

KEITH SMITH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SERVICE EMPLOYEES)	
INTERNATIONAL, INCORPORATED)	
)	
and)	
)	
INSURANCE COMPANY OF THE STATE)	DATE ISSUED: 03/25/2010
OF PENNSYLVANIA)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	ORDER

Claimant appeals the Order Granting Motion for Summary Decision and Cancelling Formal Hearing (2009-LDA-00382) of Administrative Law Judge Lee J. Romero, Jr., rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In a Decision and Order issued in July 2007, the administrative law judge found that claimant's average weekly wage at the time of his November 18, 2003, injury in Iraq was \$818.22, based on a blend of claimant's stateside earnings and his earnings from 6.7

weeks of employment in Iraq.¹ Claimant did not appeal this decision, but subsequently filed a motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, asserting a mistake in fact in the calculation of his average weekly wage. Claimant alleged that, based on the Board's decision in *K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18 (2009), *aff'd on recon. en banc*, 43 BRBS 136 (2009), his average weekly wage should be calculated on the basis of only the wages he earned in Iraq. Employer filed a motion for summary decision, asserting that claimant was not entitled to modification as his motion was based on a change in law. Claimant opposed employer's motion for summary decision.

The administrative law judge granted employer's motion for summary decision and denied claimant's petition for modification. The administrative law judge stated that claimant's petition was based on a change in law and that the Board's decision in *Simons* is to be applied prospectively only and not to a decision that has become final.

Claimant appeals, contending that the administrative law judge erred in granting employer's motion for summary decision. Claimant contends his modification petition raised a mistake in fact as to the calculation of his average weekly wage and was not based solely on a question of law. The Director, Office of Workers' Compensation Programs, agrees with claimant that the administrative law judge erred in finding that claimant did not raise an issue of fact subject to modification; he asserts the case should be remanded for the administrative law judge to address the calculation of claimant's average weekly wage. Employer originally filed briefs in opposition to those filed by claimant and the Director. Now, however, employer agrees that a remand for the administrative law judge to fully address the average weekly wage is appropriate. Thus, employer has filed a motion to remand the case to the administrative law judge.

We grant the motions to remand, and we vacate the administrative law judge's grant of summary decision. The administrative law judge erred in finding that the calculation of claimant's average weekly wage is not subject to modification in this case. A claimant's average weekly wage is an issue of both law and fact, *see S.K. [Khan] v. Service Employers Int'l*, 41 BRBS 123 (2007), and therefore is subject to Section 22 modification as the calculation of the resulting figure is an "ultimate fact." *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). Thus, the issue raised is not purely a question of law to which modification does not apply. *Ryan v. Lane & Co.*, 28 BRBS 132 (1994). The fact that the administrative law judge's prior

¹ Claimant was temporarily totally disabled from November 22, 2003 to June 17, 2006, and permanently partially disabled thereafter.

order became final for purposes of appeal to the Board cannot bar a petition for modification, as Section 22 displaces traditional notions of finality and indeed provides the only recourse to a party where a prior decision has become final. *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971). Moreover, a party need not seek modification only on the basis of new evidence, as the “process is flexible, potent, easily invoked” and intended to secure justice under the Act. *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273, 276, 37 BRBS 99, 101(CRT) (2^d Cir. 2003); *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009). Rather, a party may request that the administrative law judge “further reflect on the evidence initially submitted.” *O’Keeffe*, 404 U.S. at 256. Therefore, we vacate the administrative law judge’s grant of employer’s motion for summary decision as claimant has raised a genuine issue of material fact and as employer is not entitled to judgment as a matter of law. *See generally Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006). The case is remanded for the administrative law judge to address the parties’ contentions regarding the calculation of claimant’s average weekly wage.² *Simons*, 43 BRBS 18, *on recon.*, 43 BRBS 136; *Khan*, 41 BRBS 123; *Proffitt v. Service Employers Int’l, Inc.*, 40 BRBS 41 (2006).

Accordingly, the motion to remand is granted. The administrative law judge’s Order Granting Motion for Summary Decision is vacated, and the case is remanded for further proceedings in accordance with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

² We reject claimant’s contention that the Board should direct the administrative law judge to modify his average weekly wage. Claimant is not entitled to modification as a matter of law; as we have explained, the average weekly wage issue involves a mixed question of law and fact, and the administrative law judge must review the evidence, make findings of fact and apply the correct law.