BRB No. 97-1726

LOUIS BUTOROVICH	)	
	)	
Claimant-Respondent	)	DATE ISSUED:_____
	)	
v.	)	
	)	
EAGLE MARINE SERVICES	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision on Applications for Modification of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Robert W. Nizich (Law Offices of Robert W. Nizich), San Pedro, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision on Applications for Modification (93-LHC-2378) of Administrative Law Judge of Daniel L. Stewart 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, while working as a UTR driver for employer on February 29, 1992, sustained injuries to his neck, shoulder and back as a result of an accident. Employer paid benefits for periods of temporary total and temporary partial disability, and claimant thereafter filed a claim seeking permanent partial disability as a result of his work-related injuries. In response, employer filed its request for Section 8(f), 33 U.S.C. §908(f), relief. In

his Decision and Order - Awarding Benefits and Attorney Fees dated August 16, 1994, Administrative Law Judge Paul H. Teitler determined, based on the parties' stipulations, that claimant is entitled to continuing permanent partial disability benefits commencing on February 23, 1993 pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based upon a weekly loss in wage-earning capacity of $275, plus all reasonable medical expenses pursuant to Section 7, 33 U.S.C. §907. In addition, Judge Teitler found that employer is entitled to Section 8(f) relief.

Subsequently, both employer and claimant filed for modification of Judge Teitler's decision under Section 22 of the Act, 33 U.S.C. §922, alleging a change in conditions in that claimant's post-injury wage-earning capacity has been altered. In his Decision on Applications for Modification, Administrative Law Judge Daniel L. Stewart (the administrative law judge) denied both parties' petitions for modification on the ground that there has not been any change in conditions sufficient to warrant modification of Judge Teitler's award of permanent partial disability benefits.

On appeal, employer challenges the administrative law judge's denial of its petition for modification, arguing that it has established a change in economic conditions based on claimant's increased post-injury wage-earning capacity due to the increased availability of suitable employment. Claimant responds, urging affirmance of the administrative law judge's decision.

Section 22 of the Act 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). Section 22 allows for modification of an award where a change has occurred in claimant's wage-earning capacity between the time of the award and the time modification is sought, even in the absence of a change in physical condition. *Id*.; *see also Price v. Brady Hamilton Stevedore Co.*, 31 BRBS 81 (1996); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd,* 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985). It is well-established that 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]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we affirm the administrative law judge's Decision on Applications for Modification, as it is supported by substantial evidence and contains no reversible error. In his decision, the administrative law judge found that in the fifty-two week period preceding the parties' stipulations

before Judge Teitler (March 7, 1993 to March 5, 1994) claimant had average weekly earnings of $1,453.43, and that in the years subsequent to Judge Teitler's decision, after factoring out hourly wage increases, claimant had average weekly earnings of $1,409.16. The administrative law judge noted that during both time periods claimant was working off the swamper board. *See* Claimant's Exhibit 5, 6. Based on these calculations, the administrative law judge determined that, in actuality, claimant's post-injury earnings have been essentially unchanged since he began working off the swamper board.[1] The record therefore establishes that although there is a difference between the stipulated post-injury wage-earning capacity of $1,202.43, and claimant's actual post-injury earnings prior to the first hearing, claimant's actual post-injury earnings, after factoring out for inflation, have remained the same.[2] *See Rambo I,* 515 U.S. at 291, 30 BRBS at 1 (CRT); *Rambo II,* 117 S.Ct. at 1953, 31 BRBS at 54 (CRT); *see generally Price*, 31 BRBS at 81. Thus, contrary to employer's contention there has been no improvement in claimant's post-injury wage-earning capacity since the time of Judge Teitler's award of permanent partial disability benefits. Consequently, we affirm the administrative law judge's conclusion that employer failed to establish a change in economic conditions sufficient to warrant modification under

[1]Thus, we reject employer's assertion that there is increased availability of suitable jobs, which is sufficient to establish the requisite change in conditions. The administrative law judge found that claimant's hours increased as a result of his transfer to the swamper board, which occurred prior to the hearing before Judge Teitler. *See* Decision on Applications for Modification at 15.

[2]In light of our disposition of this case, we need not consider at this time what effect, if any, the Supreme Court's decisions in *Rambo I* and *Rambo II* may have on the decision in *Vilen v. Agarmine Contracting, Inc.,* 12 BRBS 771 (1980).

Section 22 of the Act.[3] *Rambo II*, 117 S.Ct. at 1953, 31 BRBS at 54 (CRT); *see generally Price*, 31 BRBS at 81; *Vasquez*, 23 BRBS at 428. Therefore, the administrative law judge's denial of employer's petition for modification is affirmed. *Id.*

[3]As the administrative law judge notes, at no point has employer argued that there has been a change in claimant's physical condition or that there has been a mistake in a determination of fact in Judge Teitler's decision.

Accordingly, the administrative law judge's Decision and Order on Applications for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge