BRB Nos. 04-0930
and 04-0930A

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| JANET O'NEILL | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| Cross-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| CENTENNIAL STEVEDORING SERVICES | ) | DATE ISSUED: 08/30/2005 |
| | ) | |
| and | ) | |
| | ) | |
| HOMEPORT INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| Cross-Petitioners | ) | |
| | ) | |
| and | ) | |
| | ) | |
| ILWU-PMA WELFARE FUND | ) | |
| | ) | |
| Intervenor | ) | |
| | ) | DECISION and ORDER |

Appeals of the Order Granting Employer's Motion for Reconsideration of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry, Moorhead, McAdams & Shenoi, LLP), Wilmington, California, for claimant.

Daniel F. Valenzuela (Samuelson, Gonzalez, Valenzuela & Brown), San Pedro, California for employer/carrier.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Order Granting Employer's Motion for Reconsideration (2003-LHC-1568) of Administrative Law Judge Gerald M. Etchingham 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a UTR driver, alleged that on April 4, 2001, she sustained a work-related injury to her lower back. A formal hearing was held on October 30, 2003. Employer voluntarily paid temporary total disability benefits from April 5, 2001 through May 28, 2002 at the maximum compensation rate. In addition, the administrative law judge accepted the parties' stipulation that claimant had a loss of wage-earning capacity of $353.03 per week from March 1 through July 7, 2003, when she returned to work.

The administrative law judge found claimant's back condition is causally related to her April 4, 2001 work accident with employer and that she reached maximum medical improvement on March 28, 2003. The administrative law judge found that claimant is unable to perform her usual employment as an UTR driver due to restrictions imposed as a result of her work-related injury. The administrative law judge found, moreover, that employer did not establish the availability of suitable alternate employment by its proffer that claimant could obtain sufficient marine clerk work off the casual board.[1] Consequently, the administrative law judge awarded claimant temporary total disability benefits from April 5, 2001, through February 28, 2003, temporary and permanent partial disability benefits from March 1, 2003, through July 7, 2003, and ongoing permanent total disability compensation from July 8, 2003.[2]

Employer filed a timely motion for reconsideration/modification in which it requested that the administrative law judge reconsider his award of ongoing permanent total disability benefits from July 8, 2003, since claimant had returned to work as a marine clerk on November 19, 2003. Employer specifically noted the administrative law

[1] In this regard, the administrative law judge noted claimant's testimony, which he found uncontradicted by the medical opinions of record, that she would be able to perform such work. Decision and Order at 16.

[2] The administrative law judge rejected the medical expense reimbursement request in the amount of $4,772.27, by the intervenor, the ILWU-PMA Plan. The administrative law judge found that the itemized expenses lacked sufficient specificity for him to determine whether the expenses were reasonable and necessary.

judge's original finding that claimant had testified that marine clerk work would be suitable for her, and it attached claimant's wage records. In response, claimant contended that she worked only until May 4, 2004, and that the work was sheltered employment. She also maintained that if the administrative law judge found she was only partially disabled, the administrative law judge should adjust her post-injury wages to account for inflation. Employer filed additional briefs countering claimant's inflation adjustment calculation and maintaining that the post-injury work was not sheltered.

In his Order Granting Employer's Motion for Reconsideration, the administrative law judge found that claimant's actual employment from November 19, 2003 through May 4, 2004, as a marine clerk was not sheltered employment. He also found that claimant's stopping work on May 4, 2004, in relation to the issuance of his Decision and Order on May 5 awarding total disability benefits, "makes her claim for continuing permanent total disability less than credible." Order at 3. The administrative law judge therefore amended his prior decision to award claimant ongoing permanent partial disability benefits as of November 19, 2003. With regard to the inflation factor to be applied to claimant's post-injury wages, the administrative law judge rejected both parties' contentions, and he utilized the percentage change in the national average weekly wage, 8.41 percent, between April 1, 2001 and September 30, 2003.[3] The administrative law judge therefore reduced claimant's post-injury wage-earning capacity of $846.51 per week by 8.41 percent, or $71.91, to $774.60. Order at 3.

On appeal, claimant, while conceding the appropriateness of the partial disability award from November 19, 2003 to May 4, 2004, challenges the continuing permanent partial disability award from May 4, 2004. Claimant contends there is no evidence of the availability of ongoing work as a marine clerk after May 4, 2004, and that her physician took her off work as of that date. Employer responds, urging affirmance of the administrative law judge's award of ongoing permanent partial disability benefits. In its

[3] Claimant contended the rate should be 15 percent based on the facts in *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Employer contended the rate should be 3.7 percent based on the collective bargaining agreement between the marine clerks' union and the Pacific Maritime Association. The administrative law judge explained that the national average weekly wage rose by 3.61 percent from October 1, 2000 to September 30, 2001, but, for purposes of this case, he divided this in half, to 1.81 percent, to reflect a six- month rate from April 1 through September 30, 2001. Additionally, the administrative law judge stated that the national average weekly wage rose 3.45 percent for the period between October 1, 2001 through September 30, 2002, and 3.15 percent for the period between October 1, 2002 and September 30, 2003. Order at 2-3. The administrative law judge added these figures together to arrive at an 8.41 percentage change in the national average weekly wage.

cross-appeal, employer contends that the administrative law judge erred in using an inflation factor of 8.41 percent rather than 3.7 percent based on the wage rates set out in the collective bargaining agreement. Claimant responds, urging affirmance of the administrative law judge's inflation calculation.

Claimant contests the administrative law judge's finding that she is only partially disabled as of May 4, 2004, as there is no evidence of the availability of marine clerk work after that date or that claimant is capable of performing such work. Claimant contends that her physician, Dr. Watkins, took her off work and placed her on total disability status as of May 4, 2004.

We agree with claimant that the administrative law judge's award of permanent partial disability benefits as of May 4, 2004, cannot be affirmed as it is not rational or supported by substantial evidence. The administrative law judge inferred that claimant stopped working on that date because of his Decision and Order awarding her total disability benefits. Order at 3. The administrative law judge's decision is dated May 5, 2004, and moreover, the district director certified that he received the decision on May 12, 2004, and filed it on May 13, 2004. Since claimant stopped working prior to issuance or service of the decision, it was not rational for the administrative law judge to infer that the award of total disability benefits caused claimant to stop working at otherwise suitable employment. *See generally O'Leary v. Dielschneider*, 204 F.2d 810 (9th Cir. 1953).

In addition, there is no evidence of record to support a finding that claimant was only partially disabled after May 4, 2004. *See McCracken v. Spearin, Preston & Burrows, Inc.*, 36 BRBS 136 (2002). Employer alleged in its motion for reconsideration that claimant was only partially disabled. It based this allegation on claimant's actual work as a marine clerk from November 19, 2003 to May 4, 2004, and on claimant's assertion at the hearing that such work was within her capabilities. Attached to employer's motion were claimant's wage records only for the period in question. Employer's motion stated that if there were a question as to the availability of such work, the record should be reopened to permit the testimony of a port representative. Emp. Mot. for Recon. at 4. Claimant countered that she was totally disabled after May 4, 2004, because her treating physician, Dr. Watkins, took her off work and stated that she is totally disabled. This opinion was not attached to claimant's pleadings.[4]

[4] Claimant's most recent submission of evidence regarding Dr. Watkins was his January 16, 2004, post-hearing deposition, which contained a narrative from his November 17, 2003, evaluation of claimant. His chart note from November 17, 2003, states, under the heading "work status," that "the patient is released to work on modified duty with lifting limited to 15 pounds, to change position every 15 minutes at work." Watkins dep. at EX 5.

Although employer termed its motion as one for reconsideration, in essence employer was seeking modification of the award of total disability benefits based on claimant's employment after the formal hearing.[5] 33 U.S.C. §922; *see generally Admiralty Coatings Corp. v. Emery*, 228 F.3d 513, 34 BRBS 91(CRT) (4th Cir. 2000). The regulation at 20 C.F.R. §702.336(b) allows the parties or administrative law judge to raise a new issue "at any time prior to the filing of a compensation order." *See, e.g., Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996). In this case, employer asserted, after the filing of the administrative law judge's compensation order, that claimant was only partially disabled, based on wage records for claimant's employment after the formal hearing. Under such circumstances, Section 22 supplies the mechanism for altering a compensation award based on a mistake in fact or change in condition. *See generally Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *O'Keeffe v. Aerojet-General Shipyards, Inc.* 404 U.S. 265 (1971).

The administrative law judge and parties held a conference call at which time the administrative law judge provided the parties the opportunity to brief the issues raised by employer's motion for reconsideration. Employer attached various documents to its pleadings which the administrative law judge neither accepted into evidence nor rejected. He did, however, rely on the wage records in modifying claimant's ongoing award from total to partial disability, notwithstanding claimant's allegation that she was totally disabled after May 4, 2004.

[5] The hearing was held on October 30, 2003. The record was held open until February 23, 2004, for the submission of two post-hearing depositions and briefs, but no information regarding claimant's return to work was provided until employer's motion for reconsideration after issuance of the administrative law judge's decision.

As claimant contends, these wage records, in isolation, do not satisfy employer's burden of establishing the availability of suitable alternate employment on an ongoing basis. Once the administrative law judge was on notice that employer was seeking to modify the ongoing award, the administrative law judge was obligated to reopen the record for the admission of evidence by both parties relevant to the issues raised. *See generally Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Coats v. Newport News Shipbuilding & Dry Dock Co.*, 21 BRBS 77 (1988). Indeed, in one of employer's pleadings it stated that it was prepared to obtain the opinion of a port employee as to the to availability of ongoing employment suitable for claimant. Claimant referenced a medical report from Dr. Watkins regarding her inability to work. In order to best ascertain the rights of the parties the administrative law judge needed to obtain evidence necessary for a decision on the matter, just as if it were an initial adjudication. 33 U.S.C. §923(a); 20 C.F.R. §§702.338, 702.339. Therefore, we must vacate the administrative law judge's finding that claimant is only partially disabled as of May 5, 2004, and remand the case for the administrative law judge to allow the parties to submit evidence in support of their positions and to issue a decision based on evidence admitted into the record. *Coats*, 21 BRBS at 81.

In its cross-appeal, employer asserts that the administrative law judge used an erroneous inflation factor in adjusting claimant's post-injury wages to those paid at the time of injury. Employer contends that the correct factor is the 3.7 percent increase in wages reflected in the collective bargaining agreement between marine clerks' union and the Pacific Maritime Association. As discussed earlier, the administrative law judge used an inflation factor of 8.41 percent which he purportedly derived from the percentage change in the national average weekly wage. *See* n. 3, *supra.*

An award for permanent partial disability in a case not covered by the schedule is based on two-thirds of the difference between claimant's pre-injury average weekly wage and her post-injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2000). This calculation requires that a claimant's post-injury wage-earning capacity be adjusted to account for inflation to represent the wages that the post-injury job paid at the time of claimant's injury so that the wages are compared on an equal footing. *See generally Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995) (the Supreme Court noted the administrative law judge's wage-earning capacity analysis in which he properly accounted for inflation); *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). The Board has held that the administrative law judge should use the percentage increase in the national average weekly wage for this purpose when the record does not contain evidence of the wages the post-injury job paid at the time of injury. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *see also Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). The Ninth Circuit,

within whose jurisdiction this case arises, has approved this approach, stating, however, that where the wage rates at the time of injury are known, an external inflation factor need not be applied. *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002).

In this case, claimant and employer stipulated that claimant's pre-injury average weekly wage is $1,401.89, and no party contests the administrative law judge's finding that claimant's post-injury wage-earning capacity as of November 19, 2003, is $846.51. Order at 2. In accounting for inflation, the administrative law judge rejected the parties' calculations and summarily stated that "the better inflation factor is 8.41%, the growth figure calculated using the average increase in the National Average Weekly Wage from April 1, 2001 to September 30, 2003, . . . ." Order at 2; *see* n. 3, *supra.* We agree with employer that the administrative law judge erred in not addressing the documents employer supplied that address the wage schedules in effect for the port at the relevant times.[6] Employer argues that these documents establish only a 3.7 percent increase in the wage rates based on the contract between the marine clerks' union and the Pacific Maritime Association. As employer alleges that the wage rates at the time of injury can be ascertained by reference to these documents and the administrative law judge did not address this issue, we must remand for further findings of fact. Therefore, we vacate the administrative law judge's finding concerning the inflation adjustment and we remand the case to the administrative law judge to determine whether the collective bargaining agreement should be admitted into evidence. If so, the administrative law judge should address whether the documents contain sufficient information for him to make a finding regarding the wage rates in effect at the time of injury.[7] *See Johnston,* 280 F.3d 1272, 36 BRBS 7(CRT); *Hundley,* 32 BRBS 254; *see generally Quan v. Marine Power & Equip. Co.*, 30 BRBS 124 (1996).

Accordingly, we vacate those portions of the administrative law judge's Order Granting Employer's Motion for Reconsideration awarding claimant only partial

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[6] In response to claimant's raising the issue of an inflation factor, employer filed a brief dated July 9, 2004, to which it attached the wage schedule documents. The administrative law judge neither accepted these documents into evidence nor specifically rejected them.

[7] The administrative law judge's finding that the percentage change in the national average weekly wage was 8.41 percent is incorrect. The national average weekly wage in effect at the time of claimant's injury in 2001 was $466.91. A BRBS at 3-153. The national average weekly wage in effect in November 2003 was $515.39. A BRBS at 3-166. The percentage increase between these two figures is 10.4 percent (515.39 - 466.91= 48.48; 48.48 ÷ 466.91 = 10.4).

disability benefits after May 4, 2004, and the administrative law judge's use of an 8.41 percent inflation adjustment, and we remand the case for further consideration of these issues consistent with this decision. In all other respects, the administrative law judge's Order Granting Employer's Motion for Reconsideration is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge