BRB Nos. 99-0357
and 99-0357A

FRANK RAVALLI	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
PASHA MARITIME SERVICES	)	DATE ISSUED: Dec. 23, 1999
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY/ FREMONT COMPENSATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Granting Modification of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Howard D. Sacks, San Pedro, California, for claimant.

Yvette A. Boehnke (Law Offices of Leonard J. Silberman), Santa Ana, California, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

Claimant appeals and employer cross-appeals the Decision and Order Granting Modification (97-LHC-1676) of Administrative Law Judge Alexander Karst rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, while working as a walking boss/foreman for Pasha Maritime Services

(employer), sustained a work-related injury on October 22, 1986. Pursuant to the parties' stipulations dated September 25, 1990, claimant received ongoing permanent partial disability payments of $280.12, based on an average weekly wage of $1,860.25, a post-injury wage-earning capacity of $1,440.05, and a loss of wage-earning capacity of $420.[1] Employer's liability was assumed by the Special Fund under 33 U.S.C. §§908(f), 944. At the time of the hearing, claimant had been a member of the ILWU Walking Bosses and Foremen's Union for about 17 years, and had been employed as a foreman by Marine Terminals Corporation on a "steady" basis for several years. He stated that he was about 75th in seniority in his local, which has over 300 members. Employer applied for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, seeking to terminate all compensation, on the ground that claimant no longer has any loss in wage-earning capacity.

After conducting a hearing, the administrative law judge found that claimant's current actual earnings as a walking boss reasonably represented his current earning capacity, that claimant's wage-earning capacity had been restored, and that claimant failed to establish the contrary. Accordingly, he granted modification and terminated claimant's disability award. Claimant appeals, first arguing that the administrative law judge's decision and order is void because the settlement agreement into which he and employer entered cannot be modified. He then contends that the administrative law judge's determination on modification that he is no longer permanently partially disabled is not supported by substantial evidence, and that in any event, the administrative law judge erroneously calculated his current wage-earning capacity. In the alternative, claimant requests a nominal award. Employer responds, urging affirmance, and claimant replies. On cross-appeal, employer raises the issue of the effective date of modification. Claimant summarily responds, without addressing the issue.

[1]Compensation benefits were based on an unscheduled injury to the neck, shoulders, and arms.

Section 8(i) of the Act, as amended in 1984, 33 U.S.C. §908(i)(1994),[2] provides for the discharge of employer's liability for benefits where an application for settlement is approved by the district director or administrative law judge. Claimants are not permitted to waive their right to compensation except through settlements approved under Section 8(i). *See* 33 U.S.C. §§915, 916; *Diggles v. Bethlehem Steel Corp.*, 32 BRBS 79 (1998); *see generally Henson v. Arcwel Corp.*, 27 BRBS 212 (1993). The procedures governing settlement agreements are delineated in the implementing regulations at 20 C.F.R. §§702.241-702.243. Section 22 of the Act provides for the modification of awards where there has been a change in claimant's condition or a mistake of fact. Section 22, however, explicitly states that it does not authorize the modification of settlements.

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[2]Section 8(i)(1), as amended in 1984, states:

> Whenever the parties to any claim for compensation under this chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

33 U.S.C. §908(i)(1)(1994).

We reject claimant's assertion that the parties entered into a Section 8(i) settlement in 1990 with respect to compensation benefits, which had become final and was thus not subject to modification under Section 22. The evidence does not support claimant's allegation that the parties intended to settle all issues raised by the claim; rather, the documents involved establish that the parties entered into a Section 8(i) settlement only with regard to medical benefits. Two documents were submitted in 1990. One, "Stipulations and Application for Settlement Pursuant to 33 U.S.C. §908(i)," contained language indigenous to a Section 8(i) agreement, providing that "the settlement...with respect to *medical care and treatment* has not been procured by duress and is adequate...." Cl. Post-Trial Br. Ex. B (emphasis added). *See Diggles,* 32 BRBS at 81. This agreement was approved by the administrative law judge on October 2, 1990, and the approval is not at issue. A paragraph entitled "Reasons for Settlement" in this document, stated "The parties do not wish to pursue this matter to trial, and have agreed to compromise their differences by way of Stipulations with respect to the compensation aspect of this claim, and by Section 8(i) Settlement with respect to the future medical care and treatment...." Cl. Post-Trial Br. Ex. B. The second document, which was executed by the parties on the same day and is at issue here, is called "Stipulations of Claimant and Respondents" and covers ongoing permanent partial disability benefits. Stipulation 13 states: "[A] Section 8(i) Settlement Application will be filed concurrently with these Stipulations, with respect to...future medical care and treatment." Cl. Trial Ex. 1 at 6. Clearly the intent of each document is not the same. As the parties executed two separate documents on the same day, with the one covering medical benefits specifically designated a settlement under Section 8(i), while the other covering compensation simply referring to stipulations, the compensation award is one based on agreements under 20 C.F.R. §702.315. As such, it is subject to modification. *See Lucas v. Louisiana Ins. Guaranty Assn.,* 28 BRBS 1 (1994); *Lawrence v. Toledo Lake Front Docks,* 21 BRBS 282 (1988).

We turn next to claimant's argument that the evidence does not support modification. Section 22 provides that upon his own initiative or at the request of any party, on the grounds of a change in condition or mistake in a determination of fact, the factfinder may, at any time prior to one year after the denial of a claim or the last payment of benefits, reconsider the terms of an award or denial of benefits. Section 22 allows for modification of an award where there is a change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Metropolitan Stevedore Co. v. Rambo [Rambo I],* 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*,776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). Once the party seeking modification meets its burden of demonstrating a change in claimant's physical or economic condition or a mistake in a determination of fact, the standards for determining the extent of disability are the same as in the initial proceeding. *See Metropolitan Stevedore Co. v. Rambo [Rambo II],* 521 U.S. 121, 31 BRBS 54 (CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.,* 23 BRBS 428 (1990).

Having determined that claimant's current actual earnings reasonably represented his wage-earning capacity, the administrative law judge concluded that employer had introduced evidence sufficient to warrant termination of permanent partial disability benefits based on a change in claimant's economic condition. Claimant's argument that modification is not appropriate because his actual wages do not reasonably represent his wage-earning capacity is rejected.[3] Section 8(h) of the Act provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity; however, if such earnings do not represent claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). The objective of the inquiry concerning claimant's wage-earning capacity is to determine the post-injury wage to be paid claimant under normal employment conditions as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985). If the claimant's post-injury work is found to be continuous and stable, the claimant's post-injury earnings are more likely to reasonably and fairly represent his wage-earning capacity. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53, 57 (1991). Relevant questions in this regard include whether the post-injury work is suitable, whether the claimant is physically capable of performing it, and whether claimant has the seniority to stay in the job. *See Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

The administrative law judge first determined that claimant presented no evidence suggesting that his current position is sheltered, relying on claimant's admission that he can and does perform all the regular work required of a walking boss on a container ship and a lack of evidence that such work is without utility to employer, due to the beneficence of the employer, or that claimant receives any special consideration from employer. The administrative law judge also found that the medical records fail to substantiate claimant's contention that his physical condition has deteriorated due to the work-related injury, as they merely verify that in 1996 and 1997 claimant has had persistent headaches which only he attributes to the work injury. It was also within the administrative law judge's authority to discredit claimant's assertion that his earnings have diminished due to the inordinate number of days he lost from work due to recurring medical problems, finding claimant's testimony in this regard demonstrably untrue and "cast[ing] a fatal pall on

[3]The party seeking to prove that actual wages do not fairly and reasonably represent wage-earning capacity bears the burden of proof. *See, e.g., Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

the veracity of all his testimony." Decision and Order at 5. As the administrative law judge rationally concluded that claimant's actual wages reasonably represent his earning capacity, and claimant has failed to demonstrate any reversible error, this determination is affirmed. *See generally Cook v. Seattle Stevedore Co*., 21 BRBS 4 (1988).[4]

[4]Claimant argues that the administrative law judge never ruled on his motion for dismissal made at the hearing on the ground that employer did not carry its burden of proof of showing facts warranting modification and that the evidence does not, in fact, support modification. Tr. at 17. The administrative law judge agreed to take the motion under submission and said he would rule on it in writing. While it does not appear that he explicitly ruled on the motion, any error in this regard is harmless, and the issue is moot, in view of his finding that employer's evidence was adequate to support modification.

Although we affirm the administrative law judge's determination that claimant's wages fairly represent his wage-earning capacity, we are unable to affirm his calculation of claimant's loss in wage-earning capacity. Under Section 8(h), the administrative law judge must calculate claimant's wage-earning capacity, which in this case is based on actual earnings post-injury. Under Section 8(c)(21), claimant's wage-earning capacity is compared to his pre-injury average weekly wage in order to determine claimant's loss in wage-earning capacity. In order to make this comparison, claimant's post-injury earnings must be adjusted back to the wage level paid at the time of claimant's injury in order to neutralize the effects of inflation when this figure is compared to claimant's pre-injury average weekly wage. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 4. In this case, the administrative law judge did not make the appropriate adjustment. Rather, based on the sum of increases in the National Average Weekly Wage, the administrative law judge adjusted claimant's average weekly wage upward, from 1988 to 1998 dollars for comparison to claimant's current earnings. Decision and Order at 4. This adjustment and comparison does not accord with Section 8(c)(21). *See Walker v. Washington Metropolitan Area Transit Authority,* 793 F.2d 319, 18 BRBS 101 (CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). Since claimant's post-injury wage-earning capacity must be compared to his pre-injury average weekly wage, the post-injury wage-earning capacity figure must be adjusted downward. While it is correct that the Board has held that in the absence of evidence concerning what specific post-injury jobs paid at the time of claimant's injury, the use of the percentage change in the National Average Weekly Wage (NAWW) should be used in adjusting claimant's post-injury wages downward, *see Quan v. Marine Power & Equip. Co.,* 30 BRBS 124, 127 (1996); *Richardson,* 23 BRBS at 327, in this case, the record contains evidence of the rate claimant's current job actually paid at the time of his injury. *See* Cl. Brief at 3; Emp. Response Brief at 5; Cl. Ex. 2. This figure, in conjunction with the evidence of claimant's post-injury hours, would provide an adjusted wage-earning capacity.[5] Accordingly, we vacate the administrative law judge's calculations relevant to wage-earning capacity,

[5]If, however, the administrative law judge finds good reason to use claimant's actual earnings adjusted downward to pre-injury levels by the change in the NAWW, then his method of calculating claimant's current annual earnings is reasonable. The administrative law judge averaged the earnings over the 4.5 year period prior to the hearing, during which claimant has worked "steady" for Marine Terminals. Inasmuch as this calculation is rationally based on claimant's earnings as a steady walking boss with Marine Terminals, this method of determining claimant's current earnings is affirmed. *See generally Abbott v. Louisiana Ins. Guaranty Ass'n,* 27 BRBS 192, 205 (1993), *aff'd,* 40 F.3d 122, 29 BRBS 22 (CRT)(5th Cir. 1994).

and we remand for him to apply the applicable law to the relevant evidence and recalculate claimant's post-injury wage-earning capacity, as adjusted for inflation. This figure must be compared with claimant's pre-injury average weekly wage in order to determine claimant's loss in wage-earning capacity, if any.

Claimant next challenges the administrative law judge's denial of a nominal award in the event he has no current loss. A worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm. *Rambo II,* 521 U.S. at 121, 31 BRBS at 54 (CRT). In this case, the administrative law judge reasoned that scant evidence fails to prove that a future decline in wages is probable and that claimant's testimony on this issue is not credible. As the administrative law judge's findings in this regard are supported by substantial evidence, claimant has not established a significant potential of future economic harm under *Rambo II*. The denial of a nominal award is thus affirmed.

The final issue we address is employer's request that modification take effect to "at least 1993."[6] The administrative law judge, in granting modification, did not specify an effective date. The plain language of Section 22 provides that retroactive termination of benefits is not permissible, as the section explicitly states, with two excepting provisions, that "such new order shall not affect compensation previously paid...." 33 U.S.C. §922. Section 22 provides two exceptions to the provision that a new order should not affect compensation previously paid. First, it states that an increase in compensation may be made effective from the date of injury. Secondly, it states that if any compensation due is unpaid, an award decreasing the compensation rate may be effective from the date of injury, and that employer shall receive a credit against compensation due. The Board has held that termination is a not a "decrease" within the meaning of Section 22, warranting application of a termination to a date prior to the administrative law judge's order. *Spitalieri v. Universal Maritime Services,* 33 BRBS 6, 8-9 (1999), *aff'd on recon. en banc.,* BRBS , BRB No. 98-743 (Oct. 7, 1999) (McGranery and Brown, JJ., dissenting). Employer is obligated to comply with the terms of an award until a new award is entered. The effective date of a modification order terminating benefits is the date the administrative law judge's order granting modification was filed. *See Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993).

[6]Employer states that while it is aware that it cannot recoup monies previously paid, the amount can be used as a credit against possible future liability. *See Stevedoring Services of America, Inc. v. Eggert,* 953 F.2d 552, 25 BRBS 92 (CRT)(9th Cir. 1992), *cert. denied,* 505 U.S. 1230 (1992).

In this case, the administrative law judge's decision did not decrease claimant's compensation, but rather terminated continuing disability benefits for his back injury altogether. Thus, the exception permitting a retroactive decrease which may be reflected in a credit under Section 22 does not apply, and the termination of compensation cannot be effective prior to the date of the decision. *Spitalieri,* 33 BRBS at 8-9; *Parks*, 26 BRBS at 172. However, if on reconsideration the administrative law judge, after recalculating claimant's earning capacity, determines that claimant is entitled to continuing permanent partial disability compensation benefits, he must specify a modification date and allow the Special Fund a credit for any overpayment.

Accordingly, the administrative law judge's Decision and Order Granting Modification is affirmed in part, and vacated in part, and the case is remanded for further consideration of claimant's wage-earning capacity in accordance with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge