BRB Nos. 98-1454
and 98-1454A

RONALD HANSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PORT OF PORTLAND	)	DATE ISSUED: Aug. 6, 1999
	)	
and	)	
	)	
HELMSMAN NORTHWEST	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order-Awarding Modification of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi Wilson Atchison, L.L.P.), Portland, Oregon, for claimant.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order-Awarding Modification (95-LHC-990) of Administrative Law Judge Ellin M. O'Shea 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 was injured on April 16, 1986, when, while operating a transtainer crane, he suffered an acute lumbosacral strain. He worked for a day or two after the accident, but was taken out of work by the physician who first examined him. After attempting to return to work in September 1986, claimant returned to his treating physician, who referred him to a neurosurgeon. Claimant began physical therapy and work-hardening and was able to return to work part-time on June 5, 1987. On January 21, 1988, his physician reported that claimant had reached maximum medical improvement. Claimant was restricted from prolonged sitting without posture changes, lifting more than 25 pounds, and repetitive lifting of more than ten pounds on a conveyer belt type operation. Claimant sought permanent partial disability benefits under the Act.

In her original Decision and Order, the administrative law judge found that claimant was unable to return to his former position working full-time as a crane/winch operator, with occasional jobs from the non-winch board. After considering claimant's physical condition, the types of jobs offered that claimant can perform and claimant's work history post-injury, the administrative law judge found that claimant retained a wage-earning capacity of $556 per week, and thus awarded permanent partial disability benefits. 33 U.S.C. §908(c)(21).

On January 5, 1995, employer filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging a change in condition which resulted in an increase in claimant's wage-earning capacity, and claimant subsequently filed his own petition for modification, contending that he had a decrease in wage-earning capacity. The administrative law judge found that employer established a change in condition as the economy in Portland had undergone a non-transient upswing and as the number of longshoreman qualified to work the favorable jobs claimant was able to perform had dramatically decreased. The administrative law judge also found that claimant's actual wages reasonably and fairly reflect his current wage-earning capacity. The administrative law judge then adjusted these wages to account for inflation and contractual raises. As a result, she determined that claimant's current wage-earning capacity, reduced by a wage reduction multiplier reflecting the contractual increase of the base rate plus the crane differential hourly wages, is $747.71. Thus, the administrative law judge rejected claimant's request for modification and granted employer's request for modification based on an increase in claimant's wage-earning capacity.

On appeal, claimant contends that the administrative law judge erred in finding that there has been a change in condition as claimant's physical capacity has not changed and he has acquired no new skills. Claimant also contends that the administrative law judge erred in her adjustment of claimant's actual post-injury wages to pre-injury dollars for purposes of comparison. Lastly, claimant contends that the administrative law judge erred in denying his

request for modification, based on a reduced wage-earning capacity. Employer contends on cross-appeal that the administrative law judge erred in establishing the effective date of the increase in claimant's wage-earning capacity as of the date of her Decision and Order on Modification. Employer urges affirmance of the administrative law judge's decision in all other respects.

Initially, claimant contends that the administrative law judge erred in finding that there has been a change in condition, inasmuch as his physical condition has not improved and he has acquired no new skills to increase his earning capacity. Section 22 of the Act, 33 U.S.C. §922, allows for modification of an award where there is change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Metropolitan Stevedore v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1 (CRT) (1995); *see also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985). While the Supreme Court held in *Rambo I* that a change in wage-earning capacity is not permitted with "every variation in actual wages or transient change in the economy," it notes that the "conditions" that entitle a claimant to benefits in the first instance are subject to modification. *Rambo I*, 515 U.S. at 301, 30 BRBS at 5 (CRT). Although the claimant in *Rambo I* obtained new skills that increased his wage-earning capacity, this is not a necessary prerequisite for a finding that there has been a change in economic conditions.

In the instant case, the administrative law judge found in her original decision that the availability of suitable work was a factor she considered in her determination of claimant's post-injury wage-earning capacity. *See* Cl. Ex. 1 at 5. Although claimant correctly states that the administrative law judge may not find a change in condition based on a transient change in the economy, *see Rambo I*, 515 U.S. at 301, 30 BRBS at 5 (CRT), claimant does not contest the administrative law judge's finding that the change in the Port of Portland's economy, represented by the increased tonnage being shipped through the port, is not transient.[1] Moreover, claimant does not challenge the administrative law judge's finding that there are fewer qualified workers available for the work which is suitable for one in

[1]The administrative law judge found that there has been almost a doubling of container tonnage through the Port of Portland in the ten years prior to the hearing on modification. *See* Decision and Order at 9; Emp. Ex. 5. She concluded that this increase is sustained, protracted, and therefore not transient. Decision and Order at 11.

claimant's physical condition.[2] Therefore, as the availability of suitable jobs was a condition

[2]The administrative law judge found that there were 93 people qualified to take jobs from the "crane" or "winch" board in 1992, and that there were 50 at the time of the modification hearing. Decision and Order at 9; Emp. Ex. 5.

on which the original award was based, we affirm the administrative law judge's finding that there has been a change in condition sufficient to support modification based on a change in economic conditions.[3] *See generally Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996).

As she found there has been a change in conditions, the administrative law judge properly turned to a determination of claimant's current wage-earning capacity. The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), is equal to his actual earnings if they fairly and reasonably represent his wage-earning capacity. 33 U.S.C. §908(h). The party that contends that the employee's actual earnings are not representative of his wage-earning capacity has the burden of establishing an alternative reasonable wage-earning capacity. *See generally Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997)*; Burch v. Superior Oil Co.*, 15 BRBS 423 (1983). In the instant case, claimant contends that the years he worked on the transtainer crane post-injury do not accurately reflect his current wage-earning capacity as this work is no longer available. Claimant testified that starting in 1990, he was able to work a high number of hours using a piece of equipment called a transtainer, which was particularly suitable for his work restrictions. *See* Decision and Order at 10; Tr. at 34, 45-46; Emp. Ex. 7 at 54. He

[3]Claimant also contends that the administrative law judge improperly found that his testimony in 1989 was not credible, which is a legal conclusion and not subject to modification. Inasmuch as the administrative law judge bases her finding that claimant has had a change in wage-earning capacity on the increase in availability of suitable jobs from the crane board, this contention need not be addressed. In addition, we reject claimant's contention that the Board's unpublished decision in *Reiter v. Brady-Hamilton Stevedore Co.*, BRB No. 96-1077 (April 28, 1997), is dispositive in this case. In that case, the Board affirmed the administrative law judge's finding that the ability to obtain work as a walking boss at higher wages was within claimant's wage-earning capacity at the time of the first decision, and thus could not be the basis for modification based on a change in condition.

continued to put in as many transtainer hours as possible, until the Port sold that piece of equipment, replacing it with equipment run by longshoremen working on the "lift board." Tr. at 34. As it is undisputed that the transtainer equipment has been sold, we hold that the wages claimant earned prior to 1992 were affected by a non-permanent change in conditions and cannot be used to modify claimant's wage-earning capacity. Claimant, however, does not contest the finding that his current actual wages are an accurate reflection of his wage-earning capacity.

Sections 8(c)(21) and 8(h) require that the wages earned in a post-injury job be adjusted to account for inflation to represent the wages that job paid at the time of claimant's injury in 1986. *See Richardson v. General Dynamics Corp.*, 19 BRBS 48 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980). The administrative law judge in the instant case adjusted claimant's current wages by multiplying claimant's earnings in 1990-1993 and 1996 by a reduction factor secured by dividing the 1986 base rate plus crane differential rate of $20.38 by the hourly base rate plus crane differential rate of the years being adjusted, and then dividing this amount by 52. She then averaged these five yearly figures to conclude that claimant's current wage-earning capacity is $747.71 adjusted for wage increases and inflation.

The administrative law judge rationally reduced claimant's current wages by the percentage increase from the time of the injury in the contractual wages of the base hourly rate plus the crane differential rate to adjust for inflation. *See generally Quan v. Marine Power & Equipment Co.*, 30 BRBS 124 (1996). However, as we have held that the wages claimant earned prior to 1992 were affected by his ability to work on the transtainer crane, which is no longer available, these wages cannot be used to modify claimant's wage-earning capacity. We therefore vacate the administrative law judge's use of an average of claimant's earnings from 1990-1993, and 1996 in her determination of claimant's adjusted average weekly earnings as it was made on an improper basis. Claimant's current actual wages, which the parties do not contest accurately and fairly reflects his wage-earning capacity, reduced by the percentage increase in the contractual wages of the base hourly rate plus the crane differential rate from the time of the injury is $667.30 ($20.38/26.35 = .773; $44,890 x .773 = $34,700/52 = $667.30). Thus, we modify the administrative law judge's order granting modification to reflect that claimant has a wage-earning capacity of $667.30.[4] *Cook*

[4]We also reject claimant's contention on appeal that the administrative law judge erred in rejecting his petition for modification as he currently earns substantially less than other crane operators. The administrative law judge considered claimant's future inability to work more than 1441 hours in her original determination of claimant's residual wage-earning capacity. Moreover, the Ninth Circuit and the Board have rejected methods of computing permanent partial disability based on an approximation of the amount claimant would have earned but for the injury compared with actual post-injury earnings as such methods are not

v. Seattle Stevedore Co., 21 BRBS 4 (1988); *see also Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319, 18 BRBS 101 (CRT)(D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986).

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in accordance with the statutory scheme. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Cf. McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 10 BRBS 614 (3d Cir. 1979).

On cross-appeal, employer contends that the administrative law judge erred in finding that the effective date of the increase in wage-earning capacity is the date of her Decision and Order. Relevant to the instant case, Section 22 of the Act states that a modification order

> shall not affect any compensation previously paid, except ... 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 injury ...

with employer receiving a credit for excess payments. 33 U.S.C. §922; *see generally Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). Although, from the language of the administrative law judge's decision, it appears she may have mistakenly believed that the modification of claimant's award could not be retroactive,[5] *see* Decision and Order at 15, any error is harmless as she also provided a valid rationale for making the modification effective as of the date of her decision.

The administrative law judge found that it was only at the 1997 modification hearing that all of the facts were presented necessary for an evaluation of whether modification was appropriate. She found that modification was proper due to the "non-transient" nature of the change in the economy, which requires an evaluation of long-term economic data. Given this basis for modification, we hold that the administrative law judge rationally rejected employer's argument that modification should be effective from the date of the petition, January 5, 1995, or the date after the initial Decision and Order was filed, June 26, 1990. Therefore, her finding as to the effective date is affirmed.

[5]The decision in *Parks*, relied upon by the administrative law judge, involved termination of benefits. Since claimant here continued to receive a reduced award, the reduction could be retroactive, with employer receiving a credit for excess payments.

Accordingly, the administrative law judge's finding that claimant's current weekly wage-earning capacity adjusted for inflation and wage increases is modified to $667.30. The administrative law judge's decision is affirmed in all other respects.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge