(1) of the Act, is not in accordance with law. SSA, via its cross-appeal, similarly argues that the concurrent award of benefits exceeds the statutory cap. CUT asserts that pursuant to *Anderson*, 58 F.3d 419, 29 BRBS 101(CRT), and *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *appeal pending*, No. 02-71207 (9th Cir.), claimant is limited to the statutory maximum benefit for his combined awards against SSA and CUT. In addition, CUT maintains that the administrative law judge's finding that the awards do not violate the holding in *Anderson* is erroneous since the combined awards for claimant's first and second injuries ($1,465.23 per week) exceed two-thirds of claimant's average weekly wage for claimant's July 29, 2000, injury ($1,874.68 per week). CUT further contends that the administrative law judge's refusal to provide it with an offset for the award of permanent partial disability benefits payable by SSA is erroneous.

In response, the Director urges affirmance of the administrative law judge's concurrent award of benefits. The Director contends that there is no evidence of inappropriate "double dipping" in this case since both the residual earning capacity after the first injury, and the average weekly wage at the time of the second injury, were determined in a single proceeding and, though not identical, differ only by the wage-inflation factor. In addition, the Director asserts that, pursuant to *Anderson*, 58 F.3d at 420, 29 BRBS at 102 (CRT), the administrative law judge correctly found that claimant's combined awards cannot exceed claimant's average weekly wage at the time of his March 10, 1998, injury. In this regard, the Director maintains that the Board's holding in *Price,* 36 BRBS at 63, *i.e.,* ostensibly limiting the combined awards to the average weekly wage at the time of the second injury, is contrary to law. The Director further agrees with the administrative law judge's interpretation that the Section 6(b)(1) statutory maximum compensation rate is inapplicable to concurrent awards and rather must be considered in terms of each separate award of benefits.

Where a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in permanent total disability, he may receive concurrent awards for the two disabilities. *See Hastings*, 628 F.2d 85, 14 BRBS 345; *Finch*, 22 BRBS 196. In *Anderson*, the Ninth Circuit held that, although concurrent awards for permanent partial disability and permanent total disability are permissible, the combined payment of such dual awards cannot exceed the statutory limit set forth in Section 8(a) for permanent total disability, *i.e.,* 66⅔ percent of average weekly wage. *Anderson*, 58 F.3d at 421, 29 BRBS at 103(CRT). In that case, the claimant sustained a compensable injury in 1977 and another in 1982. The Ninth Circuit explicitly stated that "the central problem in this case is that the combined benefits of permanent partial disability and permanent total disability exceed the statutory limit of

[Section] 8(a). [The employer] contends that this amounts to excessive 'double dipping' and we agree." *Anderson*, 58 F.3d at 422, 29 BRBS at 103(CRT). The Ninth Circuit, noting that the claimant was entitled to benefits for both injuries, remanded the case for "the ALJ to determine the cause of [the claimant's] increased earnings and make whatever adjustments [are] necessary to insure that the combined disability award does not exceed the statutory limit mandated by Congress." *Id.* Thus, on remand, the administrative law judge was required to discern whether the claimant's increased earnings at the time of the 1982 injury occurred as a result of inflationary increases in wage rates or whether it represented an increase in the claimant's residual wage-earning capacity from the time of the initial injury. In the former case, *i.e.*, increase due to inflation, there would not be any "double dipping" requiring adjustment of either of the two awards. In contrast, the latter case, *i.e.*, increase in claimant's residual wage-earning capacity, would require an adjustment. This holding is consistent with the overall scheme of allowing the injured worker to be wholly compensated for the full loss in wage-earning capacity due to his/her injuries. *Anderson*, 58 F.3d 419, 29 BRBS 101(CRT); *see also Hastings,* 628 F.2d 85, 14 BRBS 345; *Lopez,* 23 BRBS 295.

The administrative law judge found that the holding in *Anderson* does not preclude claimant from simultaneously receiving awards for both the permanent partial disability related to the March 10, 1998, injury with SSA, and the permanent total disability related to the July 29, 2000, injury with CUT. The administrative law judge found that although *Anderson* explicitly states that Section 8(a) of the Act precludes concurrent awards for two separate injuries in excess of two-thirds of an injured worker's average weekly wage at the time of injury, this statement "appears to be inconsistent with the last two paragraphs of the decision." Analyzing the last paragraphs of the *Anderson* decision, the administrative law judge surmised that the *Anderson* court recognized that a determination of "double-dipping" depended upon factual findings concerning the cause of an increase in the claimant's wage-earning capacity between the first and second injuries, and that the court implicitly recognized that if the increase in income is attributable solely to factors other than an increase in earning capacity (*e.g.*, inflationary increases in hourly wage rates) there would not be any "double dipping" requiring adjustment of either of the two awards. Applying this interpretation to the case at hand, the administrative law judge determined that there was no increase, but rather a decrease, in claimant's income between the first and second injuries, and that the combination of the amounts awarded in permanent partial and total disability benefits ($1,465.23) did not exceed two-thirds of claimant's average weekly wage at the time of the March 10, 1998, injury, *i.e.*, $2,643.10. The administrative law judge thus concluded that the instant case presented no danger of "double dipping," thereby making the holding of *Anderson* inapplicable.

In the instant case, the facts support the approach taken by the administrative law judge in his consideration of the applicability of Section 8(a). As previously noted, claimant's average weekly wage at the time of his March 10, 1998, work injury was $2,643.10. The administrative law judge then rationally determined, upon calculating

claimant's average weekly wage at the time of the July 29, 2000, injury at $1,874.68, that claimant's wage-earning capacity between the first and second injuries had, in actuality, decreased. Thus, in order to make claimant whole in the instant case, the administrative law judge found that the facts mandate the use of the higher March 10, 1998, average weekly wage for purposes of Section 8(a). As this finding is supported by substantial evidence, the administrative law judge's use of claimant's average weekly wage at the time of the March 10, 1998, injury for consideration of the maximum award under Section 8(a) is affirmed. Thus, the administrative law judge's awards herein comport with the holding in *Anderson.*

In this regard, we reject the Director's assertion that the Board's holding in *Price,* 36 BRBS at 63, is "plainly contrary to law." In *Price*, a case involving concurrent awards, the Board held that the carrier responsible for benefits for the second injury which resulted in permanent total disability is allowed to take a credit against its payment of permanent total disability benefits for "the amount exceeding the maximum compensation allowable under Section 8(a)." Citing *Anderson*, 58 F.3d 419, 29 BRBS 101(CRT), and *Hansen v. Container Stevedoring Co.,* 31 BRBS 155 (1997), the Board observed that "[t]he concurrent awards combined cannot exceed 66 2/3 percent of claimant=s average weekly wage at the time of the *second injury*." *Price,* 36 BRBS at 63 (emphasis added). Contrary to the Director's contention, the Board's use of the "average weekly wage at the time of the second injury" is not a resolute statement of law. Rather, it is a holding based on the specific facts in that case.

In particular, in *Price* the claimant's average weekly wage at the time of his initial injury in 1979 was $627.88, and his average weekly wage at the time of his second injury, in 1998, was $1,525.90. *Price v. Stevedoring Services of America*, 31 BRBS 91, 93 (1996). The administrative law judge found that claimant's increased average weekly wage in 1998 was not the result of any increase in claimant's residual wage-earning capacity. The administrative law judge therefore determined that the carrier responsible for the second injury would be entitled to a credit if the combined awards for the 1979 and 1998 injuries exceeded 66 2/3 percent of claimant's average weekly wage at the time of the 1998 injury. Recognizing that the goal in awarding concurrent awards is to fully compensate claimant for his overall loss in wage-earning capacity, the Board affirmed the administrative law judge's decision to use the higher average weekly wage at the time of claimant's second injury as the basis for determining the maximum allowable compensation pursuant to Section 8(a). *See Anderson*, 58 F.3d at 421, 29 BRBS at 103(CRT). Moreover, the Board's holding in *Price* is consistent with other cases involving concurrent awards, for they indicate that *Hastings* does not set forth a mechanical rule but rather outlines a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case.[3] *See*

[3] That is, the combined awards cannot exceed two-thirds of the higher average weekly wage. In *Price*, the higher average weekly wage was the one at the time of the

Morgan v. Marine Corps Exch., 14 BRBS 784 (1982), *aff'd mem. sub nom. Marine Corps Exch. v. Director, OWCP*, 718 F.2d 1111 (9th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984); *see also Finch*, 22 BRBS 196; *Kooley v. Marine Industry Northwest*, 22 BRBS 142 (1989).

We next address CUT's contention that the administrative law judge erred in finding that the maximum compensation rate in effect in July 2000 is not applicable to the combined awards. The administrative law judge observed that although claimant's two awards exceed the statutory maximum under Section 6(b)(1) in effect in 2000,[4] the case law indicates that the maximum is intended to apply only to single injuries and does not apply when an injured worker is simultaneously entitled to receive benefits from more than one injury. We reject this interpretation.

Section 8(a) of the Act provides that "[i]n case of total disability adjudged to be permanent 66 2/3 per centum of the average weekly wages shall be paid . . . ." 33 U.S.C. §908(a). It is clear that "disability" under Section 8(a), for purposes of concurrent awards, means the overall disability resulting from both injuries, as a claimant cannot be more than totally disabled. *See* 33 U.S.C. §902(10) (definition of "disability" as "incapacity because of injury," not "incapacity because of an injury"); *see Korineck v. General Dynamics Corp., Electric Boat Div.*, 835 F.2d 42, 20 BRBS 63(CRT) (2d Cir. 1987); *Rupert v. Todd Shipyards Corp.*, 239 F.2d 273 (9th Cir. 1956). As such, compensation for this "disability" shall not exceed two-thirds of the injured worker's overall earning capacity. Section 6(b)(1) also uses the term "disability," stating that "[c]ompensation for disability . . . shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage . . . ." 33 U.S.C. §906(b)(1). The United States Supreme Court has emphasized the "basic canon of statutory construction that identical terms within an Act bear the same meaning." *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479, 26 BRBS 49, 52(CRT) (1992); *Sullivan v. Stroop*, 496 U.S. 478 (1990). Thus, the term "disability" must be similarly construed in Section 6(b)(1) such that, in instances of concurrent awards, it also means the overall disability resulting from both injuries.

The decision in *Hastings*, 628 F.2d 85, 14 BRBS 345, does not mandate that the maximum compensation rate of Section 6(b) must be separately considered in terms of each award of benefits. The court therein acknowledged, in *dicta*, that concurrent awards

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second injury. This fully compensates claimant for his total loss in wage-earning capacity. In this case, the higher average weekly wage was the one at the time of the first injury.

[4] The statutory maximum in effect in 2000 was $901.28. The maximum benefit increases each year for awards of permanent total disability benefits. *See* 33 U.S.C. §906(b)(3), (c); *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990).

for multiple disabilities might, in certain cases, give rise to an anomaly wherein a twice-injured, permanently disabled worker might receive a larger award than a worker who had become permanently disabled in a single injury, particularly in instances where the concurrent awards aggregate to an amount greater than the Section 6 maximum for a single totally disabling injury, and that provision is applied only to limit the single injury worker but not the twice-injured worker. The Director's position, *i.e.*, that the Section 6(b) limit is applicable only on a single award basis, perpetuates this prospective anomaly such that it would allow for the twice-injured worker to receive compensation in excess of the single injury person, despite the fact that their overall loss in wage-earning capacities are the same. In contrast, the Board's approach, based on the plain language of Section 6(b) limiting compensation for "disability," precludes this would-be inequity since both workers are subject to the same limit. The statute should not be interpreted in a way that results in claimant's receiving from two employers more than he could receive from one employer, pursuant to an explicit statutory provision. Consequently, claimant's total award of benefits is limited to the applicable Section 6(b)(1) maximum. *See Price*, 36 BRBS at 63 n. 12. We therefore reverse the administrative law judge's finding that the statutory maximum of Section 6(b)(1) is inapplicable.

Since claimant is limited to the maximum award permissible under Section 6(b)(1), CUT, arguably, is entitled to a credit for permanent partial disability benefits paid by SSA. The issue of CUT's credit, or offset, based on the award of permanent partial disability benefits against SSA is clouded by the fact that the administrative law judge determined that the back injury sustained by claimant on July 29, 2000, aggravated, accelerated, or otherwise permanently worsened claimant's back impairment and thus that CUT bears the responsibility for that impairment. This, coupled with the administrative law judge's determination that CUT is the responsible employer in this case, leads to the conclusion that CUT is liable for all benefits related to claimant's back condition from the date of the July 29, 2000, injury. In light of that finding, CUT's credit is limited to the amount of the permanent partial disability award which represents claimant's cervical spine injury which is solely related to the March 10, 1998, injury with SSA, since it is axiomatic that a claimant may not be more than totally disabled. *See Rupert,* 239 F.2d 273; *Hoey v. Owens-Corning Fiberglas Corp.*, 23 BRBS 71 (1989). Moreover, as *Hastings* does not set forth a mechanical rule but rather outlines a flexible scheme for compensating loss of wage-earning capacity in cases of multiple injuries based on the facts in a specific case, the issues herein, which require factual determinations, require that we remand the case to the administrative law judge. *See Finch,* 22 BRBS 196; *Kooley*, 22 BRBS 142. On remand, the administrative law judge must adjust claimant's overall award of benefits downward so that it does not exceed the statutory maximum set out by Section 6(b)(1) of the Act. In the instant case, it is not clear as to what extent, if any, claimant's cervical spine injury with SSA contributed to his permanent partial disability. This determination is important as it affects the amount of any offset to which CUT may be entitled based on the reduction of the award for purposes of Section 6(b)(1). If, on remand, the administrative law judge determines that

the cervical spine injury contributed to claimant's permanent partial disability, SSA remains liable for those benefits and CUT is entitled to an offset in the payment of the total disability award with regard to that amount. *Price*, 36 BRBS at 63. Alternatively, if the administrative law judge determines that claimant's cervical spine injury does not contribute to his permanent partial disability then CUT, as the last responsible employer, is liable for the entire award of benefits, less any necessary reduction for purposes of Section 6(b)(1).

Cervical Spine Injury

SSA argues that the administrative law judge erred in finding that the March 10, 1998, work accident resulted in an injury to claimant's cervical spine. SSA contends that the administrative law judge erred by according greatest weight to claimant's treating physician, Dr. O'Hara, particularly since only Dr. London has regularly examined claimant over an extended period of time commencing in 1991. Moreover, SSA contends that in crediting Dr. O'Hara's opinion, the administrative law judge erroneously applied the Section 20(a) presumption by requiring employer to produce evidence of greater evidentiary weight than that produced by claimant.

It is well-established that once the Section 20(a) presumption has been invoked, as in this case, the burden shifts to the employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), *cert. denied*, 528 U.S. 1187 (2000); *Bath Iron Works Corp. v. Director, OWCP*, 109 F.2d 53, 31 BRBS 19(CRT) (1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 257, 28 BRBS 43(CRT) (1994).

The administrative law judge determined, based on claimant's testimony and the reports of Dr. O'Hara, that claimant is entitled to the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the neck injury allegedly sustained while working for SSA on March 10, 1998. He then found that employer established rebuttal based on the contrary testimony and reports of Dr. London, that claimant did not sustain any injury to his cervical spine as a result of the March 10, 1998, work incident. Upon consideration of all of the relevant evidence of record, the administrative law judge concluded that a preponderance of the evidence indicates that the trauma claimant experienced while

working for SSA on March 10, 1998, either caused, aggravated, accelerated or otherwise permanently worsened his neck impairment. In so finding, the administrative law judge acknowledged SSA's contention that claimant failed to mention any neck complaints when interviewed six days after the March 10, 1998, accident and that Dr. London's reports fail to corroborate any neck complaints by claimant in the months following the accident. Nevertheless, the administrative law judge determined that this evidence is outweighed by the fact that Dr. O'Hara's reports repeatedly document claimant's neck complaints, and that Dr. O'Hara did, in fact, opine that claimant's March 10, 1998, accident caused a permanent neck impairment.

The weight to be accorded to the evidence of record is for the administrative law judge as the trier-of-fact, and the Board must respect his rational evaluation of the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Furthermore, it is solely within the administrative law judge's discretion to accept or reject all or any part of any evidence according to his judgment. *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). In the instant case, the administrative law judge, after consideration of all of the relevant evidence of record, elected to credit the opinion of claimant's treating physician, Dr. O'Hara, that claimant sustained an injury to his cervical spine as a result of the March 10, 1998, accident with SSA, over the contrary opinion of Dr. London. *See generally Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). Given the administrative law judge's broad discretion in resolving conflicts in the evidence, we affirm his determination that claimant sustained a cervical spine injury as a result of the March 10, 1998, accident with SSA as it is supported by substantial evidence.

Permanent Partial Disability Award

SSA contends that the administrative law judge erred in awarding partial disability benefits related to the March 10, 1998, work accident since the record reflects that claimant returned, post-injury, to his usual and customary duties without any restrictions and/or resulting loss in wage-earning capacity. SSA maintains that Drs. O'Hara and London agreed that claimant could return to his usual employment with the same restrictions as instituted following industrial injuries which he sustained in 1980 and 1991, without limitations on the number of hours or days that claimant could work, and that claimant testified that he did, in fact, return to work in December 1998 and that he continuously received earnings for 10-12 hours per day, five days per week, as he had done prior to the March 10, 1998, accident up to the time of his accident on July 29, 2000. Additionally, SSA avers that Dr. O'Hara placed certain work restrictions on claimant with regard to his cervical spine condition only after claimant's return to work following the SSA accident. As such, SSA contends that claimant's ongoing work activities subsequent to the SSA accident permanently aggravated the conditions in his

spine, including his cervical spine, and that SSA cannot, as a matter of law, be liable for a loss in wage-earning capacity. SSA alternatively submits that if there is a compensable loss in wage-earning capacity following claimant's post-March 10, 1998, injury return to work, his post-injury wage-earning capacity should be $2,020.35 per week and not $1,874.68, as determined by the administrative law judge, thereby decreasing the award of partial disability benefits. SSA argues that claimant's overall earnings between December 12, 1998, and July 29, 2000, $163,648.34, should be divided by the actual number of weeks which claimant worked during that period of time, *i.e.*, 81 weeks.

In his decision, the administrative law judge found that SSA's assertion that the March 10, 1998, injury caused no loss in wage-earning capacity is based entirely on Dr. London's opinion that claimant's work restrictions after the March 10, 1998, injury were no greater than the work restrictions that had been previously imposed upon him following his 1980 and 1991 work accidents. The administrative law judge, however, rejected the opinion of Dr. London, and thus, SSA's contention, since he found it inconsistent with the opinion of Dr. O'Hara, to whom he accorded greatest weight, and with claimant's credible testimony that there was a permanent increase in his symptoms following the March 10, 1998, accident. The administrative law judge's factual determinations in this instance are affirmed as they are rational and supported by substantial evidence. *Calbeck*, 306 F.2d 693.

Moreover, claimant's testimony clearly supports the finding that claimant was not capable of doing the same work post-March 10, 1998, that he did prior to that date. HT at 80-81, 109-112, 117. Specifically, from the time of his return to work in 1996 up until March 10, 1998, claimant was able to perform all of the jobs available to marine clerks. HT at 80-81. Upon his return to work, claimant stated, and the administrative law judge found, that claimant initially tried all kinds of work, HT at 110, 117, 133-34, 221, 235-36, but that ultimately his March 10, 1998, injuries forced him to limit his post-injury work activities to only gate and tower marine clerk jobs. HT at 109-112, 117. In addition, claimant's earning records clearly indicate that claimant sustained a loss in wage-earning capacity as a result of his March 10, 1998, injury and thus that he was entitled to an award of partial disability benefits payable by SSA. Specifically, SSA and claimant stipulated that claimant's average weekly wage at the time of the March 10, 1998, injury was $2,643.10, Decision and Order at 10, and claimant's payroll records establish, and the administrative law judge so determined, that claimant's post-March 10, 1998, residual wage-earning capacity was $1,874.68. CX 64 at 391-95; Decision and Order at 17. Thus, the administrative law judge found that claimant established a compensable loss in wage-earning capacity related to the injury sustained while working for SSA.

Inasmuch as the administrative law judge applied the appropriate standard for determining claimant's post-March 10, 1998, wage-earning capacity, and as his factual findings are rational, supported by substantial evidence and are in accordance with law, they are affirmed. 33 U.S.C. §908(h); *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director,*

OWCP, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *see also Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985). Consequently, the administrative law judge's calculation of claimant's post-injury wage-earning capacity at $1,797.22, and resulting award of permanent partial disability benefits, is affirmed.[5] *Id.*

Medical Benefits

SSA contends that the administrative law judge improperly found it liable for medical benefits related to the March 10, 1998, work accident. SSA avers that based on the administrative law judge's finding that CUT is the last responsible employer, CUT, and not SSA, is liable for all future medical care and treatment of claimant's spine.

The Ninth Circuit has held that the multiple traumatic injury rule applies such that if the disability resulted from the natural progression of the prior injury, and would have occurred notwithstanding the subsequent injury, then the responsible employer is the one at the time of the initial injury. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), *citing Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). However, if the second injury aggravated, accelerated or combined with the earlier injury, resulting in claimant's disability, the employer for whom claimant worked at the time of the second injury is the responsible employer, even though the claimant did not incur the greater part of his injury with that particular employer. *Id.*; *McKnight v. Carolina Shipping Co.*, 32 BRBS 165 (1998), *aff'd on recon.*, 32 BRBS 251 (1998); *Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997).

The administrative law judge found that since claimant established that his back condition was permanently worsened by the work-related injury he sustained while at CUT on July 29, 2000, CUT is the responsible employer. Decision and Order at 21. As the administrative law judge considered the issue of the responsible employer in this case in light of the proper law, *see Foundation Constructors, Inc*, 950 F.2d at 624, 25 BRBS at 75(CRT); *Kelaita*, 799 F.2d at 1311, and applied an appropriate evidentiary standard in reviewing the record as a whole on that issue, *Buchanan v. Int'l Transportation Services,* 33 BRBS 32 (1999), *aff'd mem. sub. nom., Int'l Transportation Services v. Kaiser Permanente Hospital, Inc.*, No.99-70631 (9th Cir. Feb. 26, 2001), his determination that CUT is the last responsible employer in this case is affirmed. *See, e.g., Duhagon v. Metropolitan Stevedore Co.,* 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith*

[5] In light of our affirmance of the administrative law judge's award of permanent partial disability benefits against SSA, we reject SSA's contention that it cannot be responsible for an attorney's fee.

v. Director, OWCP, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). It therefore follows that, pursuant to the last employer rule, responsibility for any disability and medical benefits related to claimant's back condition subsequent to July 29, 2000, rests with CUT, and not SSA, since the employer at the time of the aggravating second injury assumes liability for all subsequent related medical expenses and compensation. *Metropolitan Stevedore Co.*, 339 F.3d 1102, 37 BRBS 89(CRT); *Lopez*, 23 BRBS 295. Accordingly, the administrative law judge's decision is modified to reflect that CUT, and not SSA, is responsible for medical benefits related to claimant's back injury subsequent to July 29, 2000. We note, however, that SSA continues to be liable for all medical care that may be reasonable and necessary for the treatment of claimant's other injuries associated with the March 10, 1998, accident, *i.e.*, his right thumb, left elbow, and cervical spine injury.

Accordingly, the administrative law judge's findings that claimant sustained a work-related cervical spine injury on March 10, 1998, that he is entitled to concurrent awards of permanent partial and permanent total disability as a result of his two work accidents, and that the combined awards do not exceed the limit imposed by Section 8(a) of the Act, are affirmed. In addition, the administrative law judge's calculation of claimant's average weekly wage at the time of his July 29, 2000, work injury is affirmed. The administrative law judge's findings regarding liability for medical benefits are modified to reflect that CUT is liable for treatment related to claimant's back condition subsequent to July 29, 2000. The administrative law judge's finding that the statutory maximum of Section 6(b)(1) is inapplicable is reversed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge