BRB No. 92-2127

TERRY W. MYERS	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	
	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order on Reconsideration, Order Denying Modification, and Order Awarding Attorney's Fees of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

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

Yvette A. Boehnke (Samuelson, Gonzalez, Valenzuela & Sorkow), Long Beach, California, for employer/carrier.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Order on Reconsideration, Order Denying Modification, and Order Awarding Attorney's Fees (91-LHC-1385) of Administrative Law Judge Edward C. Burch 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 is a shipwright who worked for employer as an optical alignment specialist. On June 6, 1987, claimant sustained injuries during the course of his employment when a suspended container upon which he was standing fell fifty to sixty feet. As a result of his accident, claimant

was hospitalized with several broken teeth, facial lacerations, a broken nose, and injuries to his right knee, right arm and back. Claimant received ongoing medical treatment over the next several months and was released to return to work, without restrictions, by Dr. Mutz on November 2, 1987. Claimant returned to light duty work. Thereafter, in a September 1988 report, Dr. Mutz further noted that claimant had sustained permanent partial impairment referable to the thoracic spondylosis and the chondromalacia of the right patella and that further medical care was warranted. In December 1989, claimant was evaluated by Dr. Latteri, an orthopedic surgeon. Dr. Latteri rated claimant's impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* as 7.5 percent whole man impairment for thoracic and cervical spine symptoms and an additional 7 percent loss to the right upper extremity secondary to ulnar nerve sensory loss of the fourth and fifth fingers of the right hand.

In his Decision and Order, the administrative law judge determined that claimant is entitled to both an unscheduled permanent partial disability award for his back injury under Section 8(c)(21), 33 U.S.C. §908(c)(21), and a scheduled award for seven percent loss of use of the right hand pursuant to Section 8(c)(1), 33 U.S.C. §908(c)(1). Additionally, the administrative law judge found that claimant is entitled to compensation for facial disfigurement under Section 8(c)(20), 33 U.S.C. §908(c)(20), and continuing medical expenses under Section 7, 33 U.S.C. §907. The administrative law judge further noted that the compensation awards were to be paid concurrently.

Employer and claimant each filed timely motions for reconsideration, asserting errors in the administrative law judge's Decision and Order. In his Order on Reconsideration dated June 2, 1992, the administrative law judge initially denied claimant's motion for reconsideration. In addressing employer's motion, the administrative law judge corrected claimant's compensation rate for the scheduled injury from $695.56 to $616.96 in order to reflect the maximum compensation rate in effect under Section 6, 33 U.S.C. §906, as of the date that claimant reached maximum medical improvement. Additionally, the administrative law judge permitted employer to take a credit for all payments previously made for payment of temporary total disability in excess of the applicable statutory maximum rate relating back to the date of injury. The administrative law judge, however, noted that the compensation rate for claimant's unscheduled injury remained at $69.55 per week but modified his decision so that payment thereof would commence after payment of claimant's scheduled award. Lastly, the administrative law judge determined that claimant's entire loss of wage-earning capacity was attributable solely to his spinal injuries, and, thus, concluded that the amount awarded for claimant's scheduled injury need not be factored out of the amount awarded for claimant's unscheduled injury.

Employer next appealed the Order on Reconsideration to the Board and simultaneously filed a petition for modification with the administrative law judge, asserting that claimant's current earning capacity exceeded that awarded for the unscheduled injury under Section 8(c)(21). Claimant objected to employer's petition and also filed his own petition for modification, arguing that the award for loss of wage-earning capacity should be modified upwards. By order dated August 31, 1992, the administrative law judge denied both petitions on the grounds that neither party could establish a change in condition which would warrant either modification of the existing award

or a new hearing. Employer appealed this decision to the Board.

Meanwhile, claimant's counsel submitted a petition for an attorney's fee for work performed before the administrative law judge, requesting a fee of $11,602.50, representing 66.3 hours at $175 per hour, plus expenses of $7,671.65. Employer filed objections, to which claimant replied. In his Order Awarding Attorney's Fees, the administrative law judge, after consideration of employer's objections, awarded a fee of $7,635 for 50.9 hours at $150 per hour, plus $5,086.65 of the requested expenses. Employer also appealed this decision to the Board.

By Order dated February 22, 1993, the Board consolidated employer's appeals of the administrative law judge's Decision and Order Awarding Benefits, Order Denying Reconsideration, and Order Awarding Attorney's Fees. *Meyers [sic] v. Todd Shipyards Corp.*, BRB No. 92-2127 (Feb. 22, 1993)(unpub. Order). At this time the Board noted that it had no record of employer's appeal of the administrative law judge's Order Denying Modification. *Id.* Subsequently, the Board, by Order dated June 24, 1993, acknowledged employer's appeal of the administrative law judge's Order Denying Modification and consolidated it with employer's appeals of the other decisions rendered by the administrative law judge in this case. *Meyers [sic] v. Todd Shipyards Corp.*, BRB No. 92-2127 (June 24, 1993)(unpub. Order). Consequently, under review in the instant case are the administrative law judge's Decision and Order Awarding Benefits, Order Denying Reconsideration, Order Denying Modification and Order Awarding Attorney's Fees.

On appeal, employer contests the administrative law judge's findings regarding the date used to determine the maximum compensation rate for payment of claimant's scheduled injury, claimant's loss of wage-earning capacity under Section 8(h), the administrative law judge's denial of employer's petition for modification, and the administrative law judge's award of attorney's fees. Claimant responds, urging affirmance. In its reply brief, employer reiterates the points raised in its brief supporting the petition for review.

Employer initially contends that the administrative law judge erred by entering a scheduled award for permanent partial benefits in accordance with the statutory ceiling set out in Section 6(b)(1), 33 U.S.C. §906(b)(1), as of the date claimant reached maximum medical improvement in September 1988. Employer asserts that under Section 10, 33 U.S.C. §910, the relevant date of inquiry is the date of injury in 1987. In support of its contention, employer cites *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1980), for the proposition that claimant's scheduled permanent partial disability benefits must have been "newly awarded compensation" as defined under Section 6(c), 33 U.S.C. §906(c), at the time of injury in 1987 and, thus, the statutory maximum compensation rate for the period corresponding to that date is applicable. Employer therefore maintains that claimant's compensation rate for the scheduled injury should be modified from $616.96 to $605.32. Employer also contends that even if Section 6(c) is read so as to permit a compensation rate to be determined at a time other than the date of injury for those who had not previously been "awarded" compensation, claimant should not be considered as one who has been "newly awarded compensation" for purposes of his schedule award.

In the instant case, the parties stipulated to an inaccurate compensation rate. In his Order on Reconsideration, the administrative law judge noted that claimant's average weekly wage of $1,043.34 and consequent compensation rate of $695.56 exceeded the statutory maximum compensation rate of $605.32 per week, allowable under Section 6, 33 U.S.C. §906, at the onset of claimant's temporary total disability at the time of injury in June 1987. Applying Section 6(b)(1), 33 U.S.C. §906(b)(1), the administrative law judge determined that employer is entitled to an off-set for benefits previously paid for temporary total disability prior to September 22, 1988, in excess of the statutory maximum. As for the scheduled injury under Section 8(c)(1), the administrative law judge noted that the statutory maximum compensation rate in effect on September 22, 1988, the date of maximum medical improvement, was $616.96, and thus, the administrative law judge reduced claimant's compensation rate from $695.56 to the statutory maximum.

Employer's contentions are without merit. First, employer's reliance on *Puccetti* is misplaced. In that case, the Board reasoned that claimant's receipt of *temporary total disability* benefits must be considered "newly awarded compensation" under Section 6(c) when benefits commence, generally at the time of injury, and, thus, temporarily totally disabled claimants receive the maximum in effect at this time. *Puccetti*, 24 BRBS at 25. The Board further held that temporarily totally disabled claimants would thereafter remain at the maximum in effect at this time; the following October 1, because they would not be "currently receiving" permanent total disability or death benefits under Section 6(c), they would not be entitled to the new maximum. *Id.* Employer is seeking to have this interpretation applied to an award for permanent partial disability benefits. Based upon the holding in *Puccetti*, claimant's receipt of benefits is considered "newly awarded compensation" for purposes of Section 6(c) when benefits commence. *See Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995). Scheduled awards such as the one involved in the instant case commence on the date of claimant's maximum medical improvement. *See Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). Thus, contrary to employer's contention, claimant's benefits for his scheduled permanent partial disability are deemed to be "newly awarded compensation." Inasmuch as claimant's scheduled award for permanent partial disability compensation commenced on September 22, 1988, the date of maximum medical improvement, the administrative law judge properly used the statutory maximum rate in effect at that time, $616.96.[1] *Kubin*, 29 BRBS at 122.

Employer next asserts that the administrative law judge improperly calculated claimant's loss of wage-earning capacity for claimant's unscheduled permanent partial disability benefits pursuant to Section 8(h), alleging that claimant's pre-injury average weekly earnings do not accurately reflect what his earnings would have been absent his injury. Specifically, employer maintains that claimant's pre-injury average weekly wage includes substantial overtime hours, which were not available to claimant post-injury because of employer's economic conditions. Employer argues that the administrative law judge should have used claimant's actual hourly wage at the time of his injury,

[1]Moreover, contrary to employer's contention, the administrative law judge was not required to use the statutory maximum compensation rate in order to determine claimant's benefits under Section 8(c)(21), since the amount of weekly compensation for claimant's permanent partial disability, $69.55, does not exceed that statutory maximum. *See* 33 U.S.C. §906(b)(1).

rather than divide his average weekly earnings by forty hours.

Pursuant to 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. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), 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. 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); *Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996). 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. *Cook v. Seattle Stevedore Co.*, 21 BRBS at 4, 6 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 652-660 (1979).

In discussing Section 8(h), the administrative law judge initially noted the parties' stipulation that claimant's average weekly wage as of the date of injury was $1,043.34, and that the record indicates that claimant's post-injury wage rate was the same as before his injury although claimant was performing light duty work for employer. Based upon this evidence, the administrative law judge rationally calculated claimant's post-injury hourly wage by dividing the average weekly wage by forty, and thus, arrived at an hourly rate of $26.08. The administrative law judge then relied upon the testimony of claimant and his supervisor, Mr. Rodriguez, that claimant lost two days per month from work as a result of his back pain due to the injury, to determine that claimant sustained a ten percent loss of wage-earning capacity (4 hours per 40 hour week) and concluded that claimant's loss of wage-earning capacity was $104.32 (*i.e.*, 4 hours multiplied by the hourly rate of $26.08), which translated to a compensation rate of $69.55 per week. *See Kubin*, 29 BRBS at 117.

While employer correctly notes that the testimony provided by claimant and his supervisor establishes that claimant was unable to receive the same overtime hours upon his return to work that he had previously earned prior to his injury, Tr. at 45, 68, 95, there is no specific evidence regarding the actual number of hours claimant worked upon his return to work and/or whether claimant received any overtime hours during that period of time. Moreover, there is no particular evidence establishing what claimant's actual post-injury wages were upon his return to employment with employer other than that wage rates were the same before and after claimant's injury. Given the lack of evidence as to claimant's post-injury wage rate, the administrative law judge reasonably relied upon claimant's pre-injury wages and the testimony concerning lost work due to back pain to calculate his post-injury wage-earning capacity. *Long*, 767 F.2d at 1578, 17 BRBS at 149 (CRT); *Mangaliman*, 30 BRBS at 39. Consequently, we affirm the administrative law judge's finding under Section 8(c)(21) and (h) that claimant is entitled to an award of $69.55 per week for a loss in wage-earning capacity.

Employer further contends that claimant no longer has any loss of wage-earning capacity and thus maintains that it has established a change in claimant's condition. Employer therefore argues that its petition for modification under Section 22 of the Act was improperly denied. Alternatively, employer asserts that the case should be remanded to the administrative law judge for a formal hearing on the modification issue.

Section 22 provides that an administrative law judge may modify a prior compensation order where a party establishes either a change of condition subsequent to the issuance of the prior award or a mistake in a determination of fact. 33 U.S.C. §922 (1988). The United States Supreme Court has held that a disability award may be modified under Section 22 where there is a change in the employee's wage-earning capacity, although there is no change in the employee's physical condition. *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995). The Supreme Court stated, however, that a change in wage-earning capacity is not permitted with "every variation in actual wages or transient changes in the economy." *Id.*

In his Order Denying Modification, the administrative law judge recognized that modification is permitted based on a change in economic condition and that since claimant's earnings in 1991 are "significantly in excess" of his post-injury wage-earning capacity, claimant no longer has a loss of wage-earning capacity, according to employer's form showing claimant's earnings in 1991. Upon review of this evidence, the administrative law judge summarily stated that neither modification of the prior award nor a hearing on this issue is warranted. *Id.* We hold that the administrative law judge must explicitly consider and discuss employer's evidence regarding a change in claimant's economic condition pursuant to the standard enunciated in *Rambo*. Accordingly, we vacate the administrative law judge's Order Denying Modification, and remand the case for further consideration. On remand, the administrative law judge must allow the parties to develop further their positions regarding the issue of claimant's present economic condition; then the administrative law judge must fully consider all relevant evidence under the *Rambo* standard.

Lastly, as employer correctly contends, the attorney's fee awarded to claimant's counsel is not payable until all appeals are exhausted and the compensation order has become final.[2] *See Fairley v. Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc*)(Brown, J., concurring), *aff'd in part and rev'd in part sub nom. Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088, 23 BRBS 61 (CRT)(5th Cir. 1990); *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT)(7th Cir. 1982); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order on Reconsideration and Order Awarding Attorney's Fees are affirmed. The administrative law judge's Order Denying Modification is vacated, and the case is remanded for further consideration consistent with this opinion.

[2]Inasmuch as employer does not challenge the administrative law judge's Order Awarding Attorney's Fees in any other manner it is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge