BRB Nos. 89-1832
and 90-926

ANTONIO DURAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERPORT MAINTENANCE CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYER'S INSURANCE OF WAUSAU	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Order Denying Reconsideration, Second Order Denying Reconsideration, Order Denying Modification and Second Order Denying Modification of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Interport Maintenance Corporation and Employer's Insurance of Wausau (jointly referred to as carrier or Wausau) appeal the Decision and Order, Order Denying Reconsideration, Second Order Denying Reconsideration, Order Denying Modification and Second Order Denying Modification (88-LHC-886) of Administrative Law Judge Jeffrey Tureck awarding benefits 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).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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).

On August 29, 1981, claimant injured his back in the course of his employment as a container repair mechanic. Claimant alleged that he subsequently sustained work and non-work-related recurrent injuries in October 1982, November 1983 and on January 17, 1985. Employer voluntarily paid compensation pursuant to the workers' compensation scheme of New Jersey through claimant's last day of employment on January 17, 1985. In April 1985 claimant was released to return to work by his treating physician, Dr. Siegel, who imposed a 40-pound lifting restriction. CX 7. Employer notified claimant that it did not have any work within this restriction, and claimant was therefore terminated. CX 7. Claimant, presently 58 years old, filed a claim for benefits under the Act and moved to the Dominican Republic.

At the informal conference, claimant and the district director[2] discovered that the wrong insurance carrier mistakenly had been notified of the conference. Additionally, a formal hearing scheduled for May 17, 1988, was continued for this reason. Tr. at 3. The formal hearing was held on October 25, 1988. Neither employer nor carrier, however, was represented by counsel at the hearing. The administrative law judge stated that it was assumed that notice of the hearing was delivered to the proper carrier, and further that employer had not participated whatsoever in any of the proceedings before the Office of Administrative Law Judges.[3] Tr. at 3-4. Notice to employer

[1] In BRB No. 89-1832, carrier appeals the administrative law judge's Decision and Order, Order on Reconsideration, and Second Order on Reconsideration awarding benefits under the Act for temporary total disability from January 17, 1985 to May 5, 1985, and for continuing permanent total disability. In BRB No. 90-926, carrier appeals the administrative law judge's Order Denying Modification pursuant to Section 22 of the Act, 33 U.S.C. §922, and the administrative law judge's denial of modification on reconsideration. By Order of the Board dated May 9, 1990, these appeals were consolidated for purposes of decision only.

[2] Pursuant to Section 702.105, 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute. "District director" will be used in this decision except when the statute is quoted.

[3]The carrier does not challenge the administrative law judge's statement that it received proper notice of the hearing.

itself was returned to sender. *Id*. Claimant's LS-18 pre-hearing statement states that the carrier (unidentified) had refused to discuss the claim. Following the conclusion of a brief hearing, the administrative law judge issued a Decision and Order awarding claimant benefits for permanent total disability based on the evidence of record submitted by claimant.

Upon its receipt of the administrative law judge's Decision and Order, the carrier promptly contacted an attorney who timely moved for reconsideration and to reopen the record to conduct discovery. The administrative law judge denied these motions. On September 12, 1989, the administrative law judge issued a Second Order Denying Reconsideration based on his construction of a May 19, 1989, letter from carrier as a motion to reconsider his denial of reconsideration.

Wausau appealed the administrative law judge's decisions to the Board, and it also filed a request for Section 22 modification, 33 U.S.C. §922, with the district director. Pursuant to its request for modification, Wausau filed a pre-hearing statement, which listed the contested issues as: Section 22, extent of disability, and entitlement to Section 8(f) relief, 33 U.S.C. §908(f).[4] The district director referred the modification and discovery requests to the Office of Administrative Law Judges, and the case was assigned to another administrative law judge. Eventually, the case was reassigned to the administrative law judge who presided at the formal hearing and who had denied carrier's prior motions for reconsideration and discovery. By Order dated January 26, 1990, the administrative law judge denied carrier's request for Section 22 modification and discovery. In a letter dated February 9, 1990, Wausau elaborated on the issues raised in its pre-hearing statement, restated its request for modification, and contended that discovery was required to fully prepare and present its case. On March 5, 1990, the administrative law judge stamped "denied" on this letter.

In these consolidated appeals, Wausau first contends that the administrative law judge erred by awarding claimant benefits for permanent total disability. Wausau also challenges the administrative law judge's denials of reconsideration, modification, and discovery because, in effect, after it failed to appear at the formal hearing, it was never afforded an opportunity by the administrative law judge to challenge the award. Claimant responds, urging affirmance.

We first address BRB No. 89-1832, in which Wausau appeals the administrative law judge's Decision and Order, Order Denying Reconsideration, and Second Order Denying Reconsideration. Wausau argues that the administrative law judge failed to comply with Section 702.336(b), 20 C.F.R. §702.336(b), when he permitted claimant to raise the issue of permanent disability for the first time at the formal hearing. Carrier also challenges the administrative law judge's failure to address the issue of jurisdiction, which claimant raised in his pre-hearing statement. Finally, it challenges the administrative law judge's denial of its motions for reconsideration and to conduct discovery.

[4]The Director filed a pre-hearing statement in response to carrier's request for modification, stating that entitlement to Section 8(f) relief is barred pursuant to Section 8(f)(3), 33 U.S.C. §908(f)(3)(1988), since it failed to raise Section 8(f) at the formal hearing, which was its first opportunity to do so.

Carrier is correct that claimant contended for the first time at the formal hearing, that he is entitled to benefits for permanent total disability and that claimant stated the issue of federal jurisdiction in his pre-hearing statement. *Compare* Tr. at 56 *with* BRB No. 89-1832, Insurer's Petition - Ex. A. Claimant initially sought benefits for temporary total disability. Carrier's arguments, however, are meritless. Section 702.336(a) states that the hearing may be expanded to include a new issue and that, if in the opinion of the administrative law judge more time is needed to prepare, the parties shall be given a reasonable time to prepare. In the instant case, it was within the administrative law judge's discretion to address whether claimant's disability is permanent without providing further notice to employer because claimant raised the issue of temporary total disability and there is no significant difference in the burdens of proof required to challenge a claim for permanent rather than temporary total disability. *See Bonner v. Ryan-Walsh Stevedoring Co., Inc.*, 15 BRBS 321, 323-324 (1983); *Walker v. AAF Exchange Service*, 5 BRBS 500 (1977).

We also reject the argument that the administrative law judge erred by failing to address the issue of jurisdiction. Section 18.5(b) of the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. §18.5(b), states that when a party fails to appear without good cause the administrative law judge may find facts as alleged by the appearing party, and issue a Decision and Order containing such findings and appropriate conclusions.[5] In the instant case, claimant undoubtedly stated jurisdiction as an issue in anticipation that employer would contest whether claimant was injured on a covered situs. *See* 33 U.S.C. §903(a). The administrative law judge questioned claimant at the hearing about employer's situs. Claimant testified that it is located a mile from navigable waters. Tr. at 17. Claimant, however, sought benefits under the Act and thus, *per se* did not *contest* the issue. When employer failed to appear and contest this issue, the administrative law judge was not obliged to specifically address whether claimant was injured on a covered situs. *See generally Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87 (1989).[6] Accordingly, we reject Wausau's objections to the administrative law judge's Decision and Order awarding benefits for permanent total disability.

Wausau next argues that the administrative law judge erred by denying its motions for reconsideration and discovery. Its motion for reconsideration stated that it failed to appear due to an administrative error by a claims adjustor, who was no longer an employee of the insurance carrier. To avoid prejudice to claimant, carrier agreed to abide by the terms of the compensation order while

[5] The regulations at 29 C.F.R. Part 18 apply to the extent they are not inconsistent with the Act and its implementing regulations. *See Wayland v. Moore Dry Dock*, 21 BRBS 177, 180-181 n.3 (1988); 29 C.F.R. §18.1(a).

[6] Contrary to employer's contention it is not clear that a container repair facility located one mile from navigable waters is not a covered situs. Such a determination requires a finding as to whether the surrounding area is an "adjoining area" under Section 3(a). *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Brady Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

the record was open for discovery and the case was under reconsideration. *See generally McCrady v. Stevedoring Services of America*, 23 BRBS 106 (1989). It also agreed to pay claimant's attorney's fee. The administrative law judge denied carrier's motion because it had not only failed to appear at the hearing, but had not in any way participated in the claim. He therefore concluded that it was too late for employer or its carrier to become involved. In response to correspondence from carrier, which the administrative law judge construed as a second motion for reconsideration, its motion was again denied. The administrative law judge found that he no longer retained jurisdiction because the case had been appealed to the Board.

We review the administrative law judge's denials of reconsideration to determine if there was an abuse of discretion. *See generally Scott v. S.E.L. Maduro, Inc.*, 22 BRBS 259 (1989); *see also Bonner*, 15 BRBS at 325. Wausau's stated grounds for reconsideration are based on the negligence of its own agent - a claims adjustor for the carrier. Carrier does not challenge the administrative law judge's rationale that it had failed to participate in the resolution of this claim until after the administrative law judge issued his Decision and Order. At the date of the formal hearing on October 25, 1988, claimant had waited over three and one-half years for the resolution of his claim. Claimant, moreover, did not receive any compensation after January 17, 1985, until the administrative law judge's Decision and Order was issued on March 15, 1989. Under these facts, we hold that the administrative law judge properly issued a Decision and Order awarding benefits, and he did not abuse his discretion by denying employer's motions for reconsideration and discovery. *See generally Scott*, 22 BRBS at 259. Wausau's arguments are therefore rejected. Accordingly, we affirm the administrative law judge's Decision and Order awarding benefits for permanent total disability, the Order Denying Reconsideration, and the Second Order Denying Reconsideration.

In BRB No. 90-926, carrier appeals the administrative law judge's denial of its motions for discovery and for modification pursuant to Section 22 of the Act. Section 22 provides, in pertinent part, that the administrative law judge may issue a new compensation order based on a mistake of fact or change of condition.[7] Accordingly, to reopen the record under Section 22, the moving party must allege a mistake of fact or change of condition, and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52-53 (1989). To determine whether to grant modification, if the evidence is sufficient to so warrant, the administrative law judge must decide whether modification would render justice under the Act. *Craig v. United Church of Christ*, 13 BRBS 567, 571-572 (1981); *see also Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174, 176 (1988).

In the instant case, carrier submitted a request for Section 22 modification after its motions for reconsideration were denied. In a pre-hearing statement, carrier alleged that claimant is only partially disabled and that it is entitled to Section 8(f) relief. It sought, *inter alia*, to submit a report and testimony from a vocational expert and a labor market survey. Wausau also stated that it would submit testimony from an independent medical examiner, a physician chosen by employer, and claimant's treating physician. Finally, it offered to produce medical records from claimant's treating physicians and employer's medical clinic.

[7]Section 22, 33 U.S.C. §922 (1988), states:

> Upon his own initiative, or upon the application of any party in interest . . . , on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case . . . in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. . . .

The administrative law judge, citing *Craig*, 13 BRBS at 571, denied the request for modification and discovery. Since this case was also on appeal to the Board, the administrative law judge stated that, pursuant to *Craig*, he must make a threshold determination whether to grant a hearing and therefore request that the Board remand the case.[8] He found that Wausau failed to raise a specific mistake of fact or change of condition. He also found that carrier failed to provide an argument or cite additional evidence that would establish a basis for modification. Carrier timely sought reconsideration of the denial of its petition for modification, which the administrative law judge also denied.

We hold that the administrative law judge abused his discretion by denying the motions for modification and to conduct discovery, and we therefore vacate the administrative law judge's orders. *See Moore*, 23 BRBS at 53; *Dobson*, 21 BRBS at 175-176. In its request for reconsideration of the administrative law judge's denial of Section 22 modification, Wausau correctly states that the issues raised in its pre-hearing statement are sufficient to bring the case within the scope of Section 22. Clearly, alleging partial disability when the Decision and Order awarded total disability raises the possibility of a mistake of fact or change in condition. *Moore,* 23 BRBS at 52. Wausau also stated how the evidence it intended to introduce and evidence already of record would support its requests for modification and to reopen the record and conduct discovery. Although the administrative law judge did not abuse his discretion in disallowing carrier's attempts to challenge the initial award of benefits, the administrative law judge erred in denying modification as carrier presented sufficient information to demonstrate grounds for modification under Section 22. Moreover, employer and carrier's failure to attend the formal hearing cannot serve as a basis for denying modification. Modification proceedings are intended to replace traditional notions of *res judicata*, *Hudson v. Southwestern Barge Fleet Services, Inc.*, 16 BRBS 367 (1984), and the scope of modification is not narrowed because employer is seeking to reduce an award. *See Blake v. Ceres Gulf*, 19 BRBS 219 (1987). Claimant in this case thus is not prejudiced by modification proceedings to any greater degree than any other claimant who is receiving benefits.

On remand, therefore, the administrative law judge shall reopen the record pursuant to Section 22, and permit the parties to submit evidence, and present their cases on the issues raised in carrier's petition. *See Dobson*, 21 BRBS at 175-176. Once carrier, as the moving party, 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 adjudication process. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). In rendering his decision, the administrative law judge should consider both the old evidence and the newly submitted evidence. *Dobson*, 21 BRBS at 176.

Accordingly, the administrative law judge's Decision and Order, Order Denying Reconsideration and Second Order Denying Reconsideration are affirmed. The administrative law

[8]The Board has changed the procedure for modification since *Craig* was issued. In *Molnar v. Harman Coal Co.*, BRB No. 83-576 BLA (Jan. 9, 1985)(unpublished order), the Board stated that when modification is sought in a case pending before the Board, it will remand the case to the administrative law judge for consideration of the modification petition. The party who filed the original appeal may seek reinstatement of its appeal to the Board after the administrative law judge rules on the modification petition, and any aggrieved party may also appeal the decision on modification. *See also* 20 C.F.R. §802.301(c).

judge's Orders denying modification are vacated, and the case is remanded for further proceedings in accordance with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge