BRB Nos. 01-0254
and 03-0361

JAMES J. FRIO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PREMIER MOTOR YACHTS	)	
	)	DATE ISSUED: Feb. 6, 2004
and	)	
	)	
FREMONT COMPENSATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Denial of Motion for Reconsideration of Alfred Lindeman, Administrative Law Judge, United States Department of Labor, and the Order Granting Employer/Carrier's Motion for Summary Decision and Remanding Claimant's Newly Filed Alternate Motion for Modification to District Director of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Robert E. Babcock, Sherwood, Oregon, for employer/carrier.

Before: SMITH, HALL and GABAUER, Administrative Appeals Judges.

Claimant appeals the Decision and Order Awarding Benefits and the Denial of Motion for Reconsideration of Administrative Law Judge Alfred Lindeman, BRB No. 01-0254, and the Order Granting Employer/Carrier's Motion for Summary Decision and Remanding Claimant's Newly Filed Alternate Motion for Modification to District Director (99-LHC-2917) of Administrative Law Judge Gerald M. Etchingham, BRB No. 03-0361, 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).

Claimant, a boat builder, injured his back at work on May 13, 1997. Claimant was released for modified duty on June 20, 1997. In addition, claimant began a part-time job at a mini-mart in June 1997, which he held until the end of August 1997. Claimant underwent back surgery on September 4, 1997, and on May 29, 1998. Claimant returned to modified work duties with employer after a healing period following each surgery. Claimant left his job with employer in October 1999 and began working for another boatbuilder, Northstar, for whom he worked for approximately 88 days before being terminated for problems unrelated to his physical condition or injury. Following this termination, claimant applied for a job with a third employer but declined the job, remaining unemployed while taking classes at the local unemployment center for a possible career change.

Administrative Law Judge Alfred Lindeman issued a Decision and Order in this case on August 4, 2000, in which he awarded claimant compensation for temporary total disability from the date of claimant's injury, May 13, 1997, to June 20, 1997, from September 3, 1997 to December 16, 1997, and from May 28, 1998 to July 7, 1998; for temporary partial disability from June 21, 1997 to September 2, 1997, from December 17, 1997, to May 27, 1998, and from July 8, 1998 to December 18, 1998;[1] and for continuing permanent partial disability thereafter based on a loss in wage-earning capacity. 33 U.S.C. §908(b), (c)(21), (e), (h). Pursuant to a pre-hearing order, Judge Lindeman declined to address claimant's claim for permanent total disability commencing in January 2000 as employer did not have adequate time to prepare for this issue. Judge Lindeman stated that it would be appropriate for claimant to seek modification pursuant to Section 22 of the Act, 33 U.S.C. §922, if he wanted to pursue this claim. *See* Order on Motion to Postpone or Remand; Decision and Order at 9 and n.10; HT at 4-5, 19.

Claimant appealed Judge Lindeman's decisions. BRB No. 01-0254. By Order dated January 22, 2001, the Board dismissed claimant's appeal and remanded the case to the administrative law judge for consideration of claimant's newly filed motion for modification. 33 U.S.C. §922; 20 C.F.R. §802.301. The case was assigned to Judge Etchingham, who granted employer's motion for summary decision on claimant's motion for modification. In support of his petition for modification, claimant relied on Dr.

[1] These were the periods of time when claimant either was employed at the mini-market, CX 59, or worked for employer in a light duty position. CX 39.

Tilson's medical report of January 3, 2000. Judge Etchingham found that since this report was admitted into evidence before Judge Lindeman and was discussed by him, claimant, legally, could not establish that his condition changed after the initial proceeding. Claimant appeals the denial of his motion for modification, BRB No. 03-0361, and also sought reinstatement of his appeal of Judge Lindeman's decisions. By Board Order dated March 13, 2003, claimant's appeals were consolidated for decision.

On appeal, claimant contends that Judge Lindeman erred in calculating claimant's average weekly wage by failing to include the wages he would have earned as a mini-mart clerk had he not been injured, and in refusing to adjust claimant's post-injury earnings for inflation. Claimant further contends that Judge Etchingham erred in denying claimant's motion for modification. Employer responds, urging affirmance of the administrative law judges' decisions in this case. Claimant has filed a reply brief.

We initially address claimant's appeal of Judge Lindeman's decision. BRB No. 01-0254. On appeal, claimant argues that the administrative law judge erred in failing to include the wages he earned in his post-injury job as a mini-mart clerk when calculating claimant's average weekly wage.[2] Claimant contends that inclusion of these wages is required to accurately reflect the wages he lost due to his injury and that the administrative law judge's rationale for not including the mini-mart wages is not supported by substantial evidence.

The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), because claimant started working for this employer only seven months prior to his injury.[3] The administrative law judge rejected claimant's contention that his earnings from the mini-mart should be included in his average weekly wage. First, he concluded that the fact that claimant was not employed at the mini-mart at the time of injury required the exclusion of those wages. The administrative law judge rejected claimant's testimony that he had been offered the job prior to his back injury. Second, he found that the record does not support claimant's testimony that he usually worked a second job, and that claimant gave conflicting reasons as to why he took the job

[2] Claimant contends that his average weekly wage should be calculated by adding the wages he was earning from employer at the time of injury (40 hours per week multiplied by $14 per hour), $560, to the wages he earned post-injury at the mini-market (16 hours per week multiplied by $6.50 per hour) $104, to yield an average weekly wage of $664.

[3] Neither claimant nor employer argues that Section 10(a) or (b) is applicable to the instant case. 33 U.S.C. §910(a), (b).

at the mini-mart.[4] Finally, the administrative law judge credited the statement of Ms. Graybill, owner of the mini-mart, that her employees are often transient because of the low wages and that she had intended to dismiss claimant at the time he left her employ due to his inability to work steadily. CX 59. The administrative law judge thus concluded that this was not an "exceptional" case that required inclusion of claimant's post-injury wages in his average weekly wage.

The goal of Section 10(c) is to arrive at the claimant's annual earning capacity at the time of injury. *See generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). Absent exceptional circumstances, a claimant's average weekly wage is to be based on the wages he earned at or before the time of injury. *See generally Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986). A determination of annual earning capacity under Section 10(c) does not preclude consideration of circumstances existing after the date of injury where previous earnings do not realistically reflect claimant's true earning potential. *See Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980). If, for example, claimant worked in seasonal employment and provided evidence of opportunities for increased work after the injury, it is appropriate to take into account the wages claimant could have earned but for his injury. *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *cf. Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984) (claimant's age and retirement plans are not factors that should be considered in the average weekly wage determination). If claimant was working at two jobs at the time of injury and his injury thereafter precluded his employment in both jobs, it is appropriate to calculate average weekly wage based on the wages of both jobs. *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128 (1986).

We affirm the administrative law judge's average weekly wage calculation based solely on the wages claimant earned from employer at the time of injury. The administrative law judge rationally rejected claimant's testimony that he has a "history" of working second jobs to supplement his income due to the absence of documentary evidence to support his contention. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1962). Moreover, the administrative law judge observed the conflict in claimant's testimony concerning the reason he took the job at the mini-mart, *see* n. 4, *supra*. Finally, although

[4] Claimant testified that he applied for the position at the mini-mart because he was not earning enough money from employer, HT at 35, and that he accepted the position as he was not obtaining enough money from his disability compensation. HT at 39, 65.

claimant applied for the mini-mart job prior to his injury, the administrative law judge found that claimant was interviewed for, was offered, and began the job after his injury. The inference drawn by the administrative law judge from Ms. Graybill's testimony, that claimant's employment at the mini-mart likely would be short-lived, supports the administrative law judge's conclusion that he need not account for claimant's probable future earnings in calculating his average weekly wage. As the administrative law judge's findings and inferences are rational and supported by substantial evidence, we affirm the administrative law judge's finding that claimant's mini-mart earnings should not be included in his average weekly wage as this case does not warrant departure from the general rule concerning post-injury earnings. *Walker*, 793 F.2d 319, 18 BRBS 100(CRT). Accordingly, claimant's contentions are rejected, and the administrative law judge's average weekly wage calculation is affirmed.

Next, claimant contends that the administrative law judge erred in failing to account for inflation in awarding claimant temporary and permanent partial disability benefits. In his decision, the administrative law judge used the $13.80 per hour earned by claimant during his employment with Northstar as reflective of claimant's post-injury wage-earning capacity for the awards of temporary and permanent partial disability benefits. The administrative law judge rejected claimant's contention regarding an inflation adjustment because it was not timely raised before him.[5] *See* Denial of Motion for Reconsideration.

We agree with claimant that the administrative law judge erred in failing to address whether claimant's post-injury wage-earning capacity should be adjusted for inflation. Post-injury wage-earning capacity is determined pursuant to Section 8(h) of the Act, and an award for partial disability compensation for a back injury, whether it be temporary or permanent, is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. *See* 33 U.S.C. §908(c)(21), (e), (h). As awards of both permanent partial and temporary partial disability are based on Section 8(h), there is no basis for refusing to consider the applicability of an inflation adjustment based on the nature of the claimant's disability as the administrative law judge stated.

[5] Although the administrative law judge held that that issue of whether claimant's post-injury wage earning capacity should be adjusted to factor out cost-of-living increases had not been presented for adjudication at the time of the hearing, he noted that "as the calculation of [claimant's] post-injury wage earning capacity was based on an approximation of prospective earnings with another employer from which position he was terminated after only a short period of employment, a "discounting" of his wages to account for the effects of inflation was not, and is not, deemed warranted." Denial of Motion for Reconsideration at 2 n.3.

Moreover, contrary to the administrative law judge's finding, claimant need not specifically raise the inflation issue separately, as the administrative law judge must consider the applicability of an inflation adjustment in order that average weekly wage and wage-earning capacity be considered on an equal footing. *See White v. Bath Iron Works Corp.,* 812 F.2d 33, 19 BRBS 70(CRT) (1st Cir. 1987); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *see also Walker*, 793 F.2d at 321 n. 2, 18 BRBS at 102 n.2.(CRT); *Cook v. Seattle Stevedore Co.,* 21 BRBS 4 (1988). The fact that the administrative law judge found that claimant's actual short-term post-injury earnings fairly represent his post-injury wage-earning capacity does not negate the requirement that he address inflation either by reference to the wages the post-injury job paid at the time of injury or by reducing post-injury wages by the percentage increase in the National Average Weekly Wage. *See Quan v. Marine Power & Equip. Co.,* 30 BRBS 124 (1996); *cf. Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002) (no inflation adjustment is required where claimant returned to the same job post-injury and the wage rate was the same before and after the injury). Therefore, we remand this case for the administrative law judge to award claimant temporary and permanent partial disability benefits based on claimant's post-injury wage-earning capacity adjusted for inflation.

Finally, claimant appeals Judge Etchingham's denial of his motion for 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,* 515 US 291, 30 BRBS 1(CRT) (1995). Claimant stopped working in January 2000. Claimant alleged that, based on Dr. Tilson's examination of January 3, 2000, he established that his physical condition had deteriorated such that he could no longer engage in yacht building and was totally disabled. Employer moved for summary decision on the grounds that Judge Lindeman's pre-hearing order stated claimant could seek modification of any partial disability award as of January 5, 2000, and since Dr. Tilson's report pre-dates January 5, 2000, it cannot establish a change in condition after that date. Employer also alleged that Judge Lindeman considered Dr. Tilson's report in determining the extent of claimant's disability. Employer therefore contended that the report, legally, could not form the basis for modification based on a change in condition. Claimant responded that Judge Lindeman did not consider Dr. Tilson's report and, moreover, that the date in his pre-hearing pleadings and in Judge Lindeman's pre-hearing order was incorrect in that it should have reflected claimant's claim for total disability as of January 3, 2000.

Judge Etchingham granted employer's motion for summary decision, finding that there were no genuine issues as to any material facts. He found summarily that Dr. Tilson's January 3, 2000 report does not establish a change in claimant's condition as of

January 5, 2000 because it was not "new" evidence, *i.e.*, it was admitted into the record before Judge Lindeman, and because Judge Lindeman noted Dr. Tilson's deposition testimony that claimant's condition essentially had not changed between December 1998 and January 2000.[6]

We hold that the case must be remanded for consideration of whether claimant is entitled to total disability benefits based on Dr. Tilson's January 3, 2000 report. The administrative law judge erred in finding that employer is entitled to summary decision in this case. First, in order for the summary decision procedure to apply, not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987); *Hall v. Newport News Shipbuilding & Dry Dock Co*., 24 BRBS 1 (1990). In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion. *Hahan v. Sergeant*, 523 F.2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). Moreover, the party seeking summary decision must be entitled to a decision in its favor as a matter of law. *See O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002).

In this case, as claimant argues, Judge Lindeman specifically declined to address the issue of claimant's entitlement to total disability benefits as of January 2000, and in fact acknowledged claimant's right to seek modification on this issue. Whether claimant sought modification as of January 3 or January 5 is of no moment. The administrative law judge cannot refuse to consider the modification request based on this overly legalistic interpretation of Section 22, as Section 22 affords the fact-finder broad discretion to modify decisions. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 265 (1971); *Banks v. Chicago Grain Trimmers Ass'n, Inc*., 390 U.S. 459 (1968); *Jensen v. Weeks Marine, Inc*., 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003); *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 36 BRBS 35(CRT) (7th Cir. 2002). Judge Lindeman recited Dr. Tilson's restrictions as of January 3, 2000, Decision and Order at 4; CX 57, but, in awarding partial disability benefits, stated only that the fact that claimant was working with physical restrictions did not give rise to a finding that claimant worked through extraordinary effort. Decision and Order at 10. In January 2000, when claimant

[6] Judge Etchingham also stated that claimant cannot rely on Dr. Tilson's report to claim total disability benefits dating from December 1998. Claimant was not moving for modification on this basis, but was seeking total disability benefits only as of January 2000. Claimant also filed another motion for modification, based on medical reports dated January 12 and 25, 2001. The administrative law judge remanded this motion to the district director for processing in the same manner as an initial claim. *See* 20 C.F.R. §702.373. Claimant does not appeal this action.

stopped working, Dr. Tilson imposed more stringent restrictions than he had previously, and therefore a genuine issue of material fact exists as to whether claimant established a change in his physical and/or economic condition after this date. Thus, the administrative law judge erred in granting summary decision. *See generally Dunn v. Lockheed Martin Corp*., 33 BRBS 204 (1999). Furthermore, the administrative law judge erred in requiring that claimant introduce evidence post-dating the hearing before Judge Lindeman, especially in light of Judge Lindeman's limitation of the issues under his consideration. *See generally Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 37 BRBS 99(CRT) (2d Cir. 2003). Therefore, we vacate Judge Etchingham's denial of claimant's motion for modification, and we remand this case for consideration of this issue consistent with law.

Accordingly, we remand the case for consideration of an inflation adjustment to Judge Lindeman's award of temporary and permanent partial disability benefits. In all other respects, Judge Lindeman's decisions are affirmed. The decision of Judge Etchingham is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge