BRB No. 93-1678

RAYMOND E. JONES	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
COMMERCIAL UNION INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order On Modification-Awarding Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (McTeague, Higbee, Libner, MacAdam, Case & Watson), Topsham, Maine, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order On Modification-Awarding Benefits (92-LHC-2107) of Administrative Law Judge David W. DiNardi 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 worked for employer in various capacities from 1952 until February 5, 1991, where he was exposed to asbestos. In 1978, claimant was exposed to a high concentration of smoke, dust, and fumes when blowers on the ship where he was working malfunctioned. As a result of this incident, claimant suffered from shortness of breath, and at the recommendation of his physician, he was removed from duty on ships to a shoreside shop where prefabricated pipe coverings were made. Claimant remained off work from August 9, 1978 through November 1, 1978. When he returned to

work on November 2, 1978, he continued to periodically miss days due to breathing problems. In 1981, Administrative Law Judge Lawrence E. Gray awarded claimant temporary total disability benefits from August 9, 1978 through November 1, 1978, and permanent partial disability thereafter based upon his stipulated average weekly wage as of August 9, 1978 of $256.80.

Claimant continued to work in the pipecovering shop and continued to be compensated as a first-class pipecoverer until the fall of 1990. At that time, the pipecovering shop, where claimant worked adjacent to an open window, was relocated to a different work area with less ventilation, no outdoor windows, and higher levels of dust than at claimant's prior work area. Claimant's exposure to dust at the new location resulted in increased breathing problems and difficulty in performing his work. On November 9, 1990, claimant reported to the emergency room at Bath Memorial Hospital, complaining of shortness of breath. Thereafter, claimant requested that employer transfer him to a cleaner worksite where he could continue working despite his breathing problems; his request was denied because employer was unable to provide such alternative employment. On the advice of his pulmonologist, Dr. Dermot Killian, claimant ultimately left employer on February 15, 1991, alleging that the dust and fumes in his new work area made it impossible for him to continue working.

Claimant subsequently sought to modify the prior award of permanent partial disability compensation to an award of permanent total disability benefits, to change his date of injury for purposes of the award of permanent total disability compensation from August 9, 1978 to February 15, 1991, and to change the average weekly wage to $516.80, consistent with his average weekly earnings immediately prior to the time that he became permanently totally disabled. *See* 33 U.S.C. §922. In a Decision and Order dated May 3, 1993, Administrative Law Judge David W. DiNardi found that as claimant was unable to perform his usual job, and employer had not introduced evidence of suitable alternate employment, claimant was entitled to modification of the original award to an award for permanent total disability benefits. The administrative law judge, however, denied modification with regard to the average weekly wage and the request for a new date of injury, finding that as the parties stipulated to an average weekly wage of $256.80 in the prior proceedings, claimant was bound by that average weekly wage in the modification proceeding; that claimant did not demonstrate an aggravation of his pulmonary problems in the ensuing interval so as to establish a new date of injury; and that claimant's permanent total disability was the result of the natural progression of the 1978 work injury.

On appeal, claimant challenges the administrative law judge's findings regarding his date of injury and average weekly wage. We agree with claimant that the denial of modification of the applicable average weekly wage and date of injury cannot be affirmed. Initially, claimant is not bound by the stipulation regarding his 1978 average weekly wage, as awards based on stipulations made by the parties are subject to Section 22 modification. *See Bass v. Broadway Maintenance*, 28 BRBS 11, 18 n.4 (1994); *Norton v. National Steel & Shipbuilding Co.*, 25 BRBS 79, 84 (1991), *aff'd on recon. en banc*, 27 BRBS 33 (1993)(Brown, J., dissenting); *Madrid v. Coast Marine Construction Co.*, 22 BRBS 148, 152 (1989).

In addition, we agree with the claimant that the administrative law judge's findings that claimant failed to establish a new injury and that his permanent total disability was due to the natural progression of his 1978 work injury cannot be affirmed, because in making these determinations the administrative law judge neglected to identify, discuss, or weigh the relevant evidence consistent

with the requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(APA). Initially, it is uncontested that employer moved the site of claimant's work to another area of the shipyard, and the record contains evidence that claimant was exposed to more irritants at this location than previously. *See* Decision and Order at 3. There is evidence in the record, including reports from claimant's treating physician, Dr. Killian, Cx. 11, and claimant's hearing testimony, Tr. at 19-20, 22, which could, if credited, establish an aggravation of claimant's pre-existing lung condition. *See, e.g., Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). Inasmuch as the administrative law judge did not discuss this or any other relevant evidence in summarily concluding that claimant did not establish an aggravation, we vacate both the administrative law judge's finding that claimant failed to establish the existence of a new injury and his finding that claimant's permanent total disability was due to the natural progression of the prior 1978 work injury. On remand, the administrative law judge should reconsider these issues in light of all the relevant evidence, and identify and explain the evidentiary basis for his conclusions consistent with the requirements of the APA. *See generally Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995). If claimant's inability to work is due to an aggravation resulting from exposure to adverse stimuli in his work environment, he is entitled to calculation of his average weekly wage at the time of his awareness of this new injury and resulting disability. 33 U.S.C. §910(i); *See, e.g., Brady-Hamilton Stevedore Co. v. Director, OWCP*, 58 F.3d 419, 29 BRBS 101 (CRT)(9th Cir. 1995).

Claimant also argues that his average weekly wage should be determined in 1991 regardless of whether an aggravation occurred. Claimant asserts that he was not fully aware of the disabling effects of his work-related injury until he was forced to retire in 1991 and thus his average weekly wage should be determined at that time. The administrative law judge correctly noted that the cases cited by claimant involve facts where subsequent employment aggravated a prior condition, thus permitting calculation of average weekly wage at the time of this new injury, and rejected claimant's argument based on his finding of no aggravation. We have remanded the case for reconsideration of aggravation, and claimant is entitled to a new average weekly wage based on his 1991 earnings if, on remand, the administrative law judge finds that such a new injury occurred.

Accordingly, the administrative law judge's findings regarding average weekly wage and date of injury in his Decision and Order on Modification are vacated, and the case is remanded for further consideration of these issues consistent with this opinion. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge