

J.D.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED: 08/22/2007
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Employer’s Request for Modification of Compensation Award by Terminating Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker, & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Employer’s Request for Modification of Compensation Award by Terminating Benefits (2006-LHC-00745) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) 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 sustained a thoracic lumbar strain as a result of an accident that occurred in the course of his work for employer on June 29, 1988. Employer voluntarily paid

claimant compensation,¹ including, relevant to the instant case, permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), from July 18, 1995, and continuing at a compensation rate of \$16.67 per week. Employer also sought and was subsequently awarded Section 8(f) relief, 33 U.S.C. §908(f), by Administrative Law Judge Richard K. Malamphy in a Decision and Order dated February 12, 1997, in which Judge Malamphy also delineated the benefits to which claimant was entitled.² In 2004, employer sought modification of the permanent partial disability award based on an alleged change in claimant's economic condition. Specifically, employer argued that the prior award should be modified as of January 1, 1999, to reflect that claimant no longer has any loss in wage-earning capacity, or alternatively to reflect a decreased weekly compensation rate of \$3.52.

In his decision, the administrative law judge denied employer's request to terminate benefits but granted its request for modification of the permanent partial disability rate beginning January 1, 1999. The administrative law judge found, after comparing claimant's pre-injury average weekly wage with his wage-earning capacity for each year from 1999 through 2006, that employer established a change in claimant's economic condition and thus was entitled to modification of claimant's award of permanent partial disability benefits. In particular, the administrative law judge modified claimant's weekly benefit rate as of February 24, 2006, to \$7.06 per week, subject to employer's recovery of its overpayment of benefits between January 1, 1999, and February 23, 2004, in the amount of \$2,102.58.³

¹ Employer voluntarily paid claimant various periods of temporary total, temporary partial, and permanent partial disability compensation between 1988 and July 18, 1995.

² The Director, Office of Workers' Compensation Programs, filed a motion for reconsideration with Judge Malamphy which resulted in his issuance of a Decision Granting Motion for Reconsideration and Reversing the Grant of Section 8(f) Relief. Employer appealed this decision, and the Board, by decision dated July 21, 1998, reversed Judge Malamphy's decision on reconsideration and reinstated his original Decision and Order granting Section 8(f) relief dated February 12, 1997. [*J.D.*] v. *Newport News Shipbuilding & Dry Dock Co.*, BRB No. 97-1565 (July 21, 1998) (unpub.).

³ In his decision, the administrative law judge calculated claimant's post-injury wage-earning capacity based on his actual wages for each year between 1999 and 2006 and then compared those figures with his pre-injury average weekly wage. Based on these calculations, the administrative law judge found that employer overpaid benefits to claimant in 1999, and from 2002 to 2006, in the total amount of \$2,796.26, but that

Claimant now appeals the administrative law judge's decision to grant modification and reduce his compensation rate for permanent partial disability. Claimant asserts that his increase in earnings is due to general contract increases and thus does not reflect an increase in his earning capacity. In response, employer avers that modification was warranted as claimant's overtime work has increased, resulting in his increased wage-earning capacity.

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 grant of modification as it is supported by substantial evidence. The administrative law judge found that claimant's actual post-injury wages from 1999 through 2006 fairly and reasonably represent his wage-earning capacity, *see* 33 U.S.C. §908(h), and that claimant's loss in wage-earning capacity had decreased since the initial award. A change in claimant's post-injury wage-earning capacity provides a sufficient basis for Section 22 modification.⁴ *See* 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo* [*Rambo I*], 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985); *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996); *see generally Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Employer's evidence, as reflected by the administrative law judge's decision, establishes that claimant's prior award of permanent partial disability benefits was predominantly based on a loss in overtime hours related to his work injury, and that claimant has, since January 1, 1999, performed increased overtime work. EX 1. The record establishes that between 1982 and 1987, claimant worked a total of 478.3 hours of overtime, or an average of 79.7 hours per year, that

claimant was underpaid benefits totaling \$693.68 in 2000 and 2001. Decision and Order at 9.

⁴ 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 on a mistake of fact in the initial decision or on 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). A disability award may be modified under Section 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition. *Id.* However, a change in wage-earning capacity is not permitted with "every variation in actual wages or transient changes in the economy." *Rambo I*, 515 U.S. at 301, 30 BRBS at 5(CRT). The party requesting modification has the burden of proof in showing a change in condition. *Metropolitan Stevedore Co. v. Rambo* [*Rambo II*], 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000)(table).

between 1988 and 1999 following claimant's injury, claimant's overtime hours diminished to a total of 16.3 hours, and that between 1999 and 2005, claimant worked 647.5 hours of overtime, or an average of 92.5 hours per year. EX 1. Based on the administrative law judge's consideration of this evidence, Decision and Order at 3-4, as well as his discussion of the parties' contentions regarding this evidence, Decision and Order at 2-3, the administrative law judge rationally granted employer's motion for modification based on claimant's increased wage-earning capacity due to his ability to perform more overtime work. *See generally Rambo I*, 515 U.S. at 301, 30 BRBS at 5(CRT). Consequently, we affirm the administrative law judge's modification of claimant's award as his finding that employer established a change in claimant's post-injury wage-earning capacity is rational and supported by substantial evidence. *See O'Keefe*, 380 U.S. 359.

Accordingly, the administrative law judge's Decision and Order Denying Employer's Request for Modification of Compensation Award by Terminating Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge