BRB No. 13-0479

DARRYLL LYONS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: July 23, 2014
	)	
EAGLE MARINE SERVICES	)	
	)	
Self-Insured Employer-Respondent	)	ORDER on MOTION for RECONSIDERATION

Employer has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case, *Lyons v. Eagle Marine Services*, BRB No. 13-0479 (May 13, 2014). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant, who appears before the Board without assistance of counsel, responds that employer's motion should be denied. Claimant, however, also reiterates that his attorney's representation of him before the administrative law judge was ineffective and that the case should be remanded so that he can offer all relevant evidence regarding his ability to perform alternate work.[1]

In its Motion for Reconsideration, employer contends that the Board's modification of the administrative law judge's award to adjust the post-injury wage-earning capacity for inflation is a de novo finding beyond the scope of its authority. Employer maintains that the Board's decision to take "judicial notice" of the change in the National Average Weekly Wage (NAWW) is improper as it requires consideration of "evidence" which is not a part of the formal case record. Employer contends that the Board could have taken judicial notice of the pay changes in the clerk positions found suitable by the administrative law judge, pursuant to the Pacific Maritime Association's 2013 Annual Report. Employer thus avers that the Board should vacate its decision with regard to its adjustment of claimant's post-injury wage-earning capacity and remand the case to the administrative law judge to determine what, if any, inflation adjustment should be made to claimant's $1,000 weekly post-injury wage-earning capacity.

[1]The Board fully addressed and rejected claimant's contention regarding his attorney's alleged ineffective representation, noting that the record reflects that his former counsel adequately countered employer's petition for modification. *Lyons*, slip op. at 2-3. Thus, we decline to address this issue again. *See* n. 3, *infra*.

As the Board previously explained, the Act contemplates that the current dollar amount of post-injury "wage-earning capacity" be adjusted downward (*i.e.*, backward in time) to account for post-injury inflation and general wage increases. *See Petitt v. Sause Bros.*, 730 F.3d 1173, 47 BRBS 35(CRT) (9th Cir. 2013); *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). It thus is undisputed that claimant's 2012 post-injury wage-earning capacity must be adjusted to account for inflation to represent the wages the post-injury job paid at the time of his 2005 injury to insure that claimant's wage-earning capacity is considered on an equal footing with his average weekly wage at the time of that injury. Moreover, it is undisputed that the record in this case did not contain any evidence from which the administrative law judge could make such a determination. The Board, having noted that the administrative law judge did not recognize the legal mandate to adjust claimant's post-injury wage-earning capacity downward to accurately reflect claimant's loss in wage-earning capacity, as well as the parties' failure to provide relevant evidence on this issue, applied the percentage change in the NAWW to achieve this purpose, consistent with law. *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990).[2] Contrary to employer's contention, the Board's reliance on the NAWW was proper as the figures are determined by the United States Department of Labor, are a matter of public record and are not subject to interpretation. *See generally Win-Tex Products Inc. v. U.S.*, 829 F. Supp. 1349 (Ct. Int'l Trade 1993). Moreover, employer does not contend that the Board's calculation is mathematically incorrect. Employer's motion for reconsideration is therefore denied.[3]

[2]The Board, in *Richardson v. General Dynamics Corp*., 23 BRBS 327 (1990), held that when the record is devoid of evidence of the wages paid at the time of injury, the administrative law judge should use the percentage change in the NAWW to adjust the post-injury wages for inflation. *See also Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Quan v. Marine Power & Equipment Co.* 30 BRBS 124 (1996).

[3]If employer has evidence that could establish a mistake in fact regarding claimant's wage-earning capacity or if claimant has additional evidence regarding his ability to work, either party may file a motion for modification pursuant to Section 22 of the Act. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1(CRT) (1995).

Accordingly, employer's Motion for Reconsideration is denied, and the Board's decision is affirmed. 20 C.F.R. §802.409.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge