

CHARLES W. MONTGOMERY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TODD SHIPYARDS)	
CORPORATION)	
)	
and)	DATE ISSUED
)	
AETNA CASUALTY AND)	
SURETY COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order upon Request for Modification of James J. Butler, Administrative Law Judge, United States Department of Labor.

Gerald A. Falbo (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Samuel J. Oshinsky (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Order upon Request for Modification (90-LHC-0723) of Administrative Law Judge James J. Butler 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 if they 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 injured his back during the course of his employment as a rigger on January 9, 1984. Employer did not dispute claimant's entitlement to compensation; in accordance with an agreement entered into by the parties, a Compensation Order was issued pursuant to 33 U.S.C. §919(c) on January 20, 1988, wherein claimant was awarded permanent total disability compensation based on an average weekly wage of \$520.45. On April 14, 1988, claimant filed a request for modification under Section 22 of the Act, 33 U.S.C. §922, arguing that a mistake of fact had been made in determining his average weekly wage. On May 19, 1988, the Assistant District Director¹ denied claimant's request for modification, finding that no mistake in fact had been made and that if a mistake in the application of the formula used to calculate claimant's average weekly wage had been made, the proper procedure was an appeal under Section 21, 33 U.S.C. §921, of the Act. Thereafter, following an informal conference held on August 16, 1988, a claims examiner recommended modification consistent with claimant's request, and the case was referred to the Office of Administrative Law Judges to resolve the dispute. In his Order upon Request for Modification, the administrative law judge determined that claimant's average weekly wage had been based upon a mutual mistake of fact. The administrative law judge accepted the figures, dates and reasoning set forth in claimant's exhibit 3 to modify claimant's average weekly wage to \$675.49.

On appeal, employer argues that neither the district director nor the administrative law judge had jurisdiction over claimant's modification request since that request was based upon a change in law rather than a mistake of fact. In the alternative, employer contends that the administrative law judge erred in determining claimant's average weekly wage by factoring into his calculation the eleven weeks that claimant was on strike during the year prior to his work-related injury. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance. Claimant has not filed a response.

¹Pursuant to Section 702.105 of the regulations, 20 C.F.R. §702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

Section 22 provides, in pertinent part, that the administrative law judge may issue a new compensation order based on a mistake of fact or change in condition.² Modification of a prior decision is permitted at any time prior to one year after the last payment of compensation or the rejection of a claim, based on a mistake of fact in the initial decision or where claimant's physical or economic condition has improved or deteriorated. *See 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); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). Accordingly, to reopen the record under Section 22, the moving party must allege a mistake of fact or change of condition, and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52-53 (1989).

To determine whether to grant modification based on a mistake of fact, the administrative law judge must decide first whether the evidence is sufficient and second whether modification would render justice under the Act. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Craig v. United Church of Christ*, 13 BRBS 567, 571-572 (1982). Under Section 22, the administrative law judge has broad discretion to correct mistakes of fact. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). The Board has long recognized that the administrative law judge has the authority to address a mistake of fact concerning the average weekly wage in a modification proceeding. *Sutton v. Genco, Inc.*, 15 BRBS 25, 26 n. 2 (1982).

Initially, employer contends that claimant's request for modification in this case is inappropriate since it is based on a change of law following the holding of the United States Court of Appeals for the Sixth Circuit in *Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22 (CRT)(6th Cir. 1988)(Ryan, J., dissenting). We disagree. In *Hawthorne*, the court, citing *Toraiff v. Triple A Machine Shop*, 1 BRBS 465 (1975), determined that Section 10(c) of the Act, 33 U.S.C. §910(c), requires that claimants be allowed to offer evidence as to what they earned or would have earned but for periods of involuntary non-work, such as labor strikes; only by doing so, the court stated, can an employee be fairly compensated for injuries suffered on the job. In *Toraiff*, the Board held that a computation under Section 10(c) resulted in an unfair approximation of probable future

²Section 22, 33 U.S.C. §922 (1988), states, in pertinent part:

Upon his own initiative, or upon the application of any party in interest, ... on the ground of a change in condition or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the day of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case ... in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation.

earning capacity where a claimant's earnings during the year prior to disability were abnormally low due to a strike. *See also Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 183 (1984). Thus, rather than constituting a change in law, the court in *Hawthorne* agreed with a long-standing holding of the Board.

We therefore reject employer's contention that claimant's request for modification was based upon a change in law. In this case, the parties stipulated initially to an average weekly wage based on dividing claimant's actual annual earnings by 52. Since claimant did not work all of the 52 weeks, however, due to time lost on strike, this calculation was based on a mistake in fact as to the proper divisor. The administrative law judge properly found that modification was available to claimant under these circumstances.

Employer next contends that the administrative law judge erred in relying upon the August 17, 1988, recommendation of the claims examiner in determining claimant's applicable average weekly wage. Section 702.317(c), 20 C.F.R. §702.317(c), states that materials transmitted from the district director to the Office of Administrative Law Judges shall not include any recommendations expressed or memoranda prepared by the district director pursuant to Section 702.316, 20 C.F.R. §702.316. In this case, we hold that any error committed by the administrative law judge in referring to the claims examiner's findings is harmless, inasmuch as the administrative law judge thereafter credited the average weekly wage calculations contained in claimant's exhibit 3 when determining claimant's average weekly wage for compensation purposes.

Employer alternatively challenges the administrative law judge's average weekly wage calculation. In the initial compensation order, claimant's average weekly wage was calculated by dividing claimant's actual earnings for the year prior to his injury by 52. It is uncontested, however, that during the year immediately preceding his work-related injury claimant was on strike for eleven weeks. Claimant thus sought modification of his average weekly wage, contending that his average weekly wage should have been calculated by dividing his earnings in the year prior to his injury by 40.65, the actual number of weeks claimant worked during that period. We will affirm an administrative law judge's determination of a claimant's average weekly wage under Section 10(c), 33 U.S.C. §910(c), if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of injury. *See generally Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979); *Hicks v. Pacific Maritime & Supply Co., Ltd.*, 14 BRBS 549 (1981).

In this regard, the Board has held that time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. *See Brien*, 23 BRBS at 207; *Klubnikin*, 16 BRBS at 183; *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290 (1978). In the instant case, the administrative law judge accepted claimant's exhibit 3, wherein claimant's prior year earnings were divided by 40.65 to arrive at an average weekly wage of \$675.49, and incorporated that exhibit into his Order.³ Employer asserts that this computation is contrary to Section 10(d), which requires that the average annual wage be divided by 52. 33 U.S.C. §910(d). Employer mistakenly equates the average annual earnings of claimant, which are an approximation of annual earning capacity calculated under Section 10(a), (b) or (c), which is then divided by 52 under Section 10(d), with claimant's actual annual earnings. Sections 10 (a), (b) and (c), however, seek a reasonable approximation of claimant's annual earning capacity. The result reached by the administrative law judge is consistent with this standard, since the average weekly wage determined by the administrative law judge takes into consideration claimant's involuntary non-work due to a labor strike and represents a reasonable estimate of claimant's annual earning capacity at the time of his injury.⁴ Thus, the administrative law judge's finding that claimant's average weekly wage is \$675.49 is affirmed. *See generally Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988).

Accordingly, the administrative law judge's Order upon Request for Modification is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³Employer does not challenge either claimant's assertion that he earned \$27,458.95, in the year preceding his injury, or that claimant, due to a labor strike during that period, worked for 40.65 weeks.

⁴The administrative law judge's calculation is the same as if he divided actual earnings by actual weeks worked to achieve a measure of actual weekly earnings and then extrapolated this figure over the entire year by multiplying it by 52 to achieve an annual earning capacity under Section 10(c). This figure would then be subject to the 52-week divisor of Section 10(d).