

BOOKER T. REDDICK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNIVERSAL MARITIME SERVICES)	DATE ISSUED: <u>June 13, 2001</u>
)	
Self-insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (99-LHC-0594) of Administrative Law Judge Paul H. Teitler 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, a longshoreman, injured his back on November 5, 1988, as a result of a falling container. He sought benefits under the Act, and was awarded permanent total disability benefits by a Decision and Order dated June 17, 1992. 33 U.S.C. §908(a). In that decision, the parties stipulated that claimant had an average weekly wage of \$1,032.01. *See* Cl. Ex. G. Thereafter, employer filed a motion for modification based on a change in condition. 33 U.S.C. §922. Claimant owns a number of businesses, and employer contended

that claimant's direct involvement with the businesses, and therefore his assets, have increased. Thus, employer contended that claimant has had a change in his economic condition.

Claimant has a number of business interests in Newark, New Jersey, which consist primarily of a liquor store, laundromats and rental houses, all of which he owned prior to his injury in 1988. The liquor store, Booker Liquors, has been owned continuously by claimant since 1976. The store is open 13 hours a day, from 9:00 a.m. until 10:00 p.m. H. Tr. at 30-32. In addition, claimant has owned Booker's Laundromat since 1976 or 1977 and the Suds and Duds Laundromat since 1986.¹ Booker's Laundromat is located next door to Booker's Liquors.

In his decision, the administrative law judge found that there is evidence revealing a change in claimant's functional impairment. The administrative law judge also found that claimant's post-injury earnings have increased substantially, and he is performing substantial full-time, gainful employment. Thus, he found that modification of the previous award is warranted. Moreover, the administrative law judge found that claimant knowingly and willfully omitted or underreported his business earnings from the LS-200 Report of Earnings statements he was required to file. Therefore, the administrative law judge concluded that claimant must forfeit all future benefits pursuant to Section 8(j) of the Act, 33 U.S.C. §908(j). The administrative law judge denied claimant's motion for reconsideration.

Claimant contends on appeal that the administrative law judge improperly found that claimant is entitled to no further benefits based on a violation of Section 8(j). Claimant contends that, at most, he would not be entitled to benefits during the period he underreported his earnings, and that if any benefits had been paid during this period, employer would be entitled to a credit against future benefits due. In addition, claimant contends that the administrative law judge improperly analyzed the evidence to conclude that claimant is no longer disabled; specifically, he asserts that the administrative law judge did not make a finding as to claimant's post-injury wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's decision.

¹Claimant also owns a property on 17th Street in Newark, which consists of a multi-family residence, which has been condemned since 1983, and another laundromat, Suds and Duds II, on the first floor. H. Tr. 59-61.

Initially, claimant contends that the administrative law judge erred in finding that he is entitled to no further benefits based on a violation of Section 8(j). Section 8(j) permits an employer to request that a claimant report his post-injury earnings, including those from self-employment. Once a request is made, the claimant must complete and return the LS-200 Form within 30 days of his receipt of the form, whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture for the period during which the employee was required to file such report if earnings are knowingly omitted or understated.²

²Specifically, Section 8(j) provides:

(1) The employer may inform a disabled employee of his obligation to report to the employer not less than semiannually any earnings from employment or self-employment, on such forms as the Secretary shall specify in regulations.

(2) An employee who-

(A) fails to report the employee's earnings under paragraph (1) when requested, or

(B) knowingly and willfully omits or understates any part of such earnings, and who is determined by the [district director] to have violated clause (A) or (B) of this paragraph,

33 U.S.C. §908(j)(1994); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994)(decision on recon.); 20 C.F.R. §§702.285-702.286. An employer can recover such forfeited compensation only “by a deduction from the compensation payable” in the future. §908(j)(3)(1994); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT)(5th Cir. 1994).

In the present case, the administrative law judge found that claimant’s reasons for not stating his income from his business entities are not credible and that claimant knowingly and willfully omitted his earnings from his business entities. The administrative law judge, therefore, concluded that claimant has forfeited his right to all future compensation benefits under the Act. The conclusion, that claimant forfeits all benefits, cannot be affirmed, as it is contrary to the plain language of Section 8(j). Section 8(j) provides for the forfeiture of benefits only during the period when claimant underreported his income. *Hundley*, 32 BRBS at 258. It thus provides for suspension of benefits during specified periods rather than the forfeiture of all future benefits. Therefore, we vacate the administrative law judge’s finding that claimant has forfeited his right to all benefits under the Act, as this is not the remedy provided by Section 8(j).

Although there are several years of income reports at issue in this case, the administrative law judge did not make any specific findings regarding these reports, despite discussing claimant’s business income at length. The record contains the reports for the years 1995, 1996 and 1997. Decisions rendered under the Act are subject to the Administrative Procedure Act which requires that every adjudicatory decision be accompanied by a statement of “findings and conclusions and the reasons or basis therefor,

forfeits his right to compensation with respect to any period during which the employee was required to file such report.

(3) Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee in any amount and on such schedule as determined by the [district director].

on all material issues of fact, law or discretion presented in the record.” 5 U.S.C. §557(c)(A).

As the administrative law judge in the instant case did not make specific findings regarding whether claimant adequately reported his earnings on each form or the specific periods in which benefits should be suspended, we remand the case to the administrative law judge for further consideration of this issue. In addressing claimant’s earnings for each period, the administrative law judge must apply the definition provided in Section 702.285(b), 20 C.F.R. §702.285(b), which implements Section 8(j) of the Act. As the administrative law judge recognized, this provision defines “earnings” as:

all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss or if the profits were reinvested.

If the administrative law judge finds that claimant had earnings under this definition which were not reported, claimant’s benefits will be forfeited for the specific periods when reports were requested and earnings were underreported.³ *Hundley*, 32 BRBS at 258.

We turn, then, to the administrative law judge’s finding that claimant no longer has a loss in wage-earning capacity. In this regard, claimant contends that the administrative law judge erred in finding a change in claimant’s condition sufficient to 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. 33 U.S.C. §922. Modification may be granted where claimant’s physical and/or economic condition has improved or deteriorated following the entry of the initial decision. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). The party seeking modification bears the burden of proving a

³If the administrative law judge finds that claimant’s benefits should be suspended because of claimant’s misrepresentation of his earnings, the administrative law judge must remand the case for the district director to consider claimant’s financial situation and to establish the forfeiture schedule. 33 U.S.C. §908(j)(3)(1994); 20 C.F.R. §702.286(c); *Moore*, 28 BRBS at 184.

change in condition or mistake in fact. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

Claimant contends that the administrative law judge erred in finding that claimant's functional impairment improved based on the evidence that "claimant lifted cases of soda, opened the gates to his stores and operates the computer which keeps records for his store." Decision and Order at 17. This finding is supported by the testimony of investigators who observed claimant's activities. *See, e.g.*, Tr. at 153. Therefore, we affirm the administrative law judge's finding that claimant is capable of performing some work, as it is supported by substantial evidence. However, this finding alone does not establish that modification under Section 22 is warranted. Employer sought modification of claimant's permanent total disability award; thus, it bore the burden of demonstrating that claimant can return to his former longshore work or that he has obtained suitable alternate employment. Moreover, a showing that claimant has no loss in wage-earning capacity requires a determination that claimant's wage-earning capacity exceeds his pre-injury average weekly wage. Evidence that claimant performed some tasks at his businesses does not establish that he has the physical capacity to return to his usual work as a longshoreman, or that he no longer has a loss in wage-earning capacity. Therefore, the administrative law judge's conclusion that the evidence supports modification based on a change in claimant's wage-earning capacity must be vacated and the case remanded for further findings.

In this regard, claimant further contends that the administrative law judge failed to determine the dollar amount representing his wage-earning capacity and erred in concluding that he has no loss in wage-earning capacity. The administrative law judge found that claimant's business activities, although they pre-existed the injury, have increased since the total disability award was entered and that his assets have also increased. On this basis, the administrative law judge concluded that modification was warranted. However, in reaching this conclusion, the administrative law judge did not determine claimant's wage-earning capacity, as claimant correctly contends. Consequently, he did not make a proper finding regarding the current extent of claimant's disability. Moreover, the administrative law judge erred in including claimant's profits and the increase in his assets in his analysis.

Pursuant to Section 8(h) of the Act, 33 U.S.C. §908(h), the overarching objective is to ascertain the wage that would have been paid on the open labor market to the claimant in his injured condition. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 61(CRT). Section 8(h) states that the claimant's wage-earning capacity "shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity." If the claimant has no actual earnings or if his actual earnings do not fairly and reasonably represent claimant's earning capacity, the administrative law judge must

determine claimant's wage-earning capacity with regard to the factors stated in Section 8(h).⁴ Actual post-injury earnings which are higher than the claimant's pre-injury average weekly wage do not preclude a finding that the claimant has a loss in wage-earning *capacity*, *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT)(9th Cir. 1991), nor do lower actual earnings preclude a finding that the claimant's wage-earning capacity is higher than his actual earnings. *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT)(5th Cir. 1990). In addition, the Act defines "wages" in pertinent part as "the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes)...." 33 U.S.C. § 902(13).

Thus, "wage-earning capacity" refers to an injured employee's ability to command regular income as the result of his personal labor. *See* 2 Arthur Larson and Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW, §83.05 (2000). Income from a business owned by the employee, even though he contributes some work to it, is not included in claimant's earnings and should not be used to reduce disability compensation. *Id.*; *Joy Technologics, Inc. v. Workmen's Compensation Appeals Board*, 155 Pa. Cmwlth. 9 (1993). Where, however, the business income is the direct result of the claimant's "personal management or endeavor," or the claimant performs such extensive services for the business that the income represents salary rather than profits, the income should be considered in determining wage-earning capacity. LARSON'S, §83.05; *see Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989)(Board affirmed administrative law judge's finding that claimant was more like an employee than an owner, but held that administrative law judge erred in including in claimant's wage-earning capacity estimated "profits" because no payments were anticipated); *see also McGee v. Estes Express Lines*, 125 N.C. App. 298, 480 S.E. 2d 416 (N.C. Ct. App. 1997)(inquiry is whether skills used by the claimant in running his business would enable him to compete in labor market); *Nannery v. GAF Corp.*, 75 A.D.2d 697, 427

⁴These include: the nature of the injury, the degree of physical impairment, the claimant's usual employment, and "any other factors or circumstances . . . which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future." 33 U.S.C. §908(h); *see Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT)(1992).

N.Y.S. 2d 306 (N.Y. App. Div. 1980). In contrast, as discussed above, the term “earnings” as used in Section 8(j) is a much broader concept, as “wages” and “salaries” are merely exemplary of earnings under Section 702.285, and this definition includes “revenue” earned by a business without regard to whether it is gross revenue or net revenue. *See* 20 C.F.R. §702.285. Thus, claimant’s total earnings from self-employment for purposes of Section 8(j) do not automatically equate to his wage-earning capacity, and they must be analyzed to determine whether they represent gross receipts or profits as opposed to wages paid for claimant’s personal labor. Only the latter is properly considered in evaluating wage-earning capacity.

In the present case, the administrative law judge erred in considering the gross revenue from claimant’s businesses in determining that the evidence establishes that claimant’s economic condition has changed. As claimant correctly contends, the profits of his businesses were not included in the determination of his pre-injury average weekly wage, and thus they cannot be included now to determine claimant’s wage-earning capacity. Only those earnings which are properly considered as wages paid for his services may be included in determining his wage-earning capacity. Therefore, on remand, the administrative law judge must discuss the relevant evidence of record and render findings as to the nature of the earnings claimant receives from his business entities in order to determine claimant’s current wage-earning capacity. The administrative law judge should determine claimant’s wage-earning capacity with reference to the amount of salary claimant could earn from his own labor. *See Seidel*, 22 BRBS at 406. Then, the administrative law judge must compare claimant’s current wage-earning capacity, adjusted for inflation, with his pre-injury average weekly wage to determine whether claimant is entitled to benefits pursuant to Section 8(c)(21). 33 U.S.C. §§908(c)(21), 908(h); *see Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990).

Accordingly, the Decision and Order and the Order Denying Motion for Reconsideration are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge