BRB No. 92-1326

RAYMOND JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TODD SHIPYARDS CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Denying Modification and Order Denying Respondent's Motion for Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Robert W. Nizich, San Pedro, California, for claimant.

Harvey Brown (Samuelson, Gonzalez, Valenzuela and Sorkow), San Pedro, California, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Modification and Order Denying Respondent's Motion for Reconsideration (88-LHC-0174, 88-LHC-0175) of Administrative Law Judge Edward C. Burch 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was injured during the course of his employment on January 21, 1981. Claimant thereafter returned to light duty work with this employer on February 3, 1982, but was re-injured on February 9, 1982. Although claimant returned to light duty work on October 4, 1982, he was dismissed by employer on October 15, 1982, for violating the collective bargaining union agreement by failing to state on his employment application that he had suffered prior back injuries. The administrative law judge awarded claimant permanent total disability benefits commencing January 13, 1983, interest, penalties, and an attorney's fee; employer was granted relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). Employer subsequently sought modification of this award, alleging that there has been a change in claimant's economic condition.

In his decision, the administrative law judge found that substantial evidence supports the conclusion that claimant is capable of employment within his physical restrictions and that employer had established the availability of suitable alternate employment. The administrative law judge concluded, however, that since employer failed to present evidence regarding the wages paid by the suitable alternate employment positions at the time of claimant's injury, employer was not entitled to modification. In denying employer's motion for reconsideration, the administrative law judge refused to consider the wage information in the record, as that evidence did not provide wages for the specific positions identified.

Employer appeals, contending that the administrative law judge erred in requiring it to present evidence of the wages paid at the time of claimant's injury by the exact jobs it identified as constituting suitable alternate employment. Claimant responds, urging affirmance.

Pursuant to Section 22 of the Act, 33 U.S.C. §922, any party in interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification based on a mistake of fact or a change in condition. The United States Supreme Court has held that a disability award may be modified under Section 22 where there is a change in an employee's wage-earning capacity, even without a change in the employee's physical condition. *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995). The party requesting modification based on a change in condition has the burden of showing the change. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990).

In the instant case, no party challenges the administrative law judge finding that employer established the availability of suitable alternate employment, specifically positions as an electronics assembler, based upon the testimony of employer's vocational consultant, claimant's satisfactory completion of a 17-week rehabilitation program that prepared him for such a position, and the medical opinions of Drs. Curry, Craemer and Schiffman. *See Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). Rather, employer contends that the administrative law judge erred in denying its motion for modification because it failed to present evidence of the wages paid by the specifically identified positions at the time of claimant's injury. We agree.

An award for permanent partial disability compensation in a case not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-

injury wage-earning capacity. 33 U.S.C. §908(c)(21), (h); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994); *Cook v. Seattle Stevedoring Co.*, 21 BRBS 4 (1988). Where, as in the instant case, a claimant is unable to return to his usual employment as a result of his injury but employer establishes the availability of suitable alternate employment which claimant is capable of performing, the wages which the new job would have paid at the time of claimant's injury are compared to claimant's pre-injury wages to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury. *See generally Sproull v. Stevedoring Services of America*, 26 BRBS 100, 108-110 (1991)(Brown, J., dissenting on other grounds), *aff'd in pert. part on recon. en banc*, 28 BRBS 271 (1994). Subsections 8(c)(21) and 8(h) of the Act require that a claimant's post-injury wage-earning capacity be adjusted to represent the wages that the post-injury job paid at the time of claimant's injury in order to neutralize the effects of inflation. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

The Board and the courts have not required employer to establish the exact wages paid at the time of claimant's injury by the positions identified as constituting suitable alternate employment. Rather, the administrative law judge, as factfinder, has considerable discretionary authority to adopt a method for adjusting a claimant's post-injury earnings to a level equal to the wages paid at the time of claimant's injury. *See Walker*, 793 F.2d at 319, 18 BRBS at 100 (CRT). Thus, in *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990), the Board held that the percentage increase in the national average weekly wage, rather than the Consumer Price Index, should be applied to adjust the claimant's post-injury wages downward when the actual wages paid at the time of injury in claimant's post-injury job are unknown. In the instant case, employer submitted into evidence testimony regarding the salary range for electronics assemblers. The administrative law judge may use evidence of wages paid in jobs similar to the specific available jobs established by employer, or the method discussed in *Richardson*, to determine wages paid by the alternate employment at the time of injury. We therefore vacate the administrative law judge's denial of employer's

motion for modification, and we remand the case for reconsideration of claimant's post-injury wage-earning capacity.

Accordingly, the administrative law judge's denial of employer's motion for modification is vacated, and the case remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge