BRB No. 02-0813

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| BOOKER T. REDDICK | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| UNIVERSAL MARITIME SERVICES | ) | DATE ISSUED: 08/26/2003 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits on Remand from the Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Lawrence P. Postal (Seyfarth Shaw), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on Remand from the Benefits Review Board (1991-LHC-0054) of Administrative Law Judge Paul H. Teitler 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).

This modification case is before the Board for the second time. To recapitulate the facts, claimant, a longshoreman, injured his back on November 5, 1988, as a result of a falling container. He sought benefits under the Act, and was awarded permanent total disability benefits in a Decision and Order dated June 17, 1992. 33 U.S.C. '908(a). In that decision, the parties stipulated that claimant had an average weekly wage of $1,032.01. *See* Cl. Ex. G. Thereafter, employer filed a motion for modification based on a change in condition. 33 U.S.C. '922. Claimant owns a number of businesses, and

employer contended that claimant=s direct involvement with the businesses, and therefore his wage-earning capacity, had increased. Thus, employer contended that claimant had a change in his economic condition.

Claimant has a number of business interests in Newark, New Jersey, which consist primarily of a liquor store, laundromats and rental houses, all of which he owned prior to his injury in 1988. The liquor store, Booker's Liquors, has been owned continuously by claimant since 1976. In addition, claimant has owned Booker=s Laundromat since 1976 or 1977 and the Suds and Duds Laundromat since 1986.[1] Booker=s Laundromat is located next door to Booker=s Liquors.

In his decision, the administrative law judge found that there is evidence revealing a change in claimant=s functional impairment. The administrative law judge also found that claimant=s post-injury earnings have increased substantially, and he is performing substantial full-time, gainful employment. Thus, he found that modification of the previous award was warranted, and he terminated benefits. Moreover, the administrative law judge found that claimant knowingly and willfully omitted or underreported his business earnings on the LS-200 Report of Earnings statements which he was required to file. Therefore, the administrative law judge concluded that claimant must forfeit all future benefits pursuant to Section 8(j) of the Act, 33 U.S.C. ' 908(j). The administrative law judge denied claimant=s motion for reconsideration.

Claimant appealed this decision to the Board. In its decision, the Board vacated the administrative law judge's finding that claimant forfeited his right to all benefits under the Act for knowingly and willfully omitting his earnings from his business entities on the LS-200 Report of Earnings statements for 1995, 1996 and 1997, as this is not the remedy provided by Section 8(j). *Reddick v. Universal Maritime Services*, BRB No. 00-1021, slip op. at 3-4 (June 12, 2001). The Board remanded the case to the administrative law judge in order to make specific findings regarding whether claimant adequately reported his earnings on each form for the specific periods in which benefits may be suspended. *Reddick*, slip op. at 4. In addition, the Board vacated the administrative law judge's finding that the evidence supports modification based on a change in claimant's wage-earning capacity and remanded the case for further findings regarding claimant's post-injury earning capacity. *Id*., slip op. at 5. The Board held that the administrative law judge erred in including claimant's profits and the increase in his assets in his analysis of claimant's current earning capacity. *Id*., slip op. at 5. Thus, the Board instructed the administrative law judge to discuss the relevant evidence and render findings as to the nature of the earnings claimant receives from his business entities in order to determine claimant's current wage-earning capacity. *Id*., slip at 7.

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[1]Claimant also owns property on 17th Street in Newark, which consists of a multi-family residence, which has been condemned since 1983, and another laundromat, Suds and Duds II, on the first floor. H. Tr. 59-61.

On remand, the administrative law judge reopened the record for additional evidence. On August 29, 2001, employer submitted, *inter alia*, claimant's LS-200 earnings statements from 1991 through 1998, and stated that they were submitted so that the potential Section 8(j) forfeiture period would encompass the entire period during which claimant was entitled to total disability benefits. The record was left open until July 1, 2002, during which time claimant did not object to the submission of this evidence or the expansion of this issue. After considering this evidence, the administrative law judge concluded that the LS-200 statements covering the period from September 30, 1991 through December 31, 1998 are intentionally inaccurate and thus the Section 8(j) bar applies to the period from 1991-1998. In addition, the administrative law judge found that he could not put a precise dollar value on claimant's wage-earning capacity, but concluded that claimant's residual earning capacity exceeds his average weekly wage. Lastly, the administrative law judge found that claimant can return to his former position as a dockman/holdman as of August 13, 2001, the date of Dr. Greifinger's report, which he found to be well-reasoned and supported by the objective findings and the job analysis report. The job's requirements are now less physically demanding than they were at the time of claimant's injury. Thus, the administrative law judge terminated claimant's total disability benefits.

On appeal, claimant contends that the administrative law judge erred in considering LS-200 statements back to 1991, as he contends that he was not given notice on remand that anything other than the 1995, 1996, and 1997 statements would be considered. In addition, claimant contends that the administrative law judge failed to take into account claimant's ownership of the business interests prior to the injury, and that as claimant received payments from his businesses prior to the injury which were not added to his average weekly wage, similar amounts received after the injury should not be determinative of his post-injury wage-earning capacity. Rather, claimant contends, the administrative law judge should have compared the differences in the salary he earned from the businesses before and after the injury in order to determine how much claimant is earning as a result of his increased activity with the businesses. Lastly, claimant contends that the administrative law judge erred in finding that claimant could return to his former employment. Employer responds, urging affirmance of the administrative law judge's decision.

Section 8(j)

Initially, claimant contends that the administrative law judge erred in considering the applicability of Section 8(j) for the periods prior to 1995. Section 8(j) permits an employer to request that a claimant report his post-injury earnings, including those from self-employment. 33 U.S.C. §908(j). Once a request is made, the claimant must complete and return the LS-200 Form within 30 days of his receipt of the form, whether or not he has any post-injury earnings. The claimant's benefits are subject to forfeiture for the period during which the employee was required to file such report if earnings are knowingly omitted from or understated on the form. 33 U.S.C. §908(j); *Hundley v.*

*Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 254 (1998); *Moore v. Harborside Refrigerated, Inc.*, 28 BRBS 177 (1994)(decision on recon.); 20 C.F.R. §§702.285-702.286. An employer can recover such forfeited compensation only "by a deduction from the compensation payable" in the future. 33 U.S.C. §908(j)(3)(1994); *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

In the present case, the Board vacated the administrative law judge's finding that claimant has forfeited his right to all benefits under the Act, as this is not the remedy provided by Section 8(j). Rather, benefits are suspended only during the periods of underreporting. *Hundley*, 32 BRBS at 258. Moreover, as the administrative law judge did not make specific findings regarding whether claimant adequately reported his earnings on each form for the specific periods, the Board remanded the case to the administrative law judge for further consideration of the issue. *Reddick*, slip op. at 3-4. In addition, the Board stated that if the administrative law judge found that claimant's benefits should be suspended because of claimant's misrepresentation of his earnings, the administrative law judge must remand the case for the district director to consider claimant's financial situation and to establish a forfeiture schedule. 33 U.S.C. §908(j)(3); 20 C.F.R. §702.286(c); *Moore*, 28 BRBS at 184.

On remand, the administrative law judge issued an order on August 23, 2001, notifying the parties that any request to reopen the record, file briefs or initiate any other proceedings on remand must be filed within 30 days of the order. Pursuant to that order, employer responded by a letter dated August 29, 2001, stating that the record "does not contain all the falsified LS-200's in OWCP's file." Employer contended that the LS-200's for the years 1991-1998 were falsified, and it submitted the LS-200 forms for those years. Claimant did not respond to this letter and did not attempt to enter any new evidence on remand until after the administrative law judge had closed the record, nearly ten months later. In addition, although employer addressed this issue in its closing brief before the administrative law judge on remand, claimant did not respond to this issue in his closing brief. The administrative law judge admitted the exhibits submitted by employer on remand into evidence. Decision and Order on Remand at 2.

The administrative law judge has the authority to address an issue for the first time on remand, *see Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999). The regulation at 20 C.F.R. §702.336(a) provides that if the evidence presented warrants consideration of an issue not previously considered, the hearing may be expanded to include the new issue. *See, e.g., Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *aff'd in part and rev'd in part on other grounds*, 143 F.3d 789, 32 BRBS 115 (CRT)(3d Cir. 1998). *See also Blanding*, 32 BRBS 174.

In the instant case, claimant had adequate notice that the scope of the Section 8(j) inquiry was being expanded on remand. Claimant responded to employer's request regarding discovery on the issue of claimant's net worth (an issue raised in the same

letter that discussed the additional years of LS-200 forms) by letter dated September 6, 2001, but he did not raise any objections to employer's submission of the additional LS-200 forms. Moreover, the administrative law judge left the record open for additional evidence until July 1, 2002. *See* Order dated May 22, 2002; Order Granting Extension dated June 12, 2002. As claimant had sufficient time to address the evidence submitted in August 2001, and the administrative law judge may address new issues raised on remand, we reject claimant's contention that the administrative law judge's consideration of additional evidence on a contested issue was in error as his due process rights were not abridged.

In addition, with regard to the administrative law judge's findings under Section 8(j), Section 8(j) does not require that claimant only report his salary, contrary to claimant's contention. The regulation at 20 C.F.R. §702.285(b) defines "earnings" as

> all monies received from any employment and includes but is not limited to wages, salaries, tips, sales commissions, fees for services provided, piecework and all revenue received from self-employment even if the business or enterprise operated at a loss of if the profits were reinvested.

20 C.F.R. §702.285(b). The administrative law judge found that claimant failed to properly report his gross earnings from Booker's Liquors, Booker's Laundromat and Suds and Duds on the LS-200 statements from 1991-1998.[2] Decision and Order at 5. Moreover, the statements do not report claimant's net earnings from Suds and Duds in any year, Booker's Laundromat from 1991-1996, and Booker's Liquors in 1991-1995, 1997-1998.[3] The administrative law judge found that claimant admitted his LS-200's were not true, H. Tr. at 81-85, and that claimant's accountant testified that the LS-200 statements were not properly completed, H. Tr. at 387-388. Based on this testimony and the omission of relevant information on the LS-200 statements, we affirm the administrative law judge's finding that claimant's right to compensation for the period from 1991-1998 is forfeited pursuant to Section 8(j). *Hundley*, 32 BRBS 254. However, the Board held in its prior decision that if the administrative law judge finds that claimant's benefits should be suspended because of claimant's misrepresentation of his earnings, the administrative law judge must remand the case for the district director to consider claimant's financial situation and to establish the forfeiture schedule. *Reddick*, slip op. at 4, n.3; *see* 33 U.S.C. §908(j)(3)(1994); 20 C.F.R. §702.286(c); *Moore*, 28 BRBS at 184. Although the administrative law judge concluded that claimant misrepresented his earnings for the years 1991 through 1998, he did not remand the case to the district director to establish a forfeiture schedule. Therefore, we vacate the administrative law judge's finding that employer is entitled to a credit for all payments during the relevant periods should claimant be found to be entitled to compensation in the future, and we remand the case to the administrative law judge to follow the procedures required by Section 8(j).

Wage-earning capacity

Claimant also contends that the administrative law judge erred in his determination of claimant's wage-earning capacity. Section 22 provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted

[2] On appeal, claimant contends that the evidence does not establish that he was working in his businesses prior to 1995, and thus that money received from these business was not from "self-employment" and not reportable on the LS-200 statements. However, the administrative law judge found that claimant had owned and maintained the businesses since before the initial hearing in 1991 and that the money received from the businesses in the form of interest and dividends has been a "cover-up" for his personal work. We affirm the administrative law judge's finding that claimant has been receiving payments from "self-employment" since 1991, at least, and thus reject claimant's contention that the income is passive, like rental income, interest or dividends.

[3] Only for the year 1995 did claimant include the income from all three businesses under gross earnings from Booker's Liquors as determined by the reviewing accountant, Mr. McErlean. Emp. Exs. 7, 12.

based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). Employer sought to establish that claimant was no longer totally disabled due to an increase in his wage-earning capacity from his self-employment. In the Board's previous decision, the Board held that the administrative law judge erred in including claimant's profits and the increase in his assets in his analysis of claimant's wage-earning capacity. The administrative law judge had found that claimant's business activities, although they pre-existed the injury, have increased since the total disability award was entered and that his assets have increased. The administrative law judge, however, did not make a determination as to claimant's wage-earning capacity. In remanding the case, the Board stated that where a claimant's business income is the direct result of the claimant's "personal management or endeavor," or the claimant performs such extensive services for the business that the income represents salary rather than profits, the income should be considered in determining wage-earning capacity. *Reddick*, slip op. at 6, *citing* 2 Arthur Larson and Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW, §83.05 (2000); *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989)(Board affirmed administrative law judge's finding that claimant was more like an employee than an owner, but held that administrative law judge erred in including in claimant's wage-earning capacity estimated "profits" because no payments were anticipated); *see also McGee v. Estes Express Lines*, 125 N.C. App. 298, 480 S.E. 2d 416 (N.C.App. 1997)(inquiry is whether skills used by the claimant in running his business would enable him to compete in labor market). The Board also stated that "claimant's total earnings from self-employment for purposes of Section 8(j) do not automatically equate to his wage-earning capacity, and they must be analyzed to determine whether they represent gross receipt or profits as opposed to wages paid for claimant's personal labor." *Reddick*, slip op. at 7.

On remand, the administrative law judge reviewed the income documents submitted by claimant, as well as the accounting review performed for employer by Mr. McErlean. The administrative law judge found that all of the payments received by claimant from the businesses are due to claimant's personal labor. The administrative law judge accepted Mr. McErlean's summary of claimant's total income, as reported on his personal tax returns, as follows:

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|---|---|
| 1986 | $51,323 |
| 1987 | $73,226 |
| 1988 | $90,690 |
| 1989 | $41,796 |
| 1990 | $19,189 |
| 1991 | $32,090 |

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|---|---|
| 1992 | $52,573 |
| 1993 | $59,062 |
| 1994 | $94,160 |
| 1995 | $55,506 |
| 1996 | $42,256 |
| 1997 | $55,611 |
| 1998 | $75,232 |

Emp. Ex. 7. The administrative law judge found that these figures do not include the cash payments that claimant made to himself. Decision and Order at 7. The administrative law judge found that the businesses made cash payments to claimant for his personal work in the form of "interest" payments paid to claimant by Booker Liquors Inc. and Suds N Duds Inc., even though there was no loan documentation to support claimant's allegation that there was an outstanding loan by claimant to the businesses, and in "dividend" payments paid by Booker's Liquors in the years 1992-1995. The administrative law judge concluded that he "cannot put a precise value on the claimant's wage-earning capacity current or at the hearing date, because the Claimant did not give truthful discovery, his financial records are a sham, and the Claimant failed to properly answer discovery." Decision and Order at 9. The administrative law judge thus found that he must make an adverse inference that claimant's earning capacity was at least as high as his best year, 1992, when his interest and dividend payments from the businesses totaled $64,926. Emp. Ex. 7 at 6. The administrative law judge found that this figure, adjusted for inflation, results in an average weekly wage higher than claimant's average weekly wage at the time of injury.[4] Thus, he found that claimant is no longer economically disabled.

On appeal, claimant agrees that he has "some" wage-earning capacity by reason of increased involvement in his own businesses, Claimant's brief at 16, and he does not contest the administrative law judge's rational finding that his testimony lacks credibility. However, claimant contends that the administrative law judge's analysis of his wage-earning capacity is erroneous in that he failed to account for the fact that claimant had earnings from businesses prior to his work injury. Claimant contends it is not rational for the administrative law judge to conclude that *all* post-injury payments are due to claimant's increased ability to perform work for his businesses, as claimant received payments from his businesses before he was injured. Moreover, claimant contends the

[4] Claimant's average weekly wage at the time of injury was $1,031.01. $64,926 divided by 52 equals $1,248.58. The administrative law judge did not make a specific finding as to the dollar effect of inflation.

administrative law judge erred in finding that wage payments to other employees of the businesses decreased after claimant's injury.

We reject claimant's argument that the administrative law judge erred in determining that at least some of interest and dividend payments to claimant by the businesses should be considered as part of his wage-earning capacity. The administrative law judge found that there was no documentation for an alleged loan made by claimant to the businesses, and he found it relevant that the amount of the "interest" payments jumped in the year following claimant's injury, at the same time as his salary stopped. As claimant never produced documentation for the existence of the loan, and the administrative law judge found that claimant's testimony alone was not credible, we reject claimant's allegation that he took out loans for the purchase of the buildings personally and thus was entitled to reimburse himself out of the assets of the businesses.

As claimant correctly asserts, however, the administrative law judge improperly found that the salaries paid by the businesses to other employees dropped after 1988. A summary of salaries paid, as indicated in the report by Mr. McErlean, indicates:

> 1. For Booker's Laundromat, wages between 1987 and 1997 were 1987 - $9,440, 1988 - $8,000, 1989 - $10,615, 1990 - $8,320, 1991 - $6,580, 1992 - $8,480, 1993 - $8,169, 1994 - $8,320, 1995 - $8,320, 1996 - $8,480 and 1997 - $8,320.
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> 2. For Village Laundromat, there are no wages listed.
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> 3. For Booker's Liquors, wages for other employees were 1989 – $17,904, 1990 – $18,640, 1991 – $13,410, 1992 – $8,580, 1993 – $23, 097, 1994 – $19,902, 1995 – $28,539, 1996 - $28,962, 1997 - $28,704, and 1998 - $28,704.
>
> 4. For Suds N Duds, the salaries paid were 1988- $10,626, 1989 - $9,809, 1990 - $6,991, 1991 - $3,658, 1992 - $3,729, 1993 - $3,377, 1994 - $3,658, 1995 - $3,658, 1996 - $3,658, 1997 - $3,728, and 1998 - $3,658.

Emp. Ex. 7. When all the years reported are considered, these figures do not support the administrative law judge's finding of a significant drop in wages paid to other employees.[5] Therefore, it was not rational for the administrative law judge to rely on a drop in other salaries to support a conclusion that all payments received by claimant in the years following the injury were attributable to claimant's increased personal services.

[5] The administrative law judge compared figures for Booker's Liquors indicating payments to other employees of $36,741 in 1988, prior to injury, as compared to $17,904 in 1989 and $8,580 in 1992. However, 1992 was the lowest year, and thereafter salaries showed a significant increase to consistent levels of around $28,000 in 1995-1998.

Moreover, we agree with claimant that it was not rational for the administrative law judge to ascribe *all* post-injury payments from the businesses to claimant's *increased* post-injury services. Claimant received payments from the businesses before his injury, which may or may not have been due to his personal services; indeed, the administrative law judge found claimant was paid a salary of $15,925 by Booker's Liquors in 1988, prior to his injury. Earnings from sources other than his longshore employment were not included in claimant's pre-injury average weekly wage; thus, in order to determine his claimant's loss in wage-earning capacity, the administrative law judge's calculation must account for any post-injury earnings equal to those received pre-injury so that claimant's post-injury wage-earning capacity reflects his increased earnings from the businesses.[6] The administrative law judge must also adjust claimant's post-injury wages to levels equal to those in 1988, explaining the method he uses to neutralize the effect of inflation, *see generally Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990), in order to effectively determine whether claimant has any loss in wage-earning capacity. The administrative law judge's finding that claimant is no longer economically disabled is therefore vacated, and the case is remanded for further findings consisted with this decision and Section 8(h), 33 U.S.C.§908(h).[7]

Change in Condition – Total disability

[6] Essentially, the administrative law judge will have to determine claimant's pre-injury wage-earning capacity resulting from his personal services to the businesses. If this figure had been added to claimant's average weekly wage from his longshore employment, as Section 10 allows, *see* 33 U.S.C. §910(c), then claimant's full post injury earnings could be compared to this average weekly wage. The same result can be reached by determining claimant's pre-injury earnings from his personal work for the businesses, if any, and deducting this amount from his post-injury earnings to arrive at an amount representing his post-injury wage-earning capacity for comparison to his pre-injury longshore average weekly wage.

[7] With regard to the administrative law judge's finding that claimant no longer has a loss in wage-earning capacity, claimant contends that the administrative law judge erred in finding that claimant has a continuing ability to earn more than he did prior to his injury as employer only relied on financial records dating until 1998. Claimant contends that the employer had access to all of claimant's financial records up to the date of the hearing in 1999 and that it chose not to use them. Thus, claimant contends that there should be an inference that these records do not reflect a change in earning capacity. We reject claimant's contention that the administrative law judge should have inferred that claimant's earnings after 1998 were lower than the figures supplied by Mr. McErlean. There is no evidence to support claimant's allegation that financial records after 1998 were provided to employer. *See generally Brown v. Pacific Dry Dock*, 22 BRBS 284 (1989).

Lastly, claimant contends that the administrative law judge erred in finding that he has no further disability because employer has established that claimant can return to his usual work. In the present case, the administrative law judge found that employer established a change in condition, in that the regular duties of claimant's employment at the time of the injury have changed and that claimant can perform the duties of the modified job. Claimant contends that this inquiry is inappropriate in determining whether claimant can perform his usual job.[8] We agree with claimant that the administrative law judge erred in terminating his compensation on the ground that claimant can now perform his "usual" work. "Usual" employment refers to the employee's regular duties at the time of the injury. *See, e.g., Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998); *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Claimant bears the initial burden of establishing his inability to perform his former job, both in an initial proceeding and on modification, in order to establish a *prima facie* case of disability. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *see generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Claimant has met this burden in this case, as it is uncontested that claimant is unable to perform the duties of the job he performed at the time of his injury. Thus, employer has not offered any evidence to warrant modification of the initial finding that claimant established a *prima facie* case of disability.[9]

Although employer's evidence that the job requirements are now less strenuous than at the time of injury cannot be utilized to defeat claimant's *prima facie* case, employer's evidence that it has identified a job within claimant's physical capabilities, as found by Dr. Greifinger, can be a basis for modification as it can establish claimant's ability to perform suitable alternate employment. In order to establish suitable alternate employment, employer must establish the availability of employment opportunities that are suitable for claimant given his age, education, vocational history and physical restrictions. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156(CRT) (5th Cir. 1991). Employer may establish suitable alternate employment by offering claimant a suitable light duty job at its facility. *Darby v. Ingalls Shipbuilding,*

[8] The job requirements of the position held by claimant at the time of the injury have changed. Claimant worked as a dockman/holdman, which required lifting of 100 lbs, but now only requires lifting up to 18 lbs. *See* Emp. Ex. 10a. Following a review of a revised job analysis reported by Robert Sans, a rehabilitation counselor, Dr. Greifinger opined that claimant can perform the job duties of a dockman/holdman as described in the job analysis dated September 11, 2001. Emp. Ex. 10a.

[9] Employer did not show that claimant's physical condition changed, so that claimant can now perform the duties required by his former job. Employer also does not seek to modify this finding based on a mistake in fact, for example, by showing that the job's requirements are not as originally found by the administrative law judge, or that claimant could, in fact, have performed his usual job at the time of the initial proceeding.

*Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996). Employer may modify an award of total disability benefits by establishing the availability of suitable alternate employment. *Lucas v. Louisiana Ins. Guaranty Ass=n,* 28 BRBS 1 (1999).

In this case, employer identified a job at its facility which has been approved by Dr. Greifinger as within claimant's physical capabilities. Emp. Ex. 10a. However, the record contains no evidence that this position is available to claimant. If employer relies on a job at its facility as suitable alternate employment, then the job must be actually available to claimant. *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986). *See also McBride v. Eastman Kodak Co.*, 844 F.2d 797, 21 BRBS 45(CRT) (DC. Cir. 1988)(where claimant is physically able to perform his former, pre-injury work, but employer does not make this job available to him, claimant continues to be totally disabled). Therefore, we hold that the administrative law judge erred in finding that employer established that claimant can return to his former job and is no longer disabled based only on a subsequent change in the description of the position claimant held at the time of injury. As there is no evidence that the modified job is available to claimant, we vacate the administrative law judge's finding that the change in claimant's former job warrants modification and the denial of further benefits on this ground.

Accordingly, the administrative law judge's finding that claimant's right to compensation for the periods 1991-1998 is forfeited pursuant to Section 8(j) is affirmed. However, the case is remanded to the administrative law judge with instructions to remand the case to the district director in order to establish a forfeiture schedule should claimant be entitled to additional benefits. In addition, the administrative law judge's finding that claimant does not have any loss in wage-earning capacity is vacated, and the case is remanded for further findings consistent with this decision. Lastly, the administrative law judge's finding that employer established a change in claimant's condition based on a change in the duties of claimant's former position is vacated.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge