BRB No. 91-0275

PHILIP VLAIC, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
METROPOLITAN STEVEDORE COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Robert W. Nizich (Naylor and Nizich), San Pedro, California, for claimant.
Barry F. Evans (Evans, Cumming & Malter), Van Nuys, California, for self-insured employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and LAWRENCE, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (83-LHC-0241) of Administrative Law Judge Alexander Karst granting modification 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).

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

Claimant sustained a low back injury during the course of his employment with

employer on December 10, 1979. Claimant subsequently filed a claim for benefits under the Act. At a June 6, 1983, formal hearing before Administrative Law Judge Steven Halpern the parties, although offering no testimony, entered into various stipulations. Thereafter, in a Decision and Order dated June 16, 1983, Judge Halpern determined that claimant had suffered a diminished wage-earning capacity as a result of his work-related injury and awarded claimant permanent partial disability compensation pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). He further found employer entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Employer thereafter sought modification of the administrative law judge's Decision and Order pursuant to Section 22 of the Act, 33 U.S.C. §922. In seeking modification, employer alleged a change in claimant's economic condition after the entry of Judge Halpern's award of benefits. In a Decision and Order issued October 9, 1990, Judge Karst initially found that the stipulations entered into by the parties at the formal hearing before Judge Halpern did not constitute a "settlement" under the Act which would preclude modification. Next, the administrative law judge determined that claimant, presently employed as a longshore foreman, no longer suffers a loss of wage-earning capacity; accordingly, claimant's award of permanent partial disability compensation was terminated. Lastly, the administrative law judge declined to address claimant's cross-petition for modification since claimant failed to give reasonable notice of that claim to either employer or the Special Fund.

On appeal, claimant challenges the administrative law judge's decision to grant employer's petition for modification and his subsequent termination of claimant's permanent partial disability benefits. Employer responds, urging affirmance.

Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions. Modification of a prior decision is permitted, at any time prior to one year after the last payment of compensation or the rejection of a claim, based on a mistake of fact in the initial decision or where claimant's physical or economic condition has improved or deteriorated. *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); *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). A request for modification pursuant to Section 22, therefore, may be based upon a change in a claimant's wage-earning capacity. *See Fleetwood, supra.* The party requesting modification based on 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).

Claimant initially contends that the administrative law judge erred in determining that the stipulations entered into by employer and claimant before Judge Halpern did not constitute a settlement of the issue of claimant's loss of wage-earning capacity, thus precluding modification of that issue pursuant to Section 22. Specifically, claimant alleges that the stipulations entered into by the parties below constituted a binding contract between the parties which is not subject to modification proceedings under the Act. We disagree. A settlement approved under Section 8(i) of the Act discharges the liability of the employer, its carrier, or both. *See* 33 U.S.C. §908(i)(1982)(amended 1984). The stipulations entered into by the parties in June 1983 cannot be

construed as a settlement which would terminate claimant's right to further compensation under the Act, however, since those stipulations did not discharge employer's liability to claimant; rather, the stipulations entered into by the parties were a prelude to Judge Halpern's formal adjudication of the claim and his subsequent award of compensation. *See Lawrence v. Toledo Lake Front Docks*, 21 BRBS 282 (1988). We, therefore, hold that the administrative law judge properly concluded that the stipulations entered into by the parties did not constitute a settlement under the Act which would preclude modification of Judge Halpern's decision under Section 22.

Claimant next contends that the administrative law judge erred in calculating claimant's post-injury wage-earning capacity. We agree. The standard for determining disability is the same during Section 22 modification proceedings as it is during initial adjudicatory proceedings under the Act. *See Vasquez*, 23 BRBS at 428. Under Section 8(c)(21), 33 U.S.C. §908(c)(21), an award of permanent partial disability benefits is based upon the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. In calculating claimant's post-injury wage-earning capacity, the administrative law judge, in order to neutralize the effects of inflation, must adjust claimant's post-injury wage levels to the level paid at the time of injury so that they may be compared with claimant's pre-injury average weekly wage. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691 (1980).

In the instant case, the administrative law judge found that claimant, since becoming a longshore foreman, worked longer hours at a greater hourly rate than he had worked pre-injury; thus, based solely upon claimant's post-injury wage-levels, the administrative law judge concluded that employer had established a significant change in claimant's economic condition which mandated the termination of weekly compensation payments to claimant. At no point in his discussion, however, did the administrative law judge calculate a figure based on wage levels paid to a foreman working similar hours at the time of claimant's injury to be compared to claimant's pre-injury average weekly wage. We, therefore, vacate the administrative law judge's finding regarding claimant's post-injury wage-earning capacity, and we remand the case for the administrative law judge to consider claimant's post-injury wage-earning capacity consistent with the statutory scheme established in Section 8(c)(21) of the Act. *See Cook*, 21 BRBS at 4.

Lastly, claimant contends that the administrative law judge erred in not considering his cross-petition for modification, in which claimant sought to increase the amount of his weekly compensation payments. We disagree. In his Decision and Order, the administrative law judge refused to adjudicate claimant's cross-petition for modification, stating that claimant had failed to give both employer and the Special Fund reasonable notice of his attempt to increase his weekly compensation benefit. Under 20 C.F.R. §§702.336 and 702.338, the administrative law judge who is empowered to resolve any issue arising at the hearing, must fully inquire into matters that are fundamental to the disposition of the issues in a case, and must receive into evidence all relevant and material evidence. *Jourdan v. Equitable Equipment Co.*, 25 BRBS 315 (1992). Section 702.336 permits an administrative law judge to expand the hearing to include a new issue, but Section 702.336(b) provides that where a new issue is raised, the parties must receive not less than 10 days

notice of a hearing on the new issue. Furthermore, an administrative law judge is not bound by technical or formal rules of procedure. *See* 20 C.F.R. §702.339; 33 U.S.C. §923(a). In the instant case, it was not until the date of the formal hearing regarding employer's petition for modification that claimant informed both employer and the administrative law judge that he too wished to seek modification of Judge Halpern's award of benefits based upon an increase in his disability. *See* March 14, 1990 transcript at 16-18. In the instant case, as it is uncontroverted that claimant failed to either seek modification, or inform the parties that modification would be sought until the date of the formal hearing, we hold that the administrative law judge properly exercised his discretionary authority to refuse to adjudicate this cross-petition raised by claimant at the formal hearing.

Accordingly, the administrative law judge's determination of claimant's post-injury wage-earning capacity is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

LEONARD N. LAWRENCE
Administrative Law Judge