BRB No. 98-1614

JAMES HELWICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SERVICE ENGINEERING COMPANY	)	DATE ISSUED: 9/14/99
	)	
and	)	
	)	
NATIONAL FIRE UNION INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Petition for Modification of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Steven M. Birnbaum (Law Offices of Steven M. Birnbaum), San Francisco, California, for claimant.

Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Petition for Modification of Administrative Law Judge Alfred Lindeman 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 marine machinist, suffered injuries to his back on March 15, 1985, when

he was struck with a hydraulic ram during the course of his employment. On March 3, 1988, the district director approved the parties' stipulations that claimant was entitled to permanent partial disability compensation based on a residual wage-earning capacity of $280 per week. Subsequently, claimant requested modification under Section 22 of the Act, 33 U.S.C. §922, based on alleged changes in both his physical and economic conditions.

In his decision, the administrative law judge found, *inter alia*,[1] that claimant failed to establish a change in his physical condition but that he had a change in his economic condition. Accordingly, the administrative law judge awarded claimant permanent partial disability compensation based on a post-injury wage-earning capacity of $280 per week from March 3, 1988 until January 1, 1991, on a wage-earning capacity of $75 per week from January 1, 1991 until November 12, 1997, based on claimant's wages at his gun club position, and on a wage-earning capacity of $280 per week from November 12, 1997, and continuing, based on suitable jobs identified in a labor market survey of that date.

On appeal, employer contends that the administrative law judge erred by improperly placing the burden on it to establish that claimant had not suffered a change in his economic condition, *i.e.*, a decrease in his wage-earning capacity, in not considering all of the evidence establishing suitable alternate employment for the period 1991 to 1997, and in improperly calculating claimant's residual post-injury wage-earning capacity. Claimant responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied*, 391 U.S. 929 (1968). When

[1]The administrative law judge's determinations regarding claimant's failure to establish a change in his physical condition, the relationship and effects, if any, of a subsequent fall, and an alleged psychological component of claimant's condition are not raised on appeal and are hereby affirmed.

considering a motion for modification, the administrative law judge is permitted to have before him the record from the prior hearing. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). It is well-established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See*, *e.g.*, *Metropolitan Stevedore Co. v. Rambo,* 521 U.S. 121, 31 BRBS 54(CRT) (1997)(*Rambo II); Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Once this initial burden is met, the standards for determining disability are the same during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *Id.*

Employer initially contends that the administrative law judge erroneously placed the burden on it to establish that claimant's actual earnings in the period from 1991 to 1997 were not indicative of claimant's post-injury wage-earning capacity; specifically employer contends that because claimant is the party seeking modification, he bears the burden of establishing that his post-injury wage-earning capacity has declined from that to which the parties stipulated in 1988. We reject this contention. An award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. Wage-earning capacity is determined under Section 8(h), 33 U.S.C. §908(h), which provides that claimant's wage-earning capacity shall be his actual post-injury wages if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not accurately reflect his wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably reflects his wage-earning capacity. *Long v. Director, OWCP*, 767 F.2d 1518, 17 BRBS 149 (CRT)(9th Cir. 1985). In this case, the administrative law judge found that claimant demonstrated a change in economic condition based on evidence that claimant's actual earnings from 1991 to 1997 were lower than the stipulated residual earning capacity in the prior order and that claimant has been unable to secure full-time employment at the higher rate of $7.00 per hour. Decision and Order at 12. Once claimant meets his burden with regard to demonstrating a change, Section 8(h) gives rise to the presumption that claimant's wage-earning capacity is equal to his actual earnings, and it is employer's burden to establish that claimant's actual post-injury wages do not reflect his wage-earning capacity. *Rambo II*, 521 U.S. at 139, 31 BRBS at 62(CRT). The administrative law judge properly allocated the burdens in this case.

In the instant case, the administrative law judge found that claimant's wages of $300 per month, working approximately 20 hours per month repairing equipment at a private gun club, represent his wage-earning capacity for the period of 1991 to 1997. Employer, however, asserts that the administrative law judge failed to properly analyze its evidence, which it asserts established the availability of suitable alternate employment at a higher wage during this period of time; moreover, employer avers that the administrative law judge erred in failing to consider the fact that claimant chose to work fewer hours than he was

capable of performing at a flat rate of pay.[2]

In support of its attempt to establish the availability of suitable alternate employment with a higher post-injury wage-earning capacity than claimant's actual earnings, employer submitted three vocational reports encompassing the relevant period of time, 1991 to 1997. In his decision, the administrative law judge rejected both the Causey report, CX 10, prepared in February 1991 and the Fogelman report, CX 9, prepared in 1992, because the jobs identified in these reports either lacked sufficient descriptions to determine whether the duties were within claimant's restrictions or indicated that there were no available openings. Decision and Order at 15. Employer does not contest these determinations. Rather, employer contends that the administrative law judge erred in failing to consider the report of its vocational consultant, Ms. Winkler, prepared in 1997, which contains a retrospective labor survey. EX 26. We agree. Our review of the record reflects that in addition to identifying suitable alternate employment available in 1997, Ms. Winkler also identified twelve prior full-time and nine part-time positions allegedly within claimant's physical and vocational capabilities. EX 26. Employer may establish the availability of suitable alternate employment at an earlier date through the use of a retrospective market survey. *See Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT)(9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). In addressing this issue, the administrative law judge did not discuss this evidence. We therefore vacate the administrative law judge's finding that claimant's actual post-injury wages fairly and accurately represent his wage-earning capacity from 1991 to 1997, and we remand the case to the administrative law judge for consideration of all the evidence on this issue.[3] *See Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

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[2]The record reflects that at the time of the original award in 1988, claimant was capable of working forty hours per week in light work not involving repetitive or heavy lifting, bending and stooping. EX 15. As the administrative law judge's conclusion that claimant has suffered no change in his physical condition is not appealed, claimant remains capable of work within the above restrictions throughout the relevant period and continuing.

[3]We note that, if employer establishes the availability of suitable alternate

Employer further contends that the administrative law judge erred in calculating claimant's residual wage-earning capacity both in his position at the gun club from 1991 to 1997 and in the post-1997 suitable alternate employment positions. In addressing claimant's job at the gun club, the administrative law judge found that claimant earned $300 per month, resulting in weekly earnings of $75 which he found represented claimant's wage-earning capacity from 1991 to 1997. Employer contends that in reaching this result, the administrative law judge failed to consider that claimant worked only twenty hours per month at the gun club position, whereas the administrative law judge found that claimant was capable of working in a suitable position forty hours per week. Employer thus posits that these earnings do not represent claimant's earning capacity and that dividing claimant's salary by the actual hours worked indicates an earning capacity of $14.29 per hour. We reject this argument, as there is no evidence that work at the gun shop was available for claimant on a full-time basis or at a higher rate than actually paid. Based on the evidence, the administrative law judge did not err in finding that claimant's earnings in this job were $75 per week. Whether these earnings are representative of claimant's wage-earning capacity turns on the availability of full-time, higher paying suitable employment, an issue remanded for the administrative law judge's consideration.

Employer also contends that the administrative law judge erred in concluding that claimant's post-1997 wage-earning capacity of $11.15 per hour was the equivalent of his wage-earning capacity of $7 per hour to which the parties stipulated in 1988. In calculating claimant's post-injury wage-earning capacity, the administrative law judge must adjust a position's post-injury wage levels to the levels paid pre-injury in order to neutralize the effects of inflation. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, Ms. Winkler's report contains the wages paid in the proffered positions in 1991, which must be adjusted to 1988 levels to be compared to the prior stipulation, and to 1985 levels for comparison with the pre-injury average weekly wage. The administrative law judge may adjust those wages by using the percentage change in the National Average Weekly Wage (NAWW) calculated under Section 6(b)(3), 33 U.S.C.

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employment, a claimant may establish a lower wage-earning capacity if he demonstrates that he diligently sought such employment but was unable to obtain it. *Livingston v. Jacksonville Shipyards*, 32 BRBS 123 (1998); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

§906(b)(3). *See Richardson,* 23 BRBS at 330. The administrative law judge found higher-paying suitable alternate employment established in 1997 by a position which paid $11.15 per hour at that time. Relying on evidence that this job paid $9.10 in 1991, he inferred it paid about $7.00 an hour in 1988, the same rate as used in the initial award. Employer argues that the administrative law judge should have made a more specific calculation using the NAWW. This general argument has merit, but the specific calculations urged by employer do not.

Employer asserts that the NAWW increased by 38.4 percent between 1988 and 1997. Based on this increase, employer asserts that claimant's $7.00 per hour earning capacity in 1988 would equate to $9.69 in 1997, and argues that when this figure is compared to the $11.15 rate, it indicates an increased earning capacity. This argument lacks both a statutory and logical basis, as there is no rationale which supports adjusting the figure stipulated in 1988 upward. The relevant starting point is the wage rate paid by the suitable job shown to be available in 1997, which is then adjusted downward to the rate that job paid in 1988 to eliminate the effects of inflation. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Quan v. Marine Power & Equipment Co.,* 30 BRBS 124 (1996); *Richardson,* 23 BRBS at 330. The adjusted rate is then compared to the prior rate for purposes of determining the change in claimant's economic condition. *Id.* Applying the 38.4 percent rate used by employer to adjust the $11.15 hourly rate yields the figure of $6.87[4] paid by that job in 1988, an amount remarkably close to the administrative law judge's inference. Employer's argument is thus rejected, and the administrative law judge's findings regarding claimant's wage-earning capacity after 1997 are affirmed.

Accordingly the administrative law judge's finding regarding claimant's loss in wage-earning capacity from 1991 to 1997 is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the Decision and Order on Petition for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

[4]The exact calculations are as follows: 38.4 % of $11.15 = $4.28. $11.15 - $4.28 = $6.87.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge