

WYLIE P. SMITH)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
NEWPORT NEWS SHIPBUILDING AND)	DATE ISSUED:
DRY DOCK COMPANY)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Modification of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Stephanie Burks Paine (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion for Modification (95-LHC-1608) of Administrative Law Judge Fletcher E. Campbell, Jr., 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On June 15, 1984, claimant sustained an injury to his left thoracic muscle while working for employer as a helper. The parties stipulated that claimant is entitled to temporary total disability benefits from June 29, 1984, through October 14, 1984, temporary partial disability benefits from October 23, 1986, to April 9, 1987, and permanent partial disability benefits from April 10, 1987, to September 30, 1987, and continuing. The award for permanent partial disability benefits compensated claimant for a loss of overtime in the

amount of \$24.13 per week, or 3.2 hours per week. These stipulations were embodied in a compensation order issued by the district director.

Employer thereafter requested modification of the district director's award of permanent partial disability benefits pursuant to Section 22 of the Act, 33 U.S.C. §922. Employer sought termination of the award for permanent partial disability benefits as claimant's injury has not caused him to lose any overtime since August 1, 1994, when he was transferred from the sail loft, where little overtime was available, to the ventilation shop, where more overtime was available.

In his Decision and Order Granting Motion for Modification, the administrative law judge found that claimant ceased to suffer any loss of the ability to work overtime as of August 1, 1994, when claimant was transferred to the ventilation shop. Consequently, the administrative law judge terminated employer's liability for permanent partial disability benefits.

On appeal, claimant challenges the administrative law judge's conclusion that his work injury is not now causing a reduction in his ability to work overtime and seeks reinstatement of the award of permanent partial disability benefits compensating him for the loss of overtime. Employer responds in support of the administrative law judge's decision.

Under Section 22, 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 change in conditions. Modification based on a change in conditions may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992). A loss of overtime is relevant to a determination of wage-earning capacity. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987).

After consideration of claimant's contentions on appeal and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's granting of employer's motion for modification and termination of claimant's permanent partial disability award for a loss of overtime. The administrative law judge properly granted employer's motion for modification as employer showed a change in claimant's economic condition. *Rambo*, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT). Upon claimant's transfer from the sail loft to the ventilation shop on August 1, 1994, the administrative law judge found that claimant has the opportunity to work more than the 3.2 hours per week in overtime for which his permanent partial disability award compensated him.¹ Emp. Ex. 6. The administrative law judge also found that the overtime available

¹The administrative law judge found that claimant had the opportunity to work overtime in the

to claimant in the ventilation shop is within his work restrictions and job functions. Emp. Ex. 9(c); Tr. at 31, 47, 54.

Claimant's contention that he might be earning more in overtime pay if he could work on ships, if not for his injury, is without merit. The administrative law judge rationally found that although claimant cannot now perform overhead work due to work restrictions imposed as a result of his injury, claimant could still work some overtime on ships, if he wanted to, as not all of the work aboard the ships was overhead work. Decision and Order at 9; Tr. at 53. Even if claimant were able to perform all of the ship overtime available to him, the administrative law judge's finding that less ship overtime is now available is supported by substantial evidence, and does not support claimant's claim that he still has a loss of overtime, *see generally Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987), in view of the increased overtime available in the ventilation shop. Decision and Order at 9-10; Cl. Ex. 2(k); Tr. at 43. Consequently, as the record supports the administrative law judge's finding that claimant has sufficient overtime available so that he no longer has the loss in overtime for which he was being compensated, we affirm the administrative law judge's granting of employer's motion for modification resulting in the termination of claimant's award for permanent partial disability benefits. *See Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110 (1989); *Peele*, 20 BRBS at 133.

Accordingly, the administrative law judge's Decision and Order Granting Motion for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

ventilation shop at the rate of 4.4 hours per week in 1994 and 6.2 hours per week in 1995. Emp. Exs. 4(a)-(c), 5.