BRB No. 06-0586

WILLIAM N. GATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DEL MONTE TROPICAL FRUIT COMPANY	)	DATE ISSUED: 04/26/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

G. Mason White (Brennan, Harris & Rominger, LLP), Savannah, Georgia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2005-LHC-0318) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which 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).

Claimant, a forklift driver/warehouseman, suffered two work-related injuries: a wrist injury on June 1, 1995, and a neck, back and left foot and ankle injury on February 5, 1996. Claimant was performing light-duty work for employer at the time it closed its facility on July 11, 1997. Subsequently, claimant obtained employment as a package store clerk for the month of June 1998 and as a security guard on October 22, 1998.

In the initial Decision and Order in this case, Administrative Law Judge Richard T. Stansell-Gamm awarded claimant compensation for a three percent impairment of his left arm, 33 U.S.C. §908(c)(1), and for a two percent impairment of his left foot, 33 U.S.C. §908(c)(4). He also awarded claimant compensation for temporary total disability from July 11, 1997, to March 15, 1998, permanent total disability from March 16, 1998, to May 31, 1998, and ongoing permanent partial disability thereafter based on claimant's loss in wage-earning capacity in his post-injury position as a security guard. 33 U.S.C. §908(c)(21).

Both parties appealed this decision. In its decision, the Board vacated Judge Stansell-Gamm's award of compensation for permanent partial disability from June 1, 1998, to October 21, 1998, based on a loss of wage-earning capacity of $46.34, and modified the decision to award claimant compensation for permanent partial disability from June 1 to June 30, 1998, based on a loss of wage-earning capacity of $275, and for permanent total disability from July 1, 1998, to October 21, 1998, based on an average weekly wage of $380. The Board affirmed the award in all other respects. *Gates v. Del Monte Fresh Produce*, BRB Nos. 00-0955/A (June 20, 2001)(unpubl.).

In October 2003, claimant filed a request to modify the partial disability award alleging that he suffered an additional loss in wage-earning capacity. In January 2003, his employer, Sizemore Security, transferred him from the Air National Guard facility to the Savannah I&D Water Supply Authority. Claimant worked fewer hours in the new position and is paid a lower hourly rate. In his Decision and Order, Administrative Law Judge Malamphy (hereinafter the administrative law judge) granted claimant's motion for modification and awarded claimant greater compensation to reflect his loss in hourly wages and hours worked.[1]

Employer appeals, contending that the administrative law judge erred in finding that claimant's loss in wages at the water authority is due to any reason other than his

[1] The administrative law judge awarded claimant compensation of $60 per week from January 3 to June 22, 2003, $156.67 per week from June 23 to October 24, 2003, and compensation of $60 per week thereafter. Decision and Order at 3.

own misconduct.[2] Employer therefore contends the increased loss in wage-earning capacity is not compensable. Claimant responds, urging affirmance of the award on 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). It is well established that the party requesting modification has the burden of showing the change in condition or mistake in fact. *See, e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In this case, claimant established a change in his economic condition: he lost the post-injury job that formed the basis of the prior award of compensation. He is now being paid a lower hourly wage and working fewer hours per week.[3] *See Rambo I*, 515 U.S. at 296, 30 BRBS at 3(CRT) ("applicable 'conditions' are those that entitled the employee to benefits in the first place").

The standards for determining disability are the same during a Section 22 modification proceeding as during the initial adjudicatory proceedings under the Act. *Rambo II*, 521 U.S. at 139, 31 BRBS at 61-62(CRT). As claimant established a change in his condition, he must also establish that he was transferred from the job which was previously found to constitute suitable alternate employment for reasons unrelated to any misconduct on his part. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Where a claimant loses a position because of his failure to follow company procedures or policies, any resulting loss of wage-earning capacity is not compensable since it was not due to claimant's work-related injury. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1 (1992), *aff'd sub nom. Brooks v. Director, OWCP*, 2 F.3d 64, 27 BRBS 100(CRT) (4th Cir. 1993); *Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980). If, however, the loss of a

[2] We decline to address employer's argument that it is entitled to a credit for an alleged overpayment of benefits as it failed to raise this issue before the administrative law judge. *See Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997).

[3] Contrary to employer's contention, claimant demonstrated a permanent change in wage-earning capacity. Thus, this case is consistent with the Supreme Court's recognition that modification must be based on a change in claimant's wage-earning capacity and not on every variation in actual wages or transient change in the economy. *Rambo I*, 515 U.S. at 301, 30 BRBS at 5(CRT); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRS 91 (1996).

position is due to claimant's inability to perform the work, to an economic layoff or to other reasons unrelated to misconduct, employer must establish the availability of other suitable alternate employment in order to avoid increased liability. *Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 35 BRBS 87(CRT) (4th Cir. 2001); *Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

In this case, the parties agree that claimant's work as a security guard with Sizemore Security constitutes employment within claimant's post-injury physical restrictions. It is also agreed that at the time of claimant's original award this position paid $333.66 per week, *i.e.*, 40 hours per week at $8.34 per hour, working at an Air National Guard facility. On January 3, 2003, however, claimant was transferred to the Savannah I&D Water Supply Authority and his hourly rate was reduced to $7.25 per hour; moreover, between June 22 and October 23, 2003, his hours were reduced to 20 per week. ALJX 1. The administrative law judge found that employer's contention that claimant's transfer and resultant increased loss in wage-earning capacity were the result of his own malfeasance was unsubstantiated by record evidence.

Employer contends that claimant was reassigned to the lower paying position because of his performance on the job. Records from Sizemore contain two incidents of on the job misconduct: on March 25, 2002, claimant was counseled for "dereliction of duty," EX E at 19; and on September 17, 2002, Captain Elliot of the Air National Guard suggested claimant be terminated for being argumentative. EX E at 21. Ms. Swank, who works in payroll and human resources at Sizemore Security, testified by deposition that claimant was transferred in early January 2003 at the request of the customer, *i.e.*, the Air National Guard. EX E at 6-7. The administrative law judge, however, found that the two recorded incidents were too remote from the actual transfer and that Ms. Swank's statement concerning the reasons for claimant's transfer several months later was unsupported by any official notations in Sizemore's records.

We reject employer's contention that the administrative law judge erred by failing to give determinative weight to Ms. Swank's statement that claimant was transferred due to his own malfeasance. The administrative law judge rationally found that Ms. Swank's statement that claimant's transfer was the direct result of a request from the National Guard, unsupported by any official notation in claimant's records, was insufficient to establish that claimant's transfer was the result of his own actions. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, the administrative law judge was entitled to find that as the two incidents occurred four and nine months prior to the transfer, they were unrelated to the change in duty stations. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Contrary to employer's assertion that claimant admitted to misconduct relative in time to his transfer, claimant stated only that there had been a discussion

concerning his repeated requests for vacation time at which time the prior incidents had been mentioned. CX 9 at 23-24. Thus, there was no misconduct contemporaneous with the transfer. Moreover, within one week of claimant's transfer from the National Guard to the water authority, employer promoted him in rank. CX 9 at 13. Thus, as substantial evidence supports the administrative law judge's finding that claimant's transfer was unrelated to misconduct, we affirm it.

Employer's argument that claimant made no effort to obtain other employment paying equal wages following his transfer is without merit.[4] The party seeking to demonstrate that a claimant's actual post-injury wages do not fairly and reasonably represent his wage-earning capacity bears the burden of so establishing. 33 U.S.C. §908(h); *see Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). In this case, claimant presented evidence of his actual post-injury earnings upon his transfer to the water authority. Employer did not establish that claimant has a higher wage-earning capacity on the open market, *see, e.g., Rambo II*, 521 U.S. at 139, 31 BRBS at 61-62(CRT); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108(CRT) (5th Cir. 1990), and the administrative law judge therefore rationally based claimant's award on his actual earnings at the water authority.[5] 33 U.S.C.

[4] Employer's reliance upon *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991), for its contention that business decisions made by Sizemore resulting in claimant's further loss in wage-earning capacity are not compensable and, therefore, that modification is not appropriate in this case, is misplaced. The United States Court of Appeals for the Ninth Circuit reversed the Board's holding in *Edwards*, stating that that the long-term remedial purpose of the Act is to compensate for any injury-related reduction in wage-earning capacity throughout the claimant's lifetime. *Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994), citing *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984). *See also Lentz v. Cottman Co.*, 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

[5] In this regard, we disagree with our dissenting colleague that remand is necessary for further findings of fact, as employer has not met its burden of establishing that claimant's actual wages do not represent his wage-earning capacity. Claimant satisfied his initial burden of showing a change in his economic condition, as the basis for the former permanent partial disability award changed. *Rambo I*, 515 U.S. at 296, 30 BRBS at 3(CRT); *Rambo II*, 521 U.S at 139, 31 BRBS at 61-62(CRT). Pursuant to Section 8(h) of the Act, the claimant's actual wages are presumed to represent his wage-earning capacity, *Rambo II*, 521 U.S. at 139, 31 BRBS at 61-62(CRT), and the party contending otherwise has the burden of so establishing. *Id.* As employer did not introduce any

§908(c)(21), (h); *Hundley v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998). Thus, as substantial evidence supports the administrative law judge's finding that claimant has an increased loss in wage-earning capacity due to his transfer to the water authority, we affirm the administrative law judge's award of increased permanent partial disability benefits pursuant to Section 22 of the Act. *Vasquez*, 23 BRBS 428.

Accordingly, the administrative law judge's Decision and Order granting claimant's motion for modification is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge:

I respectfully dissent from the decision to affirm the administrative law judge's grant of modification. I would hold that the administrative law judge did not make all the necessary findings required by the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995), and therefore I would remand the case for further consideration.

In *Rambo I*, the Supreme Court held that a change in a claimant's economic condition may be the basis for the modification of a prior award or denial of benefits. 33 U.S.C. §922. Specifically, the Court stated, "where [a claimant's] wage-earning capacity has been reduced, restored, or improved, the basis for compensation changes and the statutory scheme allows for modification." *Rambo I*, 515 U.S. at 298, 30 BRBS at

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evidence of a higher wage-earning capacity, there is no reason to remand the case, as the administrative law judge reached the only legally correct conclusion based on his finding that claimant's transfer was unrelated to misconduct.

4(CRT). The Court cautioned, however, that, "[t]his circumspect approach does not permit a change in wage-earning capacity with every variation in actual wages or transient change in the economy." *Id.*, 515 U.S. at 301, 30 BRBS at 5(CRT). Rather, the factfinder is required to analyze whether there has been a change in the claimant's *wage-earning capacity*. *Id.*

In this case, the administrative law judge did not take this step. Rather, he granted modification in cursory manner, solely on the basis of a change in claimant's actual wages. *See* Decision and Order at 3. Therefore, I would remand the case for the administrative law judge to analyze whether the decrease in claimant's wages was due to a change in his earning capacity, in accordance with Section 8(h) of the Act, 33 U.S.C. §908(h). *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979); *see generally Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988).

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JUDITH S. BOGGS
Administrative Appeals Judge