BRB Nos. 92-1425
and 92-1425A

MARK MILOSEVICH	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order - Denying Modification and Granting Section 8(f) Relief and Supplemental Decision and Order Denying Request To Petition For Attorney's Fees of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

William H. Shibley, Long Beach, California, for claimant.

Barry F. Evans (Evans, Cumming and Malter), Woodland Hills, California, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order - Denying Modification and Granting Section 8(f) Relief (86-LHC-815) 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 if they 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

The case currently on appeal involves the administrative law judge's denial of requests for modification under Section 22 of the Act, 33 U.S.C. §922, filed by claimant and employer. Claimant, a longshoreman, sustained a work-related back injury on August 30, 1985, when he slipped and fell while attempting to gain entry into a cargo hold. Claimant first returned to light-duty work on December 20, 1985, and resumed his regular "board" work approximately one month later. Claimant, however, continued to experience back pain which he felt caused him to lose time from work and accordingly sought compensation under the Act.

In the initial Decision and Order, the administrative law judge rejected employer's intoxication defense under Section 3(c) of the Act, 33 U.S.C. §903(c), and awarded claimant temporary total disability compensation from August 31, 1985, through December 19, 1985, and permanent partial disability compensation thereafter. 33 U.S.C. §908(b), (c)(21). In calculating the permanent partial disability award, the administrative law judge determined that claimant sustained an 11 percent loss in his wage-earning capacity based on a comparison of the number of days claimant actually worked after his return to work during the two years following his injury with the number of days he would have worked had he not had to miss days due to a sore back. *See* 33 U.S.C. §908(h).[1] The administrative law judge also awarded claimant medical expenses pursuant to 33 U.S.C. §907 and $8,125 in attorney's fees payable by employer. *See* 33 U.S.C. §928.[2]

[1]The administrative law judge projected that in 1986, the year after the injury, based on the 918.75 hours claimant actually worked from January to September, he would work 1225 hours, or 153 days, over the full year as he was; but for the injury, the administrative law judge found he would have worked 172 days. This difference constituted an 11 percent loss. Decision and Order - Awarding Benefits at 4. The administrative law judge performed a similar analysis for 1987, again finding an 11 percent loss.

[2]Employer initially appealed the administrative law judge's Decision and Order to the Board on April 22, 1988. Subsequently, it filed its petition for modification with the district director on July 25, 1989, and on June 22, 1990, employer filed a petition for modification with the administrative law judge. By order dated July 31, 1990, the Board remanded the case to the administrative law judge, stating that employer could request reinstatement of its appeal within 30 days from the date the administrative law judge filed his order on modification. The administrative law judge's Decision and Order Denying Modification was filed on March 17, 1992; therefore, employer's request for reinstatement should have been filed by April 16, 1992. Employer requested reinstatement on June 29, 1992. By order dated September 23, 1992, the Board denied employer's request as being untimely. The only appeal before the Board is, therefore, that of the administrative law judge's Decision and Order on modification.

Thereafter on May 11, 1990, employer filed a petition for modification alleging that a significant change had occurred in claimant's economic condition, in that both claimant's number of hours worked and average earnings had increased since the time of the initial award. Emp. Ex. 2. In response, claimant filed a pre-hearing statement in which he asserted that if the award is modified, it should be modified upward rather than downward, because his loss of wage-earning capacity has actually increased. A hearing was held on the modification petition on December 5, 1991.

In his Decision and Order Denying Modification, the administrative law judge found that claimant still continued to exhibit an 11 percent loss in wage-earning capacity despite the increased number of hours worked.[3] In so concluding, the administrative law judge credited claimant's testimony that his ability to work more hours is reflective of a general increase in work availability, and that, but for his back condition, he would be able to work even more hours. The administrative law judge also noted that claimant continued to miss about three days per month of work due to his back pain, approximately the same number of missed days relied upon in making the initial award of permanent partial disability benefits. The administrative law judge rejected claimant's claim of an increased loss in his wage-earning capacity. The administrative law judge found that claimant's log books, in which he recorded the time allegedly missed from work due to back problems, were too self-serving and speculative to support claimant's assertion that he currently has a 20 percent loss of wage-earning capacity.[4] Employer now appeals and claimant cross-appeals the administrative law judge's decision denying modification.

In its appeal, employer reiterates the argument made below that claimant's increased hours and earnings following his initial award demonstrate a significant change in claimant's economic condition such that he no longer has any loss of wage-earning capacity or, if he has, it has decreased substantially. Employer also alleges that it was error for the administrative law judge to find that claimant's log books were too self-serving and too speculative to support claimant's assertion of increased disability and yet credit claimant's general testimony over employer's Pacific Marine Association (PMA) wage records in finding that claimant continued to exhibit an 11 percent loss in his wage-earning capacity. Employer further maintains that the administrative law judge's decision seems to conclude that modification cannot be based on change in claimant's economic status so long as the physical disability continues. Claimant responds that the administrative law judge properly denied employer's modification request and that to the extent that the administrative law judge found no decreased loss of wage-earning capacity, the decision should be affirmed. Claimant, however, asserts that the administrative law judge improperly disregarded his uncontradicted evidence of increased disability , *i.e.*, his log books, and asserts that employer is liable for the attorney's fee incurred in defending employer's request for modification.

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[3]The administrative law judge reasoned that missing about three days of work per month out of 26 work days (claimant reported for dispatch at least six days a week x 4.33 weeks per month) amounts to approximately 11 percent.

[4]The administrative law judge also granted employer Section 8(f) relief; this issue is not before the Board.

On cross-appeal, claimant contends that based on such factors as economic conditions at the port, the increased cost of living, and claimant's need to earn more money because he has had more children, the administrative law judge should have found an increased loss in his wage-earning capacity. Claimant argues that the administrative law judge should have credited claimant's logs to find more frequent absences due to his back condition. Claimant further avers that the administrative law judge erred in denying his request for fees and costs incurred in defending against employer's modification request in his Supplemental Decision and Order Denying Request to Petition For Attorney's Fees. Employer responds that the administrative law judge properly determined that claimant did not meet his burden of establishing a change in condition and acted within his discretion in denying claimant's request to file a petition for attorney's fees.

Under Section 8(c)(21), 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. 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. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge 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 under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *See Cook*, 21 BRBS at 6; *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). If the claimant is unable to return to his usual employment as a result of his injury but secures other employment which is representative of his wage-earning capacity, the wages which the new job would have paid at the time of injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. Sections 8(c)(21) and 8(h) require that wages earned in a post-injury job 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 Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 4; *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The burden of proof is on the party seeking to prove that actual post-injury wages are not representative of claimant's wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992).

We reject both employer's and claimant's arguments that the administrative law judge erred in denying modification on the evidence presented. Although the Board has held that Section 22 permits modification based on a change in claimant's economic condition, *see Ramirez v. Southern Stevedores*, 25 BRBS 260, 264-265 (1992), the administrative law judge properly found that no

basis existed for permitting modification on that ground in this case.[5] Crediting claimant's testimony that the "board" from which he gets jobs has many more openings than there were previously, that he could work seven days per week if he wanted to do so, and that he still misses about the same amount of work due to his back condition as he did previously, the administrative law judge reasonably determined that claimant continued to exhibit an 11 percent loss in his wage-earning capacity. Contrary to employer's assertions, it was not an abuse of discretion for the administrative law judge to reject claimant's logbooks as self-serving and then credit his general testimony; the administrative law judge may accept or reject any part of any testimony according to his judgment. *See Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969).[6]

Claimant's argument that the administrative law judge erred in discrediting his log books must fail under the same rationale. Although claimant alleges that the administrative law judge should have granted modification based on such factors as the increased cost of living and his need to have more money to support his larger family, we note that these are not the types of changes in claimant's economic condition contemplated under Section 22 of the Act. As neither party has raised any reversible error made by the administrative law judge in evaluating the evidence or making credibility determinations, his denial of modification in this case is affirmed. *See Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992).

We next address claimant's appeal of the administrative law judge's denial of his request to file a petition for attorney's fees for work performed in defending employer's modification request. On March 16, 1992, subsequent to the issuance of the administrative law judge's Decision and Order Denying Modification and Granting Section 8(f) relief on March 11, 1992, claimant's counsel filed a post-hearing brief in which he requested 30 days in which to file a fee petition. In a Supplemental Decision and Order Denying Request to Petition for Attorney's Fees, the administrative law judge stated that claimant's post-hearing brief was late and therefore not available to him in preparing his Decision and Order. The administrative law judge further determined that there was nothing in the brief which would have caused him to alter his decision. Finally, the administrative law judge noted that claimant had not prevailed in obtaining any increase in his compensation, and that his attorney's

[5]We note the result reached by the administrative law judge in denying modification is consistent with the recent decision of the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, in *Rambo v. Director, OWCP*, F.2d , No. 92-70783 (June 24, 1994), holding that modification cannot be granted based on a change in claimant's economic condition.

[6]In its post-trial brief, which employer incorporated into its petition for review, employer suggests that it was improper for the administrative law judge to entertain claimant's increased disability argument on modification. The administrative law judge has broad discretion and may expand the hearing to include new issues provided that the parties are afforded a reasonable time in which to prepare. *See* 20 C.F.R. §702.336. Although claimant's argument was apparently raised in his pre-hearing statement filed some 20 days prior to the hearing, the parties were given the opportunity for post-hearing briefing. In any event, given the administrative law judge's denial of the petition, employer's contentions are moot.

services had not contributed to the denial of employer's modification petition. On appeal, claimant argues that the administrative law judge erred in denying him the opportunity to file a fee petition for work performed in defending employer's modification request.

An award of an attorney's fee is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 272 (1980).

We agree with claimant that the administrative law judge abused his discretion in denying his request to file a fee petition for work performed in defending employer's modification request. The Board has held that where, as here, a claimant is successful in defending his award, his attorney is entitled to a fee. *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, 110 (1990), *aff'd on recon.*, 26 BRBS 32 (1992). The test for determining whether an attorney's work is compensable is whether the work reasonably could have been regarded as necessary to establish entitlement at the time it was performed. *See, e.g., Cabral v. General Dynamics Corp.,* 13 BRBS 97 (1981). In the instant case, a hearing was held on the issue of modification at which time claimant was represented by counsel. As a result of the modification procedure, claimant succeeded in defending employer's attempt at reducing or eliminating the permanent partial disability award. While the reasons given by the administrative law judge for denying a fee suggest that he did not hold the quality of the claimant's counsel's representation in high regard, they do not justify the administrative law judge's denial of a fee in its entirety. Moreover, the administrative law judge's rationale indicates he reviewed the work for whether it was necessary to his disposition rather than applying the proper standard as to whether counsel could view the work as reasonable and necessary at the time it was performed. Accordingly, the administrative law judge's determination that claimant is not entitled to file a fee petition is vacated, and the case is remanded for the administrative law judge to permit counsel to file a fee petition and to award a reasonable fee for work performed in defense of employer's modification request consistent with the requirements of 20 C.F.R. §702.132.

Claimant's counsel has also submitted a petition for fees and costs for services rendered before the Board in which he requests $2,970, representing 19.8 hours at $150 per hour. Employer has filed no objections. Although some of the itemized services claimed were performed in defense of the employer's appeal of the administrative law judge's initial Decision and Order, which was dismissed prior to a final disposition on the merits, the Board has held that claimant's success on modification constitutes a successful prosecution sufficient to support an award of attorney's fees for claimant's efforts in connection with the previously dismissed claim. *Brodhead v. Director, OWCP*, 17 BLR 1-138 (1993). As claimant was ultimately successful in establishing entitlement even though the Board did not decide the case on its merits, counsel is entitled to a fee for work performed before the Board, because he could reasonably have regarded the work as necessary at the time it was performed. Inasmuch as the requested fee is not unreasonable given the complexity of the case, the quality of the representation, and the benefits obtained, we award claimant's counsel the

full $2,970 fee requested. *See* 20 C.F.R. §802.203.[7]

Accordingly, the administrative law judge's Decision and Order - Denying Modification and Granting Section 8(f) Relief is affirmed. The Supplemental Decision and Order Denying Request to Petition for Attorney's Fees is vacated and the case is remanded for the administrative law judge to award a reasonable fee in accordance with this opinion. Claimant's attorney is awarded a fee of $2,970 for work performed before the Board in successfully defending employer's appeal.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge

[7]In his cross-petition and response briefs, claimant requests that sanctions be imposed against employer under Section 26 of the Act, 33 U.S.C. §926, for filing and pursuing a frivolous appeal. The United States Court of Appeals for the Ninth Circuit, wherein this case arises, recently indicated that the Board has no authority to assess costs as sanctions under Section 26. *Metropolitan Stevedore Co. v. Brickner*, 11 F.3d 887, 27 BRBS 132 (CRT)(9th Cir. 1993).