BRB No. 98-0770

KERMIT SHAFFER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CROSBY & OVERTON	)	DATE ISSUED:
	)	
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorhead, LLP), Wilmington, California, for claimant.

Steven G. Sloma (State Compensation Insurance Fund), Cerritos, California, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-LHC-536) of Administrative Law Judge Henry B. Lasky 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).

On November 30, 1985, claimant, during the course of his employment as a vacuum-truck driver, suffered injuries to his lumbar spine which necessitated two surgeries. On October 13, 1989, an award was made by the deputy commissioner pursuant to stipulations, whereby employer was to pay temporary total disability to claimant from December 3, 1988 to February 17, 1989,[1] followed by permanent partial disability compensation through February 17, 1991, after which the Special Fund would commence payment. EX-12. Thereafter, both claimant and employer filed petitions for modification under Section 22 of the Act, 33 U.S.C. §922. In his petition, claimant sought an award of both permanent total disability compensation and future medical costs. Employer, alleged in its petition, that claimant's condition had substantially improved such that claimant could return to his usual and customary employment. In addition, employer asserted a Section 31, 33 U.S.C. §931, claim, alleging that claimant had given perjured testimony based on the *sub rosa* videotape films entered into evidence.

In his Decision and Order, the administrative law judge found that employer had not sustained its burden of proving that claimant's condition improved such that he could return to his usual and customary employment or, in the alternative, seek suitable alternate employment. Rather, the administrative law judge found that claimant had successfully met his burden in showing the deterioration of his condition and, accordingly, that claimant was permanently and totally disabled from July 1, 1992. *See* 33 U.S.C. §908(a).

On appeal, employer contends that the administrative law judge erred in finding that claimant is unable to return to his previous employment duties with employer. Employer further asserts that this case should be referred to the United States Attorney due to fraudulent representations by claimant under Section 31(a) of the Act. Claimant responds, urging affirmance.

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 U.S. 291, 30 BRBS 1 (CRT)(1995). It is well-established that the party requesting modification

[1]Employer had commenced paying temporary total disability benefits on December 3, 1985. CX-2.

due to a change in condition has the burden of showing the change in condition. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *see also Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (1997). Moreover, the Board has held that the standard for determining disability is the same during Section 22 modification proceedings as it is during the initial adjudicatory proceedings under the Act. *Vasquez*, 23 BRBS at 431.

It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.,* 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Const. Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must show that he is unable to return to his usual employment due to his work-related disability. *See Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

Employer initially contends that claimant is no longer disabled. Specifically, employer asserts that its videotapes show claimant engaged in activity contrary to his stated limitations, including bending, squatting, lifting, and moving a large tree several times. The administrative law judge, however, declined to give determinative weight to these videotapes, reasoning that claimant's activities on the videotapes did not represent an accurate portrayal of claimant's total activities; in rendering this decision, the administrative law judge noted that the videographer stopped and started the film numerous times, and that the videographer was unable to account for some period that claimant could have been resting. Furthermore, the administrative law judge disagreed with employer's characterization of the activities shown on the tapes. It is well-established that the administrative law judge, as the trier of fact, is entitled to draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Anderson,* 22 BRBS at 22. Thus, as the administrative law judge's determination is rational and within his authority as factfinder, we affirm his findings that employer's videotapes do not establish that claimant is capable of resuming his usual employment duties with employer.

Employer next contends that the administrative law judge erred in failing to give determinative weight to the testimony of Dr. Lieb. We disagree. In adjudicating a claim, the administrative law judge is required to evaluate the credibility of witnesses, including doctors, and is not bound to accept the opinion or theory of any particular medical examiner; rather, the administrative law judge may draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954(1963); *Todd Shipyards*

Corp., 300 F.2d at 741. In evaluating the medical evidence in the instant case, the administrative law judge chose to give greater weight to the opinions of Dr. Butuk, whom the administrative law judge noted was claimant's current treating physician, and Dr. Rhodes. Dr. Rhodes concluded that claimant was totally disabled with regard to remunerative activities because of cumulative progressive spinal stenosis secondary to work injuries. Dr. Rhodes opined that claimant was restricted from his work as a vacuum truck driver, Tr. at 139, and that his need for narcotics contributes to his not being employable, Tr. at 140. Lastly, Dr. Rhodes did not believe that claimant was malingering. Dr. Butuk similarly noted that he never saw any evidence of malingering, that claimant was clearly disabled, and that claimant's ability to perform any job on a regular basis for more than an hour or two would be very questionable. CX-31. As these opinions constitute substantial evidence in support of the administrative law judge finding that claimant is totally disabled, that determination is affirmed.[2] *See generally General Dynamics Corp. v. Director,*

[2]We reject employer's argument that Dr. Lieb's opinion should have been controlling. Dr. Lieb, after reviewing the videotapes and an on-site job analysis, inferred that claimant could perform the activities required by a vacuum truck driver. Tr. 177-178. The administrative law judge acted within his discretion in determining that Dr. Lieb's viewing of the videotape and consequent analysis of claimant's capabilities was inconsistent with what the tape represented. With regard to the opinion of Dr. London, the administrative law judge discussed Dr. London's report of April 29, 1997, in which Dr. London stated that claimant's back complaints are excessive, and found that although this opinion is contradictory to the conclusions of Drs. Butuk and Rhodes, Dr. London's cursory report is entitled to little weight.

OWCP, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982).

Although employer correctly notes that the administrative law judge did not discuss Dr. London's supplementary letter in which he states that after reviewing the films he agrees with Dr. Lieb's opinion that claimant is fully capable of performing his usual and customary activities as a vacuum truck driver, EX-11 at 139, this omission is harmless since the administrative law judge previously determined that the opinions of Drs. Butuk and Rhodes were more persuasive, that Dr. London's report was cursory, and that the films were unpersuasive.

Accordingly, the Decision and Order Awarding Benefits is affirmed.[3]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[3]Section 31(a) of the Act states that any false statement or representation, which is knowingly and willfully made for the purpose of obtaining benefits under the Act, is a felony. 33 U.S.C. §931(a). In light of the administrative law judge's findings that claimant is disabled as he claimed, which we affirm as supported by the record, this issue is moot.