BRB No. 99-0953

MICHAEL SESTICH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LONG BEACH CONTAINER TERMINAL	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION	)	DATE ISSUED:
	)	
Employer/Carrier-Respondents	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order - Denying Additional Benefits of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for claimant.

William M. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denying Additional Benefits (91-LHC-2641) of Administrative Law Judge David W. Di Nardi 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, a longshoreman, injured his back in a work-related accident on December 30, 1988. In a Decision and Order dated August 14, 1992, Administrative Law Judge Samuel J. Smith awarded claimant continuing permanent partial disability benefits of $150 per week. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). The Director, Office of Workers' Compensation Programs (the Director), appealed this decision to the Board. The Board agreed with the Director that the administrative law judge erred in awarding employer Section 8(f) relief based on evidence submitted at the hearing that was not served on the Director. The Board remanded the case for the administrative law judge to allow the Director to raise the applicability of the absolute defense of Section 8(f)(3), 33 U.S.C. §908(f)(3), and to challenge the employer's application for Section 8(f) relief on the merits. *Sestich v. Long Beach Container Terminal*, BRB No. 92-2643 (May 30, 1995). On remand, Judge Smith again awarded employer Section 8(f) relief.

Thereafter, employer filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant's economic condition had changed such that he is no longer disabled. Judge Di Nardi (the administrative law judge) found that claimant's actual earnings represent his wage-earning capacity, and that his wages, adjusted to account for inflation, have increased such that he no longer has a loss in wage-earning capacity as compared to his average weekly wage. Thus, he terminated claimant's compensation as of the date employer's motion for modification was filed, February 23, 1998. The administrative law judge also denied claimant a nominal award. He awarded a credit to the Special Fund for its overpayment of compensation against any benefits that become due in the future.

On appeal, claimant contends that the administrative law judge erred in terminating his award of benefits as he continues to have a loss in wage-earning capacity. Employer responds, urging affirmance. The Director did not respond to this appeal.

A disability award may be modified under Section 22 when there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition.[1] *Metropolitan Stevedore Co. v. Rambo* [*Rambo* I] , 515 U.S. 251, 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.*, *Metropolitan Stevedore Co. v. Rambo* [*Rambo* II], 521 U.S. 121, 31 BRBS 54(CRT) (1997). Higher post-injury wages do not preclude compensation under Section 8(c)(21) if claimant has suffered a loss in wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991).

Claimant does not contest the administrative law judge's finding that his actual post-injury wages in the years since the award was entered, adjusted for inflation, exceed his average weekly wage at the time of injury. He does, however, contend that he continues to have a loss in wage-earning capacity because his injury prevents him from working as a crane operator. In this regard, claimant states that after he returned to work following his 1988 injury, he worked many hours on the overhead and transtainer cranes, and he intended to become certified in this area. This work, however, aggravated his back condition, so that by 1996 Dr. London opined that claimant can no longer perform this work. Thus, claimant contends that "but for" his injury, he would have the potential to earn more than he is currently earning, thus demonstrating a loss in wage-earning capacity.

[1]Employer has standing to seek modification in a case in which the Special Fund is paying benefits pursuant to Section 8(f)(2)(B) of the Act, 33 U.S.C. §908(f)(2)(B). *See also Terrell v. Washington Metropolitan Area Transit Authority*, 34 BRBS 1 (2000).

We affirm the administrative law judge's termination of claimant's permanent partial disability award. Although the administrative law judge noted claimant's higher wages in the years between 1993 and 1996, the administrative law judge found employer entitled to modification of the award based on claimant's changed economic status after he received training, from May 19, 1997 through May 30, 1997, qualifying him as a marine clerk and for membership in Local 63, the marine clerk's local union. The administrative law judge found that this type of employment provides claimant with remuneration not available to basic longshoreman,[2] *see* Tr. at 204-205, and, in addition, requires less physical labor than the work he performed after he returned to work following his injury. He found that claimant conceded that his unadjusted wages as a marine clerk are more than double what he earned at the time of injury.[3] The administrative law judge therefore concluded that claimant's economic condition has changed, such that he no longer suffers from a loss of earning capacity caused by his 1988 work accident. This finding is supported by substantial evidence, and is consistent with the Supreme Court's decision in *Rambo* I.

Moreover, in addition to the fact that the administrative law judge did not base the modification of claimant's award on the wages claimant earned prior to becoming a marine clerk, the administrative law judge properly found that the wages claimant may have earned "but for" his 1988 injury are not taken into account in determining claimant's loss in wage-earning capacity. Claimant testified that had he been able to work as a crane operator, he would now be earning "just over $134,000 a year," Tr. at 18, and he offered the testimony of co-workers to corroborate his testimony. The administrative law judge found claimant's contention "speculative," Decision and Order at 23-24, and, in any event, inconsistent with the comparison required by the Act between claimant's average weekly wage at the time of injury and his wage-earning capacity in his injured condition. *See* 33 U.S.C. §908(c)(21), (h); Decision and Order at 25.

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[2]Claimant testified that as a marine clerk he is paid for 50 hours even though he only works between 30 and 40 hours. Tr. at 204-205.

[3]Claimant's average weekly wage at the time of his injury was $921.78. Claimant's actual weekly wage in calendar year 1997 was $2,098.82, and was $2,059.43 in 1998. The administrative law judge adjusted these wages for inflation using two alternative methods, resulting in weekly wages of $1,597.76 and $1,620.71 for 1997, and $1,503.01 and $1,590.29 for 1998.

We need not address claimant's contention that the administrative law judge erred in finding speculative his testimony concerning the wages he would be earning if he were able to work as a crane operator, as the administrative law judge's finding that this consideration is not relevant comports with law. The inquiry into a claimant's post-injury wage-earning capacity concerns his ability to earn wages in his injured condition, and not what he could be earning absent injury. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149(CRT) (9th Cir. 1985)*; Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984)*; Bath Iron Works Corp. v. White*, 584 F.2d 569, 8 BRBS 818 (1978) (1st Cir. 1978). Moreover, as the administrative law judge correctly stated, the Act requires that a claimant's permanent partial disability award be based on a comparison between the claimant's average weekly wage at the time of injury, and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21);[4] *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); *Pumphrey v. E.C. Ernst*, 15 BRBS 327 (1983); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 692 (1980). *Cf. McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d. 59, 63, 10 BRBS 614, 620 (3d Cir. 1979) (Third Circuit holds that appropriate comparison is between claimant's post-injury earnings and what claimant would be earning in his pre-injury job if not for the injury). The court's statement in *Long* that the claimant therein did not establish that "but for" his injury he could have obtained a higher paying position does not constitute an endorsement of this method of calculating benefits. First, the court specifically stated that the "the objective is to determine the wage that would have been paid in the open market under normal employment conditions to the claimant as injured." *Long*, 767 F.2d at 1582, 17 BRBS at 153(CRT), *citing* 2 Larson, *Workmen's Compensation* §57.21 (1983). Moreover, the court was merely affirming the administrative law judge's finding that the claimant's current wages were representative of his wage-earning capacity. Finally, the critical point in the present case is that even without this higher paying work, claimant's earning capacity has greatly increased and exceeds his pre-injury earnings. Inasmuch as the administrative law judge in the instant case properly rejected claimant's contention, and as the administrative law judge's other findings are unchallenged, are supported by substantial evidence, and are in accordance with law, the administrative law judge's grant of modification is affirmed.

Accordingly, we affirm the administrative law judge's Decision and Order - Denying

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[4]Section 8(c)(21) states:

> In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

Additional Benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge