

BRB No. 96-1077

ROBERT F. REITER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
BRADY-HAMILTON STEVEDORE)	DATE ISSUED:
)	
and)	
)	
SAIF CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Denying Petition for Modification of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison), Portland, Oregon, for claimant.

Norman Cole (SAIF Corporation), Salem Oregon, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Denying Petition for Modification (95-LHC-257) of Administrative Law Judge Thomas Schneider 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 the 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).

The case currently on appeal involves the administrative law judge's denial of employer's request for modification under Section 22 of the Act, 33 U.S.C. §922. Claimant, a Class A longshoreman with considerable seniority, sustained a work-related back and ankle injury while working for employer as a "casual" walking boss on June 30, 1978. After undergoing surgery, claimant returned to work but was unable to accept all of

the jobs he performed previously. Claimant sought permanent partial disability compensation under the Act pursuant to 33 U.S.C. §908(c)(21).

In the initial Decision and Order issued on November 26, 1980, claimant was awarded permanent partial disability compensation commencing August 30, 1979, for a 30 percent loss of wage-earning capacity, based on his inability to accept all jobs which would be available to him as a "casual" walking boss because of his work-related injury.

Thereafter, claimant was promoted to "local" walking boss in 1990, which resulted in a 30 to 35 percent increase in his salary. See Tr. at 44. Employer sought modification under Section 22, alleging that claimant's increased earnings reflected a change in his wage-earning capacity and that claimant was no longer eligible for disability compensation. Claimant responded that he continued to have a 30 percent loss in his wage-earning capacity because as a result of his work injury he continues to have to turn down jobs requiring substantial climbing, walking, and traveling and accordingly earns at least 30 percent less than the average walking boss.

In his Decision and Order Denying Petition for Modification, after recognizing that pursuant to *Metropolitan Stevedore Co. v. Rambo*, U.S. , 115 S.Ct. 2144, 30 BRBS 1 (CRT)(1995), modification is permitted under the Act based upon a change in economic condition alone, the administrative law judge found that modification was not warranted because employer failed to establish a change in claimant's wage-earning capacity. Employer appeals the administrative law judge's finding in this regard and claimant responds, urging affirmance. Employer has also filed a reply brief in which it reiterates its prior arguments.

In its appeal, employer avers that the administrative law judge applied an incorrect legal standard in denying modification because he focused on the fact that claimant's higher paying job as a walking boss did not require additional skills or training and failed to determine if claimant's present earnings fairly and reasonably represent claimant's post-injury wage-earning capacity. Section 22 of the Act, 33 U.S.C. §922, allows for modification of an award where there is change in claimant's wage-earning capacity, even in the absence of a change in his physical condition. *Rambo*, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT). See *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

After considering the administrative law judge's Decision and Order in light of the record evidence, employer's arguments are rejected. Employer correctly asserts that the administrative law judge erred to the extent his decision suggests that employer was required to establish that claimant acquired new skills in order to demonstrate a change in his wage-earning capacity. See *Rambo*, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT). We nonetheless affirm his denial of modification, because his overall analysis comports with applicable law, and his finding that employer failed to establish a change in claimant's wage-earning capacity is rational and supported by substantial evidence. See *O'Keefe*, 380 U.S. at 359.

In determining that modification was not warranted, the administrative law judge initially concluded that the ability to obtain work as a walking boss was within claimant's wage-earning capacity at the time of his injury. As claimant and John Arthur Ronne, another walking boss, testified that becoming a "local" walking boss where one is a "casual" walking boss requires no additional skills or training and is primarily a matter of seniority, Tr. at 44, 49, 88-89, 91, and the record reflects that claimant was actually offered the walking boss position in 1979¹ while convalescing from his work injury, Tr. at 31, it cannot be said that the administrative law judge's finding in this regard is irrational or lacking a proper evidentiary basis. Moreover, in denying modification, the administrative law judge also rationally determined that claimant's increased wages do not reflect an increase in his wage-earning capacity, but rather are due to his seniority, because a "casual" walking boss is essentially a walking boss in training. Decision and Order at 5-6. Finally, the administrative law judge rationally concluded that even in his new position, claimant continues to suffer a 30 percent loss in his wage-earning capacity; the record reflects that claimant continues to turn down certain jobs because of his work injury, and as a result earns approximately 32 percent less than the average walking boss. Decision and Order at 3, 5-6; Tr. at 82-83, 86; Cx.6 at 70. Inasmuch as the findings made by the administrative law judge are rational, supported by substantial evidence, and consistent with the Supreme Court's recognition in *Rambo* that modification must be based on a change in claimant's wage-earning capacity and not every variation in actual wages or transient change in the economy, 115 S.Ct. at 2150, 30 BRBS at 5 (CRT), we affirm his denial of modification in this case. See generally *Container Stevedoring Co., v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991).²

¹The administrative law judge erroneously refers to this date as 1978 in his decision.

²Although employer also alleges that the administrative law judge made inconsistent findings regarding whether there had been a change in claimant's physical condition, we decline to address this argument as employer did not raise the issue of modification based on a change in claimant's physical condition while the case was before the administrative law judge. *Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90 (1993)(*en banc*)(Brown and McGranery, JJ., concurring and dissenting), *modified on other grounds on recon. en banc*, 28 BRBS 102 (1994), *aff'd mem. sub. nom. Ingalls Shipbuilding, Inc. v. Director, OWCP*

[Biggs], 46 F.3d 66 (5th Cir. 1995); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988).

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

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge