BRB Nos. 88-3016,
88-3016A and 88-3016B

EDO ZIRING	)	
	)	
Claimant-Respondent	)	
Cross-Respondent A	)	
Cross-Petitioner B	)	
	)	
v.	)	
	)	
ZIDELL MACHINERY & SUPPLY COMPANY	)	
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	
Cross-Petitioner A	)	
Cross-Respondent B	)	DECISION and ORDER

Appeals of the Decision and Order Allowing Modification, Post-Decision and Order, and Second Post-Decision Order of R. S. Heyer, Administrative Law Judge, United States Department of Labor.

Donald R. Wilson (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Ruth M. Cinniger, Portland, Oregon, for employer/carrier.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation, United States Department of Labor.

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

PER CURIAM:

Employer appeals, and the Director, Office of Workers' Compensation Programs (the Director), and claimant cross-appeal, the Decision and Order Allowing Modification, Post-Decision and Order, and Second Post-Decision Order (85-LHC-1833, 87-LHC-2305) of Administrative Law Judge R. S. Heyer 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant, at age 29, was injured during his college vacation while working as a welder for employer on December 20, 1965, when he slipped and fell into the hatch of a grain barge. As a result of the injury, he became a paraplegic and is confined for life to a wheelchair. Claimant subsequently completed his senior year at Oregon State University, earning an engineering degree in June 1967, and with his tuition covered by carrier, obtained a masters degree in industrial engineering in 1969. The major jobs claimant has held since his graduation were as an engineer for the Israeli government in Israel where he worked from August 16, 1971 through June 1979, and for General Electric in Washington where he has worked since October 1979.[1] General Electric accommodated claimant by installing a special elevator, widening claimant's office to facilitate his ability to maneuver his wheelchair, providing him with a special draftboard, and arranging for him to be picked up at the airport when he returns from business trips. Emp. Ex. 5. At the time of the formal hearing, claimant was earning approximately $42,000 to $44,000 a year in his present job; his pre-injury average weekly as determined by the administrative law judge was $52.50. Due to his condition, claimant has numerous health problems including sensitivity to heat and cold, loss of bladder and bowel control, recurrent urinary tract infections, muscle spasms in his legs and stomach, skin ulcerations, occasional dizziness in hot weather, tendinitis in his elbows, and brittle leg bones, one of which he broke. Claimant testified that his condition is worsening.

While the record is not entirely clear, employer apparently paid claimant benefits in the amount of $35 a week from December 21, 1965 to February 16, 1967, $70 a week from February

[1]Claimant returned to the United States in May 1979 to look for work because the heat of the Israeli climate caused extreme swelling in his legs, increased urinary infections, and severe dizzy spells.

16, 1967 through July 1, 1971, and $35 a week thereafter through September 13, 1984.[2] *See* Tr. 88; Emp. Exs. 1, 3 and 4. After 1972, the Special Fund also made payments pursuant to Section 10(h), 33 U.S.C. §910(h).[3] On June 3, 1974, the deputy commissioner[4] issued a letter to employer stating that claimant will soon reach the $24,000 maximum payable for permanent partial disability, and that in light of the presumption of total disability due to loss of both legs contained in Section 8(a), 33 U.S.C. §908(a), claimant is deemed to be permanently totally disabled. The letter stated that OWCP understood that employer planned to terminate payments, and that employer should continue to pay claimant permanent total disability benefits at the rate of $35 per week. The second letter to employer, dated June 6, 1974, signed by a claims examiner, stated that OWCP determined that claimant is permanently and totally disabled as a result of his injury, and that claimant is entitled to adjustments under newly enacted Sections 10(f) and (h).

On September 14, 1984, employer reduced its weekly compensation payments to 1 percent of $35 to reflect its belief that claimant was entitled only to a *de minimis* award, and further reduced that payment by 25 percent for recoupment of an overpayment allegedly in the amount of $32,005.51. On the basis that claimant was working full-time and was no longer permanently totally disabled, the Director notified claimant on June 6, 1984 that he was filing a claim for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. The Special Fund stopped making payments pursuant to Section 10(h) sometime thereafter.

The case twice was referred to the Office of Administrative Law Judges for a formal hearing and twice remanded to the deputy commissioner for informal proceedings. A formal hearing was held on January 11, 1988, before Judge Heyer. In his Decision and Order Allowing Modification, the administrative law judge found that the June 6, 1974 letter from the claims examiner stating that claimant is permanently totally disabled, considered in conjunction with the June 3, 1974 letter from the deputy commissioner, constitutes an "order," and therefore a Section 22 modification proceeding is proper. The administrative law judge found that although claimant is working, his career growth

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[2]Employer's Form LS-208 indicates that it paid benefits in the amount of $35 a week for temporary total disability from December 21, 1965 to May 30, 1974, and for permanent partial disability from May 31, 1974 to September 13, 1984. A letter dated February 21, 1967 from the deputy commissioner, however, indicates that the carrier intended to increase the weekly rate to $70 commencing February 16, 1967. Further, a letter from the deputy commissioner dated June 3, 1984, stating that claimant will soon have been paid the pre-1972 $24,000 maximum for permanent partial disability benefits suggests employer had been paying $70 a week for part of the time. *See* 33 U.S.C. §914(m)(1970)(repealed 1972); Cl. Ex. 1. This is corroborated by claimant's testimony that he received $70 weekly compensation payments. Tr. 88.

[3]Section 10(h) was enacted in 1972 to upgrade the compensation payable for permanent total disability to claimants injured before 1972 beyond the pre-1972 statutory maximum.

[4]Although the term "deputy commissioner" recently was replaced by the term "district director," *see* 20 C.F.R. §702.105, this decision will use "deputy commissioner."

is limited, *i.e.*, claimant is unable to move to warmer or cooler climates where he could earn a higher salary, his quality of life is impaired, his physical condition is worsening, and General Electric has made adjustments to accommodate claimant. The administrative law judge concluded that claimant's condition had changed from total to partial in part due to the fact that claimant suffers "costs associated with his employment that an unimpaired person would not have," that claimant's actual wages do not represent his wage-earning capacity, and that claimant has suffered an eight percent loss in wage-earning capacity. Decision and Order at 5. The administrative law judge found, however, that the time lapse between the date of claimant's injury and the proceeding before him, *i.e.*, almost twenty years, precludes the usual calculation for determining claimant's post-injury wage-earning capacity under Section 8(c)(21) and (h), 33 U.S.C. §908(c)(21), (h), even accounting for adjustments in inflation.

The administrative law judge therefore awarded claimant permanent partial disability benefits for an eight percent loss of claimant's immediate "prior permanent total disability rate," from June 7, 1984, the date after the Director filed a claim for modification, and continuing. Without explanation, the administrative law judge found that claimant is entitled to "penalties sought under 33 U.S.C. §§914, 918 with respect to payments withheld for any period or amount for which the claimant" is entitled. The administrative law judge also found employer and the Director each was liable for one-half of claimant's attorney's fee.

The Director moved for reconsideration, contending that the administrative law judge erred in finding that the 1974 correspondence from the deputy commissioner's office constitutes an "order," and that the administrative law judge erred in failing to address the average weekly wage issue and in awarding a penalty under Section 14(f). In a Post-Decision and Order, the administrative law judge denied the Director's motion, corrected a typographical error, and awarded claimant an attorney's fee of $6,768.75 to be assessed solely against employer. The administrative law judge also stated that the compensation rate to be paid claimant is two-thirds of eight percent of claimant's pre-injury average weekly wage, "which has always been recognized as $52.50." In a Second Post-Decision Order, the administrative law judge corrected typographical and clerical errors in the Post-Decision and Order.

On appeal, employer and the Director contend that the June 1974 correspondence issued from the deputy commissioner's office is not an "order" subject to modification under Section 22. The Director therefore contends that the administrative law judge erred in assessing a penalty pursuant to Section 14(f), and he maintains that the case must be remanded for initial adjudication of all issues. The Director further contends that the administrative law judge should recalculate claimant's average weekly wage on remand because his finding that claimant's average weekly wage is $52.50 on the basis it was so recognized by the parties since the beginning is not supported by the evidence of record and is a mere assumption. The Director notes, for instance, that carrier paid claimant $70 a week based on weekly wages exceeding $105. *See* Emp. Ex. 3. In the alternative, assuming the 1974 correspondence constitutes an order, the Director contends that the administrative law judge erred in assessing the Section 14(f) penalty on all compensation due claimant, as he should have assessed it on the compensation due and unpaid solely for the prior period of permanent total disability. BRB No. 88-3016A.

Employer contends that the administrative law judge erred in finding that claimant suffered any loss in wage-earning capacity because claimant's salary increased over 50 percent in his ten years of employment, the administrative law judge erroneously considered claimant's increased job opportunities if he had not been injured, and the administrative law judge did not calculate claimant's loss in earning capacity in a dollar amount as required by Section 8(h).[5] Additionally, employer contends that if the 1974 correspondence is not an "order," a Section 14(f) penalty should not have been assessed, and if claimant does not prevail on the issue of loss in wage-earning capacity, claimant is not entitled to an attorney's fee payable by employer since claimant will not have successfully prosecuted his claim. Employer contends, in the alternative, that if claimant is entitled to an attorney's fee, the Special Fund should be liable for it because the Director initiated the Section 22 modification proceeding and failed to attend the informal conferences. BRB No. 88-3016.

In his appeal, claimant, who states that the 1974 correspondence is an order, contends that the administrative law judge erred in granting modification and in changing the permanent total disability award to one for permanent partial disability. Claimant contends modification is not permitted unless there is a change in his physical condition, and that the evidence establishes his condition was worsening. Claimant alternatively contends that the administrative law judge erred in reducing his wage-earning capacity by only eight percent in view of the severity of his physical symptoms, the fact that he could earn two to three times more if he were not injured, and that his current employer had made special accommodations for him. Claimant contends that the Section 8(a) presumption of permanent total disability for loss of both legs has not been rebutted. BRB No. 88-3016B.

We hold that the 1974 correspondence from the deputy commissioner's office does not constitute an "order" subject to modification under Section 22 of the Act.[6] *Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Initially, we note that the 1972 Amendments to the Act removed the deputy commissioner's power to issue compensation orders, absent the agreement of the parties. *See O'Berry v. Jacksonville Shipyards, Inc.*, 22 BRBS 430 (1989), *modifying on other grounds on recon.* 21 BRBS 355 (1988); *Roulst v. Marco Construction Co.*, 15 BRBS 443, 447 (1983); 20 C.F.R. §702.315. Thus, even if the letters in this case were construed to be an "order," such an order would be void as there is no evidence that the parties requested the issuance of an order following informal proceedings. *See generally Norton v. National Steel & Shipbuilding Co.*, 27 BRBS 33 (1993) (*en banc*)(Brown, J., dissenting), *aff'g on recon.* 25 BRBS 79 (1991); *Roulst*, 15 BRBS at 447. Moreover, the letters do not purport to be a formal compensation order as they merely advise employer, with a copy to claimant, of its obligations to claimant, and request that employer fill out appropriate forms to effect the adjustments pursuant to Section 10(f) and (h). *See generally Maria v. Del Monte/Southern Stevedore*, 22 BRBS 132 (1989), *vacating on recon.* 21 BRBS 16

[5]Employer maintains that evidence of claimant's continued employment rebuts the Section 8(a) presumption of total disability due to loss of both legs.

[6]Contrary to the administrative law judge's finding, the fact that the Director initiated the proceeding to modify the 1974 "order" and later changed his position as to the effect of the letters is not binding.

(1988)(McGranery, J., dissenting). That the language of the letters is "stronger" than a mere recommendation is not dispositive of this issue.[7]

Accordingly, as no order was issued in this case, the administrative law judge erred in modifying claimant's compensation pursuant to Section 22.[8] We, therefore, vacate the administrative law judge's Decision and Order Allowing Modification, Post-Decision and Order, and Second Post-Decision Order and remand the case for the administrative law judge to adjudicate all issues *de novo*. *See Intercounty Construction*, 422 U.S. at 1, 2 BRBS at 3. These issues should include the extent of claimant's disability, his post-injury wage-earning capacity expressed in a dollar amount, and claimant's average weekly wage at the time of injury, which never has been determined pursuant to 33 U.S.C. §910. We note that the objective of Section 8(h) is to arrive at a wage-earning capacity for the claimant in his injured condition, and is not intended to compensate him for what he could have earned had he not been injured. *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985). Moreover, contrary to the administrative law judge's finding, despite the lengthy time lapse between claimant's current employment and the date of his 1965 injury, the Section 8(h) analysis should be applied. Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988). Finally, in order to weed out the effects of inflation, the administrative law judge must compare claimant's average weekly wage at the time of injury with wages the post-injury job paid at the time of injury. *Id.*

[7]For example, the administrative law judge found that the terms "it has been determined," "is entitled to," and "compensation should be continued" indicate that a formal order was contemplated by the deputy commissioner.

[8]We reject, however, claimant's contention that modification is appropriate only if there is a change in claimant's physical condition. A change in economic condition may support modification of a prior decision under Section 22. *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992).

Since we have held that the 1974 correspondence does not constitute an order, we also vacate the administrative law judge's finding that a Section 14(f) penalty is due on compensation "awarded" under the terms of the letters.[9] In the event the administrative law judge again finds that an attorney's fee award is appropriate, we reject employer's contention that the Special Fund should be liable for it either pursuant to Section 28, 33 U.S.C. 928, *see Director, OWCP v. Robertson*, 625 F.2d 873, 12 BRBS 550 (5th Cir. 1980), or pursuant to Section 26, 33 U.S.C. §926, *see Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991).

Accordingly, the administrative law judge's Decision and Order Allowing Modification, Post-Decision and Order and Second Post- Decision Order are vacated, and the case is remanded for initial adjudication consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[9]In any event, the administrative law judge has no authority to enforce a finding that employer or the Special Fund defaulted on payments due, as claimant must seek enforcement of a supplemental order of default in district court under Section 18.