BRB Nos. 13-0107
and 13-0107A

CHARLES LAKE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
L-3 COMMUNICATIONS	)	DATE ISSUED: 12/17/2013
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Daniel S. Shaivitz (Bulman, Dunie, Burke & Feld, Chtd.), Bethesda, Maryland, for claimant.

Keith L. Flicker and Brendan E. McKeon (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (2011-LDA-00355) of Administrative Law Judge Christine L. Kirby rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in

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

Claimant, while working for employer in Iraq as a law enforcement instructor, sustained multiple injuries resulting from two suicide bomb detonations on December 6, 2005. Claimant continued to work for employer until March 2006, when he returned to the United States for further medical treatment. Claimant filed a claim under the Act for compensation and medical benefits for the disability resulting from his work-related injuries. No hearing was held as the parties requested a decision based on their written briefs and certain of their previously-submitted stipulations.[1] The legal issue to be decided by the administrative law judge concerned the calculation of claimant's permanent total disability benefits.

In her Decision and Order issued on November 1, 2012, the administrative law judge approved the parties' previously-submitted Stipulation of Facts with the exception of paragraphs 10, 11 and 14. Thus, consistent with the approved stipulations, the administrative law judge found, *inter alia*, that claimant's work-related injuries reached maximum medical improvement on December 10, 2008, and that his average weekly wage at the time of his injury was $2,865.33. The administrative law judge further found that claimant was entitled to temporary total disability benefits from March 21, 2006, through December 9, 2008, and to permanent total disability benefits from December 10, 2008 and continuing. 33 U.S.C. §908(a), (b). It was undisputed that, pursuant to Section 6(b)(1), 33 U.S.C. §906(b)(1), the applicable compensation rate for the entire period of claimant's temporary total disability is $1,073.64, which is the maximum rate allowable at the time his entitlement to those benefits commenced on March 21, 2006. The parties disagreed, however, as to the statutory maximum rates applicable to claimant's subsequent permanent total disability benefits. Claimant asserted that he became entitled to the fiscal year 2009 statutory maximum rate of $1,200.62 as of December 10, 2008, when his entitlement to permanent total disability benefits commenced. The administrative law judge rejected claimant's position and found, pursuant to the Board's decision in *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006), that for the period from December 10, 2008 through September 30, 2009, claimant was limited to the same fiscal year 2006 maximum rate of $1,073.64 that he had received for his previous temporary total disability. The administrative law judge next determined the maximum

[1]On November 11, 2011, the parties submitted signed stipulations to the administrative law judge. On December 13, 2011, the administrative law judge issued a Decision and Order Approving Stipulations and Compensation Order Awarding Benefits. On that same date, however, the administrative law judge received notice that claimant had withdrawn his agreement to paragraphs 10 and 11 of the Stipulation of Facts, which pertained to the calculation of claimant's compensation rates. On December 19, 2011, the administrative law judge issued an Order Revoking Approval of Stipulations.

rates for claimant's permanent total disability benefits for the succeeding fiscal years. Specifically, for the period from October 1, 2009 through September 30, 2010, she found claimant entitled to the maximum rate in fiscal year 2010, $1,224.66. The administrative law judge further found that each October 1 thereafter, claimant is entitled to the new statutory maximum rate until such time that the statutory maximum rate exceeds two-thirds of his average weekly wage. In so finding, the administrative law judge rejected employer's argument that the compensation rate for claimant's permanent total disability benefits should be based only on the fiscal year 2006 maximum rate adjusted annually pursuant to Section 10(f), 33 U.S.C. §910(f).

On appeal, claimant assigns error to the administrative law judge's finding that the fiscal year 2006 maximum rate applies to his permanent total disability award for the period from December 10, 2008 through September 30, 2009. Employer responds, urging affirmance of the administrative law judge's finding regarding the maximum rate during this period. BRB No. 13-0107. In its cross-appeal, employer challenges the administrative law judge's findings regarding the maximum compensation rates applicable to the period from October 1, 2009 through September 30, 2010, and in subsequent fiscal years.[2] Claimant responds, urging affirmance of the administrative law judge's findings regarding the maximum rates applicable as of October 1, 2009 and thereafter. BRB No. 13-0107A.

We first consider the issue presented by claimant's appeal, BRB No. 13-0107, regarding his initial period of entitlement to permanent total disability benefits from December 10, 2008 through September 30, 2009. For the reasons that follow, we agree with claimant that the administrative law judge erred in basing claimant's benefits for this period on the fiscal year 2006 statutory maximum compensation rate rather than on the fiscal year 2009 maximum compensation rate. Pursuant to Sections 8(a) and (b) of the Act, compensation for permanent and temporary 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 rate allowable under the Act. 33 U.S.C. §906. In this regard, Section 6 provides, in pertinent part, that:

> (b)(1) Compensation for disability or death (other than compensation for death required by this chapter to be paid in a lump sum) shall not

[2]Employer advances related arguments in both its brief in response to claimant's appeal and in its Petition for Review and brief filed in its cross-appeal regarding the maximum compensation rates applicable to the period from October 1, 2009 through September 30, 2010, and to subsequent fiscal years. These arguments, which are based on employer's interpretation of Sections 6 and 10(f) of the Act, 33 U.S.C. §§906, 910(f), will be addressed in the Board's discussion of employer's cross-appeal.

> exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).
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> * * *
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> (b)(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year….
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> (c) 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.

33 U.S.C. §906(b)(1), (3), (c).

In the case before us, the administrative law judge relied on the Board's decision in *Reposky*, 40 BRBS 65, to find that claimant's compensation for the period from December 10, 2008 through the end of fiscal year 2009, that is September 30, 2009, is limited to the fiscal year 2006 statutory maximum rate of $1,073.64, the rate that applied to claimant's preceding period of temporary total disability compensation. Decision and Order at 3-4. The administrative law judge recognized that the Board's holding in *Reposky*[3] regarding the statutory maximum rate applicable to the initial period of entitlement to permanent total disability benefits was overruled by the United States Court of Appeals for the Ninth Circuit in *Roberts v. Director, OWCP,* 625 F.3d 1204, 1208-09, 44 BRBS 73, 76(CRT) (9th Cir. 2010), *aff'd sub nom. Roberts v. Sea-Land Services, Inc.,* 132 S.Ct. 1350, 46 BRBS 15(CRT) (2012). *Id.* at 3. The administrative law judge found, however, that the Ninth Circuit's holding in *Roberts* is not binding precedent in this case, which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[4]

[3]The *Reposky* case arose within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

[4]This Defense Base Act case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See McDonald v. Aecom Technology Corp.,* 45 BRBS 45 (2011). The Fourth Circuit has not addressed the issues presented in this case.

In its decision in *Reposky*, 40 BRBS 65, the Board addressed the factual situation presented in this case, where the claimant's temporary total disability changed to permanent total disability during the fiscal year, and reasoned that while the date of maximum medical improvement changes the nature of the claimant's disability, a claimant who was continuously receiving benefits was not "newly awarded" compensation at that time. The Board consequently held that the Section 6(b) statutory maximum rate in effect during the fiscal year that the claimant reached maximum medical improvement does not apply to increase the claimant's compensation rate for permanent total disability, and it concluded that such a claimant receives the same rate until the following October 1, when she is then entitled to the new Section 6(b) statutory maximum rate as she was "currently receiving" permanent total disability benefits at that time. *Reposky*, 40 BRBS at 77.

As acknowledged by the administrative law judge in this case, the Ninth Circuit subsequently addressed this precise issue in *Roberts*, 625 F.3d 1204, 44 BRBS 73(CRT). In *Roberts*, the claimant was awarded temporary total disability benefits from March 2002 to July 2005, permanent total disability benefits from July 2005 to October 9, 2005, and ongoing permanent partial disability benefits commencing October 10, 2005. The Ninth Circuit addressed two questions regarding the interpretation of Section 6(c). The first issue involved the "newly awarded" clause of Section 6(c), and pertained to the maximum rate applicable to the claimant's temporary total and permanent partial disability benefits. *Roberts*, 625 F.3d at 1206-08, 44 BRBS at 74-76(CRT). With respect to this issue, the Ninth Circuit held that an employee is "newly awarded" compensation within the meaning of Section 6(c) when he first becomes entitled to compensation. As claimant Roberts became newly entitled to compensation in fiscal year 2002, the year in which claimant Roberts first became disabled, the Ninth Circuit held that the administrative law judge had "properly applied the 2002 fiscal year maximum to Roberts's compensation for temporary total disability and permanent partial disability." *Id.*, 625 F.3d at 1208, 44 BRBS at 75-76(CRT).

The second issue considered by the Ninth Circuit in *Roberts*, which is the same issue presented by claimant's appeal in the case before us, involved the "currently receiving compensation for permanent total disability" clause of Section 6(c). *Roberts*, 625 F.3d at 1208-09, 44 BRBS at 76(CRT). The Ninth Circuit held in *Roberts* that the "currently receiving" clause refers to the period during which an employee is entitled to receive permanent total disability compensation regardless of whether his employer actually pays it. *Id.* The Ninth Circuit, therefore, concluded that since claimant Roberts was entitled to receive permanent total disability compensation during the period between July 12, 2005 and September 30, 2005, the applicable maximum rate to be applied to that award should be based on the National Average Weekly Wage (NAWW) with respect to fiscal year 2005.

Claimant Roberts filed a petition for certiorari regarding both of the issues decided by the Ninth Circuit. The United States Supreme Court, however, granted review only with respect to the first issue considered by the Ninth Circuit regarding the interpretation of the "newly awarded" clause, and thereafter upheld the Ninth Circuit's interpretation of that clause, ruling that an employee is "newly awarded compensation" when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order is issued. *Roberts*, 132 S.Ct. at 1363, 46 BRBS at 22(CRT).

As the Supreme Court did not consider the second issue addressed by the Ninth Circuit in its decision in *Roberts*, the Ninth Circuit's interpretation of the "currently receiving compensation for permanent total disability" clause of Section 6(c) is binding on cases arising within the jurisdiction of the Ninth Circuit. As previously noted, the *Reposky* case arose within the Ninth Circuit's jurisdiction and, thus, to the extent that the Board's decision in *Reposky* is inconsistent with the Ninth Circuit's decision in *Roberts*, it is overruled. Moreover, upon further consideration, we agree with the reasoning set forth by the Ninth Circuit, and we therefore adopt that court's holding that a claimant is "currently receiving compensation for permanent total disability," within the meaning of Section 6(c), during a period in which he is entitled to receive such compensation, regardless of whether his employer actually pays it. *Roberts*, 625 F.3d at 1208-09, 44 BRBS at 76(CRT).

As argued by claimant, the Ninth Circuit's decision in *Roberts* is consistent with both the decision of the Supreme Court in *Roberts* and the subsequent decision of the United States Court of Appeals for the Eleventh Circuit in *Boroski v. Dyncorp Int'l [Boroski II]*, 700 F.3d 446, 46 BRBS 79(CRT) (11th Cir. 2012).[5] Both the Ninth Circuit in *Roberts* and the Eleventh Circuit in *Boroski II* emphasized that their respective

[5]*Boroski II* was before the Eleventh Circuit on remand from the Supreme Court for further consideration in light of the Supreme Court's decision in *Roberts*. *Boroski II*, 700 F.3d at 447, 46 BRBS at 79-80(CRT). The Supreme Court's decision in *Roberts* conclusively answered the first issue in *Boroski II* concerning the interpretation of the "newly awarded" clause in Section 6(c). The Supreme Court's *Roberts* decision, however, did not resolve the second issue presented in *Boroski II* regarding the "currently receiving compensation" clause in Section 6(c). *Id.*, 700 F.3d at 448-49, 46 BRBS at 80-81(CRT). The claimant in *Boroski II* interpreted this clause to mean the actual physical receipt of compensation while the Director, Office of Workers' Compensation Programs (the Director), construed the clause to mean "currently entitled to compensation." *Id.*, 700 F.3d at 449-50, 46 BRBS at 81-82(CRT). The Eleventh Circuit rejected the claimant's construction of the clause and held, consistent with the Director's interpretation, that the "currently receiving" clause means "currently entitled to compensation." *Id.*, 700 F.3d at 450-53, 46 BRBS at 82-84(CRT).

decisions harmonized the interpretation of the Section 6(c) "currently receiving" clause with the construction of the "newly awarded" clause of Section 6(c). The Ninth Circuit stated in this regard that its construction of the "currently receiving" clause renders the interpretation of both clauses consistent, in that "[u]nder both clauses, the inquiry into the applicable maximum rate focuses on an employee's *entitlement* to compensation." *Roberts*, 625 F.3d at 1208, 44 BRBS at 76(CRT) (emphasis in original). Similarly, the Eleventh Circuit stated in *Boroski II* that its construction of the "currently receiving" clause to mean "currently entitled to compensation" harmonizes the "currently receiving" and "newly awarded" clauses. *Boroski II*, 700 F.3d at 451-52, 46 BRBS at 82-83(CRT).

In light of our adoption of the Ninth Circuit's interpretation of the "currently receiving" clause of Section 6(c), the Board's rationale in *Reposky* is no longer viable. Consistent with the Ninth Circuit's *Roberts* decision, we hold that, in cases where the claimant's temporary total disability changes to permanent total disability during the fiscal year, the applicable maximum rate for the claimant's initial period of permanent total disability benefits is the rate in effect at the time the claimant's entitlement to those benefits commences. *Roberts*, 625 F.3d at 1208-09, 44 BRBS at 76(CRT). Therefore, in the case before us, we modify the administrative law judge's decision to reflect that for the period from December 10, 2008 through September 30, 2009, claimant is entitled to permanent total disability benefits at the fiscal year 2009 maximum rate of $1,200.62.

We next consider employer's cross-appeal, BRB No. 13-0107A, challenging the administrative law judge's finding that claimant is entitled to the fiscal year 2010 statutory maximum rate of $1,224.66 for the period from October 1, 2009 to September 30, 2010, and to the new statutory maximum rates for subsequent years until such time that the maximum rate exceeds two-thirds of claimant's average weekly wage. Decision and Order at 4-5. Employer's assertion of error in this regard is premised on employer's view of the statutory scheme as necessarily implicating an interplay between Sections 6(b), (c) and 10(f), of the Act.[6] Employer contends that the administrative law judge's

[6]Section 10(f) provides:

> (f) Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries subject to this chapter shall be increased by the lesser of–
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> > (1) a percentage equal to the percentage (if any) by which the applicable national average weekly wage for the period beginning on such October 1, as determined under section 906(b) of this title, exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1; or

findings regarding the applicable maximum rates as of October 1, 2009 and each fiscal year thereafter are inconsistent with Section 10(f) and case law interpreting that subsection. Specifically, employer relies on precedent under Section 10(f) holding that, upon attaining permanent total disability status, a claimant is not entitled to a "catch-up" for cost-of-living adjustments unavailable to him during his previous period of temporary disability.[7] According to employer's interpretation of the statutory scheme, Section 6(b), (c), does not automatically entitle a claimant to the statutory maximum in effect for each applicable period. Rather, in employer's view, Section 6(c) merely allows the claimant, once he has attained permanent total disability status, to receive Section 10(f) cost-of-living adjustments to the statutory maximum rate in effect at the time of his injury. For the reasons that follow, we disagree with this interpretation.

The precise argument advanced by employer in this case was considered and rejected by the Board in *Marko v. Morris Boney Co.*, 23 BRBS 353 (1990). As does employer in this case, the employer in *Marko* took the position that the claimant's compensation rate became fixed at the statutory maximum rate applicable at the time of injury and that, except for yearly Section 10(f) adjustments, this rate is not subject to change during the course of his disability. *Marko*, 23 BRBS at 361. Stating that there is no basis in the Act for holding that a claimant who is permanently totally disabled is limited to the maximum rate applicable at the time of injury, the Board rejected the employer's argument that the maximum rate in effect at the time of the injury remains constant subject only to Section 10(f) adjustments on that rate. *Id.* at 362. The Board held that, pursuant to the plain language of Section 6, as long as two-thirds of a claimant's average weekly wage remains higher than 200 percent of the current NAWW, the claimant "currently receiving" permanent total disability or death benefits is entitled

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(2) 5 per centum.

33 U.S.C. §910(f).

[7]Employer cites in this regard the Section 10(f) line of precedent set by *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36(CRT) (5th Cir. 1990) (en banc) (overruling *Holliday v. Todd Shipyards Corp.*, 654 F.2d 415, 13 BRBS 741 (5th Cir. 1981)); *see also Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990); *Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78(CRT) (2d Cir. 1990); *Scott v. Lockheed Shipbuilding & Constr. Co.*, 18 BRBS 246 (1986). *Contra Southeastern Maritime Co. v. Brown*, 121 F.3d 648, 31 BRBS 140(CRT) (11th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998). Employer contends that the Ninth Circuit's holding in *Roberts*, 625 F.3d at 1204, 44 BRBS at 73(CRT), is undermined by the court's failure to address its prior holding in *Bowen*, 912 F.2d 348, 24 BRBS 9(CRT), regarding the absence of a "catch-up" provision in Section 10(f).

to receive the new maximum compensation rate each year. *Id.* at 361-62. The Board noted, in this regard, that once two-thirds of the claimant's actual average weekly wage is less than 200 percent of the applicable NAWW, the claimant's actual average weekly wage becomes the basis for his permanent total disability compensation rate, and he is then entitled to annual Section 10(f) adjustments in the amount of the lesser of the percentage increase in the NAWW as determined under Section 6(b)(3) or the Section 10(f) five percent cap. *Id.* at 361 n.6.

The decision in *Marko* represents longstanding Board precedent under Section 6 that has not been directly overturned by any circuit court in the 23 years since it was issued. We are not persuaded that the Ninth Circuit's decision in *Bowen v. Director, OWCP*, 912 F.2d 348, 24 BRBS 9(CRT) (9th Cir. 1990), which employer cites as supportive of its position, invalidates the precedent established in *Marko.* In *Bowen*, the Ninth Circuit held that the claimant's permanent total disability award was properly based on the maximum compensation rate at the time of injury subject only to Section 10(f) adjustments occurring after the claimant's temporary total disability changed to permanent total disability.[8] *Bowen*, 912 F.2d at 349-51, 24 BRBS at 10-13(CRT). The *Bowen* court's inquiry, however, was focused narrowly on the issue of whether, pursuant to Section 10(f), a claimant who is permanently totally disabled is entitled to receive the benefit of intervening cost-of-living adjustments occurring during a prior period of temporary disability. *Id.*, 912 F.2d at 349-50, 24 BRBS at 10-12(CRT). The Ninth Circuit's sole reference to Section 6 is in a footnote and merely sets forth the provision at Section 6(b)(1). *Id.*, 912 F.2d at 349 n.1, 24 BRBS at 10(CRT) n.1. As the *Bowen* decision lacks a substantive discussion of Section 6, we do not view that decision as providing a basis for departing from the precedent established in *Marko.*

Moreover, the Ninth Circuit's recent decision in *Roberts*, 625 F.3d at 1204, 44 BRBS at 73(CRT), supports the Board's reasoning in *Marko.* Specifically, the Ninth Circuit noted that as claimant Roberts was entitled to the statutory maximum rate in effect at the time he became entitled to permanent total disability benefits, it necessarily followed that he became entitled to the new Section 6(b)(3) statutory maximum on the following October 1.[9] *Roberts*, 625 F.3d at 1209 n.2, 44 BRBS at 76 n.2(CRT).

[8]With the exception of the decision in *Bowen*, the decisions cited by employer holding that claimants are not entitled to Section 10(f) "catch-up" adjustments, *see* n.7 *supra*, involve claimants whose compensation rates based on their actual average weekly wages were less than the Section 6(b)(1), (3) maximum rates. Thus, as Section 6 was inapplicable to those cases, their holdings have limited relevance to the issues presented in this case concerning the proper interpretation of Section 6.

[9]We do not agree with employer that the Ninth Circuit's decision in *Roberts* is undermined by the fact that it lacks a discussion of that court's decision in *Bowen.* As discussed, *supra*, the *Bowen* decision did not include a substantive discussion of Section

Therefore, the Board will adhere to its longstanding position that, in a permanent total disability case in which two-thirds of the claimant's actual average weekly wage exceeds the Section 6(b)(3) statutory maximum rate, he is entitled to the benefit of the new maximum rate each fiscal year.[10] *Marko,* 23 BRBS at 361-62. Such a claimant is

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6 of the Act and, thus, *Bowen* would appear to have limited, if indeed any, precedential weight with respect to the issues regarding the proper interpretation of Section 6 presented to the Ninth Circuit in *Roberts*.

[10]We note in this regard that although Sections 6(b)(3) and 10(f) both reference the NAWW and result in an increase in compensation, the purposes of the two provisions are not identical. The purpose of permanent total disability compensation, to which Section 6 applies, is to fully replace two-thirds of an injured worker's loss in wage-earning capacity. 33 U.S.C. §§902(10), 908(a); *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 298, 30 BRBS 1, 3-4(CRT) (1995) (The fundamental purpose of the Act is to compensate employees . . . for wage-earning capacity lost because of injury. . . ."); *see also Roberts,* 132 S.Ct. at 1359, 46 BRBS at 19(CRT). The purpose of Section 10(f) is to ensure that the value of the compensation benefits is not eroded over time by inflation. *See generally Director, OWCP v. Bath Iron Works Corp.,* 885 F.2d 983, 22 BRBS 13(CRT) (1st Cir. 1989). This is evident from legislative history. In enacting in 1972 a rate cap as a percentage of the NAWW, Congress recognized that the then-existing compensation rate scheme was inadequate. The 200 percent rate cap was phased in over a period of three years. It was the "[e]xpectation [of Congress] that a 200 percent maximum will enable approximately 90 percent of the work force covered by this Act to receive 2/3 of their average weekly wage." *See* H.R. Rept. No. 92-1411, 92d Cong., 2d Sess. at 3.

> The bill also requires an annual redetermination by the Secretary which will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the Act. A *similar* provision for upgrading benefits is contained in Section 10 of the Act. . . These employees will receive annual increases based on percentage increases in the national average weekly wage.

Id. (emphasis added); *see also Director, OWCP v. Rasmussen*, 440 U.S. 29, 9 BRBS 955 (1978). This language supports our holding herein—annual increases in the NAWW, pursuant to Section 6(b)(3), are to enure to the benefit of the permanently totally disabled claimant until two-thirds of his actual average weekly wage falls below 200 percent of the applicable NAWW. At this point, a disabled claimant is fully compensated for his loss in wage-earning capacity and Section 10(f) applies thereafter to ensure that his benefits are not eroded by inflation. In this manner, the two sections function similarly, although Section 10(f) adjustments are capped at a five percent increase. *See generally*

entitled to receive the new Section 6(b)(3) maximum rate each fiscal year until such time as two-thirds of his actual average weekly wage falls below 200 percent of the applicable NAWW, and then annual adjustments under Section 10(f) apply. *Id.* at 361 n.6. In the case before us, the administrative law judge's findings regarding the statutory maximum rates applicable to the period from October 1, 2009 through September 30, 2010, and to succeeding fiscal years, are consistent with the Board's holding in *Marko*, which we have reaffirmed herein. We therefore affirm the administrative law judge's determination that the fiscal year 2010 Section 6(b)(3) statutory maximum rate of $1,224.66 applies to the period from October 1, 2009 through September 30, 2010, and that claimant is entitled to the new Section 6(b)(3) maximum each year until such time that the statutory maximum rate exceeds two-thirds of claimant's actual average weekly wage.

Accordingly, the administrative law judge's Decision and Order is modified to award claimant permanent total disability benefits from December 10, 2008 through September 30, 2009, at a rate of $1,200.62 per week. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

Boroski II, 700 F.3d at 452, 46 BRBS at 83(CRT) (noting how the two sections function similarly). In *Boroski*, the claimant was permanently totally disabled from the date of injury. The Director observed to the court that the initial increases in the claimant's compensation were due to the "currently receiving" clause of Section 6(c) rather than to Section 10(f). *Id.*, 700 F.3d at 449, 46 BRBS at 81(CRT).