BRB No. 00-0475

GUADALUPE V. TREVINO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED	)	DATE ISSUED: Jan 31, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

Marilyn T. Hebinck (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1535) of Administrative Law Judge C. Richard Avery 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 rational, supported by substantial evidence, and 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 sustained a work-related injury to his back on July 29, 1991, while dismantling the rigging of a ship. An MRI revealed a slight central herniation and degeneration of a disc. He returned to longshore work in July 1992, within restrictions imposed by doctors. At the time of his injury claimant had a seniority rating of 23, out of a maximum of 45, in Local 24 of the ILA. May 14,1997 Hearing Transcript (Tr. 1) at 77.

Mr. Frederickson, employer's general superintendent, testified that this rank would place claimant in the 60-65 percent seniority rank relative to other union members, and that seniority determines in what order employees are hired for jobs. Tr. 1 at 78. Mr. Frederickson thought claimant could obtain a job within his restrictions four days per week. *Id.* at 80.

Dr. Awitan became claimant's treating orthopedic surgeon. In a functional capacities evaluation dated April 14, 1996, Dr. Awitan limited claimant to intermittent sitting, walking, standing, bending, squatting, climbing, kneeling and twisting, and to lifting 50 pounds. Cl. Ex. 4. Claimant testified that after the injury he tried to obtain jobs as a foreman or "flagging jobs." Tr. 1 at 39. He testified that, obviously, the most senior employees take the easier jobs. Tr. 1 at 45. During the year prior to his injury, from July 29, 1990, to July 29, 1991, claimant worked 1,930 hours. Emp. Ex. 5.

A hearing was held on May 14, 1997. In a decision issued on September 30, 1997 (Decision and Order 1), the administrative law judge found that claimant had a 20 percent loss in wage-earning capacity, and that therefore, based on the stipulated average weekly wage of $989.15, his residual wage-earning capacity was $791.32. The administrative law judge awarded claimant continuing permanent partial disability benefits based on the difference between this figure and claimant's average weekly wage. 33 U.S.C. §908(c)(21), (h).

Claimant subsequently filed a Motion for Modification of the administrative law judge's decision, alleging that his wage-earning capacity is substantially less than the $791.32 figure determined by the administrative law judge. In a decision issued on January 19, 2000 (Decision on Modification), the administrative law judge denied modification, finding that there was no physical change in claimant's condition, because while Dr. Awitan stated that claimant's condition has worsened since May 1997, he did not further limit claimant's functional performance levels and did not alter his physical restrictions. The administrative law judge further found that any additional loss of wages due to claimant's working fewer days is due to an economic downturn, rather than to claimant's work- related injury.

On appeal, claimant contends that the administrative law judge erred in denying modification, alleging that he has a greater loss in wage-earning capacity than originally determined by the administrative law judge and that his actual post-injury earnings accurately represent his wage-earning capacity. Employer responds, urging affirmance of the administrative law judge's denial of modification.

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 [Rambo I],* 515 U.S. 291, 30 BRBS

1(CRT) (1995). 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 [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997)*; Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Section 22 was intended to allow the factfinder broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972); *see also Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3 (CRT); *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting). Section 22 allows for modification of an award where there is change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT); *see also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985).

Claimant contended at the modification hearing that the administrative law judge's original determination of his post-injury wage-earning capacity was too high and that his wage-earning loss has been much greater than the administrative law judge determined. Decision on Modification at 7. Thus, claimant was essentially arguing that there was a mistake in a determination of fact in the initial decision. The Supreme Court's decisions in *Aerojet-General Shipyards,* 404 U.S. 254, and *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, *reh'g denied,* 391 U.S. 929 (1968), make clear that the scope of modification based on a mistake in fact is not limited to any particular kinds of factual errors. *See Rambo I*, 515 U.S. at 295-296, 30 BRBS at 2-3(CRT); *Williams v. Jones*, 11 F.3d 247, 27 BRBS 142(CRT) (1st Cir. 1993).

Thus, a mistake in a determination of wage-earning capacity is subject to modification pursuant to Section 22. *See generally Sutton v. Genco, Inc.*, 15 BRBS 25 (1982). The parties stipulated that claimant's pre-injury average weekly wage was $989.15. Claimant alleges that his weekly earnings in 1996, the year prior to the initial hearing, were $344.42, or less than 50 percent of his pre-injury average weekly wage of $989.15. Cl. Ex. 13. At the time of the first hearing, the administrative law judge found claimant had a 20 percent loss in wage-earning capacity based on Mr. Frederickson's testimony that claimant could obtain work within his restrictions four days per week. Tr.1 at 80. This resulted in a post-injury wage-earning capacity of $791.32. The disparity between claimant's alleged actual post-injury wages and the wage-earning capacity determined by the administrative law judge forms the basis for claimant's motion for modification based on a mistake in fact, and warrants closer scrutiny and explanation pursuant to Section 8(h), 33 U.S.C. §908(h).

Section 8(h) of the Act provides that the claimant's wage-earning capacity shall equal his actual post-injury earnings if these earnings fairly and reasonably represent his post-injury wage-earning capacity. If such earnings do not represent the claimant's wage-earning capacity, the administrative law judge must calculate a dollar amount which reasonably represents the claimant's wage-earning capacity. In determining a claimant's wage-earning capacity, relevant considerations include the employee's physical condition,

age, education, and industrial history, as well as the availability of employment which he can perform post-injury. *Fleetwood*, 776 F.2d 1225, 18 BRBS 12(CRT); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). As claimant alleged that the administrative law judge made a mistake in determining claimant's post-injury wage-earning capacity, and the administrative law judge did not consider this argument, we vacate the administrative law judge denial of claimant's motion for modification , and remand the case for him to consider this issue. In determining whether to grant modification based on a mistake of fact, the administrative law judge must also consider whether modification would render justice under the Act. *McCord v. Cephas*, 532 F.2d 1377, 3 BRBS 371 (D.C. Cir. 1976)*; Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, No. 99-1954 (4th Cir. Dec. 8, 2000); *Lucas v. Louisiana Ins. Guaranty Association*, 28 BRBS 1 (1994); *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Craig v. United Church of Christ*, 13 BRBS 567 (1981).

Moreover, we are not persuaded that the administrative law judge's determination, that there was no change in claimant's economic condition, is in accordance with law. Once the moving party, claimant herein, submits evidence of a change in condition or mistake in fact, the standards for determining the extent of disability are the same as in the initial proceeding. *See Rambo II*, 521 U.S. at 139, 31 BRBS at 61-62(CRT); *Vasquez*, 23 BRBS 428. A determination of wage-earning capacity pursuant to Section 8(h) encompasses factors such as the availability of employment which claimant can perform post-injury. *See generally* 33 U.S.C. §908(h); *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981). At the time of the first hearing, the administrative law judge found claimant had a 20 percent loss in wage-earning capacity based on Mr. Frederickson's testimony that claimant could obtain four days of work within his restrictions. Tr.1 at 80. The credited testimony of Mr. Frederickson that claimant can now obtain 2.5 to 3 days of work per week instead of the four days to which he testified at the 1997 hearing, constitutes evidence of a considerably greater reduction in work available to claimant than the 10 percent reduction allegedly experienced by all longshoremen working at the Port of Houston. Tr. 2 at 120, 124. In fact, this reduction in work availability represents a loss of 25 percent to 37 percent since the time of the first hearing and a 40 percent to 50 percent loss since the time of claimant's injury.

Claimant also alleges that his actual earnings averaged $341.51 per week in 1997, $386.24 per week in 1998, and $401.06 per week in 1999. Cl. Ex. 13. In finding that

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[1]Thus, as the burden is on the party that contends the claimant's actual wages are not representative of his earning capacity, employer herein bears the burden of establishing the propriety of a higher wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30(CRT) (5th Cir. 1992).

claimant did not establish a change in his economic condition, the administrative law judge relied on the fact that claimant worked 1,005 hours in 1997, 1,028 in 1998, and 1,200 hours in 1999, thus demonstrating an increase in hours. Nevertheless, these are not significant increases, and the administrative law judge did not address claimant's contention that his actual post-injury earnings reflect a significant decrease from his pre-injury average weekly wage. If, due to claimant's limitations, less work is available to him because employer has available less of the type of work which claimant is capable of performing, the administrative law judge must consider this factor in assessing claimant's wage-earning capacity. *See Fleetwood,* 776 F.2d at 1225, 18 BRBS at 19(CRT). As the administrative law judge's reliance on Mr. Frederickson's opinion that the overall availability of work at the Port of Houston was down 10 percent during the past three years does not account for claimant's alleged greater loss of available hours and almost 50 percent loss of actual wages, we vacate the administrative law judge's finding in this regard and remand the case for him
to reconsider whether a grant of modification is warranted on these facts.

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[2]This case is distinguishable from *McCormick Steamship Co. v. U.S. Employees' Compensation Comm'n,* 64 F.2d 84 (9th Cir. 1933). In that case, the court took judicial notice of the pervasive conditions of unemployment in the 1930s. In this case, the evidence reflected that the reduced availability of work was limited to the Port of Houston, where claimant worked. Mr. Frederickson testified that the downturn did not apply to the Barbour Cut facility, where claimant did not have sufficient seniority to work, and was not necessarily a downturn nationwide. Tr. at 122-123; *see Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 1231, 18 BRBS 12, 23-24(CRT) (4th Cir. 1985), *discussing McCormick Steamship Co.* Moreover, the Supreme Court in *Rambo I,* rejecting claimant's argument that *McCormick* held that "change in conditions" refers only to changes in physical condition, stated that claimant's argument was based on a misreading of *McCormick,* which did not reject the idea that Section 22 encompasses changes in wage-earning capacity, but "merely expressed doubt that §22 'applies to a change in earnings due to economic conditions,' 64 F.2d at 85." *Rambo I,* 515 U.S. at 299, 30 BRBS at 4(CRT). If a decline in the economy causes a greater loss in wage-earning capacity to the claimant in his injured condition than it does to the general workforce, it may be appropriate to modify a prior decision to reflect the effects of the downturn on the claimant.

[3]*Rambo I* does not mandate a finding of change in wage-earning capacity with every variation in actual wages or transient change in the economy. *Rambo I,* 515 U.S. at 301, 30 BRBS at 5(CRT). Mr. Frederickson testified that there has been a downturn of business at the Port of Houston since 1997. Tr. 1 at 119-120. The hearing was held on October 20, 1999. Economic conditions lasting several years would not appear to be the type of "transient change" which *Rambo* held did not warrant modification.

Accordingly, the Decision and Order of the administrative law judge denying modification is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge