BRB Nos. 92-812
and 93-1741

BENNIE ALEXANDER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RYAN-WALSH STEVEDORING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
EMPLOYERS NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Upon Remand - Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor, and the Compensation Order Change of Physician Section 7(b) of Donnette S. Glenn, District Director, United States Department of Labor.

James C. Klick (Carimi Law Firm), Metairie, Louisiana, for claimant.

B. Ralph Bailey (Bailey, Rossi & Kincade), Metairie, Louisiana, for employer/carrier.

Karen B. Kracov (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Upon Remand - Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration (87-LHC-2433) of Administrative Law Judge James W. Kerr, Jr., and the Compensation Order Change of Physician Section 7(b) (Case No. 7-106049) of District Director[1] Donnette S. Glenn 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).[2] 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 F.2d 359 (1965); 33 U.S.C. §921(b)(3). The district director's determinations will be affirmed unless shown to be arbitrary, capricious and an abuse of discretion, or not in accordance with law. *See Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

This case is before the Board for the second time. Claimant was injured while working for employer on January 28, 1986, when he tripped on a plastic strip and fell. As he fell, claimant attempted to catch himself by placing his hand on top of a pail of salad oil. Claimant alleges that he hit his head on the floor after the fall. It is undisputed, however, that a co-worker by the name of Charles Johnson then inadvertently placed another pail of salad oil weighing approximately 40-50 pounds on top of claimant's hand. Claimant informed the superintendent of the accident the same day. Claimant testified that he experienced immediate pain in his hand, arm, shoulder and neck. He performed only light work for about two months following the accident, and then returned to heavy work. The pain began to worsen again in October 1986 and progressed until, on January 2, 1987, he quit work. At least by this time, claimant had also developed pain in his neck. Subsequently, claimant was diagnosed as having carpal tunnel syndrome in his hand and cervical spondylosis and degenerative arthritis in his neck. Claimant underwent surgery for a carpal tunnel release on June 15, 1987. He has not returned to work since January 2, 1987.

In his initial Decision and Order, the administrative law judge applied the Section 20(a), presumption, 33 U.S.C. §920(a), and determined that employer failed to sever the potential

[1] Pursuant to 20 C.F.R. §702.105, the term "district director" has been substituted for the term "deputy commissioner" used in the statute.

[2] By Order dated June 23, 1993, the Board consolidated for purposes of decision employer's appeals of the administrative law judge's Decision and Order Upon Remand - Awarding Benefits and Decision and Order Denying Employer's Motion for Reconsideration, BRB No. 92-812, and its appeal of the district director's Compensation Order Change of Physician Section 7(b), BRB No. 93-1741. 20 C.F.R. §802.104.

connection between claimant's hand and neck impairments and his employment. The administrative law judge further found that claimant was totally disabled since January 6, 1987, and reached maximum medical improvement on March 11, 1988. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from January 6, 1987 to March 10, 1988, and permanent total disability benefits commencing March 11, 1988 and continuing. 33 U.S.C. §908(a), (b).

Employer appealed the administrative law judge's decision to the Board. *See Alexander v. Ryan-Walsh Stevedoring Company, Inc.*, 23 BRBS 185 (1990). The Board held that employer was barred from raising for the first time on appeal the issue of notice under Section 12 of the Act, 33 U.S.C. §912. The Board next affirmed the administrative law judge's finding that claimant's hand and neck injuries were related to the January 28, 1986 work accident, holding that employer failed to sever the potential connection between the accident and both conditions and, thus, failed to rebut the Section 20(a) presumption. 23 BRBS at 189-190.

Employer appealed the Board's decision to the United States Court of Appeals for the Fifth Circuit. The court affirmed the Board's holding with regard to Section 12, but held that there was sufficient evidence in the record to rebut the presumption of causation with regard to claimant's neck impairment.[3] The court thus vacated the Board's decision in this regard and remanded the case to the administrative law judge to reconsider this issue. *See Ryan-Walsh Stevedoring Company, Inc. v. Alexander*, No. 90-4670 (5th Cir. Feb. 14, 1991).

Subsequent to the issuance of the Fifth Circuit's decision, the following procedural events occurred: (1) Employer, in a letter to the administrative law judge dated February 25, 1991, stated that the court had decided all facts in favor of employer and that the only thing left for the administrative law judge to do was to render a decision in favor of employer; in the next paragraph, however, employer stated that the mandate of the Fifth Circuit is *un*clear, and that should the administrative law judge be inclined to decide the case on the present record, employer requested an application for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, based on a mistake of fact or a change in condition with regard to claimant's earning capacity. (2) On March 15, 1991, the district director issued a Compensation Order Change of Physician Section 7(b), wherein the district director designated Dr. Harris as claimant's authorized treating physician in accordance with 33 U.S.C. §907(b), and ordered employer to incur the liability for treatment which Dr. Harris "deems necessary and appropriate by virtue of the effects of the job related injury." This order was issued because claimant's previous treating physician, Dr. Dabezies, had left the New Orleans area.[4] Dr.

[3]Employer stipulated that claimant's hand impairment was related to the January 28, 1986 work accident. *See Ryan-Walsh Stevedoring Company, Inc. v. Alexander*, No. 90-4670, slip op. at 4 (5th Cir. Feb. 14, 1991).

[4]In a previous order dated April 9, 1990, the district director designated Dr. Dabezies to be claimant's authorized treating physician since his previous treating physician, Dr. Haddad, died. Previously, employer had approved authorization for claimant to be treated by Dr. Haddad, and paid for his treatment by Dr. Haddad. *See* Tr. at 103, 157, 161-162.

Dabezies was treating claimant for his carpal tunnel syndrome, which employer stipulated was work-related. (3) On April 17, 1991, employer appealed the district director's Order to the Board. BRB No. 93-1741. (4) By Order dated May 9, 1991, the Board formally vacated its February 27, 1990 Decision and Order and remanded the case to the administrative law judge for further proceedings consistent with the Fifth Circuit's opinion. (5) On June 26, 1991, employer filed with the administrative law judge a motion to compel claimant to submit to an evaluation by a vocational rehabilitation counselor. Claimant objected to this motion on July 1, 1991. On August 12, 1991, the administrative law judge denied employer's motion.

In his Decision and Order Upon Remand - Awarding Benefits, issued on October 29, 1991, the administrative law judge acknowledged that since the Fifth Circuit had held that employer established rebuttal of the Section 20(a) presumption with regard to claimant's neck condition, the only issue on remand was whether claimant's neck injury was caused, aggravated or accelerated by the work-related accident on January 28, 1986. The administrative law judge subsequently credited the opinion of Dr. Manale, who believed that claimant had suffered a double crush injury on January 28, 1986, which was responsible, at least in part, for claimant's complaints of neck pain, and thus found that claimant established a work-related "shoulder" injury. Thereafter, the administrative law judge, noting that his finding of total disability had not been disturbed on appeal and that employer did not offer evidence of suitable alternate employment, reaffirmed his original finding that claimant is entitled to permanent total disability benefits. Employer's motion for reconsideration was subsequently denied by the administrative law judge. Thereafter, employer appealed these decisions to the Board. BRB No. 92-812.

With regard to employer's appeal of the district director's order, BRB No. 93-1741, employer concedes that the district director has the authority to designate a physician to provide medical care to claimant, but argues that the district director does not have the authority to hold in advance that employer shall be liable for any medical care which the designated physician deems necessary and appropriate. In its appeal of the administrative law judge's decision, BRB No. 92-812, employer contends that the administrative law judge did not have jurisdiction to render his Decision and Order Upon Remand, as employer's previous appeal to the Board regarding the district director's Order was still pending. Employer argues that, at the very least, the administrative law judge erred in not considering the issue in his decision. Thus, employer urges the Board to vacate the administrative law judge's decision; in the alternative, employer contends that the decision should be reversed, and the case remanded for the administrative law judge to consider the jurisdiction issue. Employer also asserts on appeal that the administrative law judge erred in finding that claimant's neck condition was caused by his January 28, 1986, work-related injury. Lastly, employer contends that the administrative law judge committed reversible error in denying employer's motion for modification under Section 22 of the Act, 33 U.S.C. §922; specifically, employer asserts that had it been allowed to have claimant evaluated by a vocational rehabilitation counselor, it would have been able to submit evidence regarding the issue of suitable alternate employment.

Claimant responds to both appeals, first urging affirmance of the district director's order designating Dr. Harris as claimant's authorized physician. Claimant also asserts that employer's

argument that the administrative law judge did not have jurisdiction to render a decision on remand is without merit, and urges affirmance of the administrative law judge's finding that his neck condition is work-related as being supported by substantial evidence. Claimant also contends that the administrative law judge's denial of employer's motion to compel claimant to undergo a vocational rehabilitation evaluation was proper; specifically, claimant argues that employer's letter of February 25, 1991, is insufficient to give rise to a formal motion for modification under Section 22 of the Act.

The Director, Office of Workers' Compensation Programs (the Director), has also filed a response brief, agreeing with employer that the administrative law judge should have considered the issue of jurisdiction in his decision, but asserting that since it is solely a question of law, the Board can render a determination in this regard. The Director asserts that since the Board issued its remand order to the administrative law judge on May 9, 1991, after employer's April 9, 1991 appeal of the district director's order, the administrative law judge had jurisdiction to render his Decision and Order Upon Remand. With regard to Section 22, the Director is in agreement with employer's position that employer clearly requested modification based on a change in claimant's earning capacity, that employer had a right to make such a request, and that the administrative law judge erred in refusing to allow the submission of evidence to support employer's Section 22 application.

I. *Section 7*

We first address employer's appeal of the district director's Order regarding a change of physicians under Section 7(b). BRB No. 93-1741. Section 7(a) of the Act, 33 U.S.C. §907(a), states that "[t]he employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require." In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary, *see* 20 C.F.R. §702.402, and the claimant must establish that the medical expense is related to the injury. *See Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *see also Maguire v. Todd Pacific Shipyards Corp.*, 25 BRBS 299 (1992). Under Section 7(b) of the Act, 33 U.S.C. §907(b), the Secretary of Labor is granted authority to actively supervise an injured employee's medical care. Specifically, Section 7(b) of the Act provides:

> The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his

> judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges. Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

33 U.S.C. §907(b); *see also* 20 C.F.R. §§702.406, 702.407.

In its initial decision, the Board affirmed the administrative law judge's holding that claimant's carpal tunnel syndrome is related to his January 28, 1986, work accident. Employer subsequently conceded this issue before the Fifth Circuit. *See* footnote 3. Thus, employer is liable for treatment related to this injury. *See Ballesteros*, 20 BRBS at 184. In the instant case, it is uncontroverted that the district director originally designated Dr. Dabezies as claimant's authorized physician. After Dr. Dabezies left the New Orleans area, the district director selected Dr. Harris as claimant's authorized physician,[5] and ordered employer to incur the liability for treatment by Dr. Harris, which that physician "deems necessary and appropriate by virtue of the effects of the job related injury." *See* Compensation order at 2. Employer does not contest the designation of Dr. Harris as claimant's authorized treating physician but, rather, argues that the district director erred in delegating her responsibility to actively supervise claimant's medical case to the physician for determining what treatment is necessary. Under Section 7 and the implementing regulations, it is the district director, as the Secretary's designee, who is charged with the responsibility of determining whether treatment is reasonably necessary. 20 C.F.R. §702.407(b). Accordingly, the district director's Compensation Order Change of Physicians Section 7(b) is modified to reflect that employer is liable for treatment by Dr. Harris which *the district director* deems necessary and appropriate by virtue of the effects of claimant's work-related hand injury.

[5]Dr. Harris had taken over Dr. Dabazies' practice.

II. *Jurisdiction*

Next, we consider employer's arguments contained in its appeal of the administrative law judge's Decision and Order Upon Remand. BRB No. 92-812. Employer initially contends that the administrative law judge did not have jurisdiction to issue his decision on remand, as employer's appeal of the district director's Order, BRB No. 93-1741, was pending before the Board. In the alternative, employer argues that the administrative law judge abused his discretion in failing to address the jurisdiction issue. We disagree.

In the instant case, employer appealed the district director's Order to the Board on April 17, 1991. Thereafter, the Board formally vacated its initial decision in this case and remanded the case to the administrative law judge "for further proceedings consistent with the opinion of the United States Court of Appeals for the Fifth Circuit." *See* Order dated May 9, 1996. Under the Act and its implementing regulations, the Board's May 9, 1991 Order conferred jurisdiction to the administrative law judge to consider the issue of whether claimant's neck condition was work related, as directed by the Fifth Circuit. *See* 33 U.S.C. §921(b)(4); 20 C.F.R. §802.405.[6] This issue is separate and distinct from employer's appeal of the district director's Order, as that Order concerned the designation of an authorized treating physician regarding claimant's carpal tunnel syndrome while the remanded case concerned claimant's neck pain. Thus, we hold that any error committed by the administrative law judge in failing to address employer's contentions regarding his jurisdiction over the remanded case is harmless, inasmuch as the administrative law judge did in fact have jurisdiction to consider the merits of the remanded case and to issue his Decision and Order Upon Remand.

[6]Section 802.405 of the regulations, which addresses the subject of remands by the Board and federal courts, provides:

> (a) *By the Board.* Where a case is remanded, such additional proceedings shall be initiated and such other action shall be taken as is directed by the Board.
>
> (b) *By a court.* Where a case has been remanded by a court, the Board may proceed in accordance with the court's mandate to issue a decision or it may in turn remand the case to an administrative law judge or deputy commissioner with instructions to take such action as is ordered by the court and any additional necessary action.

20 C.F.R. §802.405.

III. *Causation of Claimant's Neck Condition*

Employer next argues that the administrative law judge erred in finding that claimant's neck condition was caused by his January 28, 1986, work-related injury. To briefly recapitulate, the administrative law judge in his initial decision determined that employer failed to rebut the Section 20(a) presumption linking claimant's neck impairment to his employment. On appeal, the Board accepted the administrative law judge's finding that claimant's injury to his neck occurred on January 28, 1986, when he fell on his back and hit his head. This account of the accident, although not the circumstances described in claimant's testimony, was given in testimony by co-worker Charles Johnson; the Board held that it was within the administrative law judge's discretion to rely on Mr. Johnson's version of the accident. Moreover, the Board affirmed the administrative law judge's finding that employer did not rebut the presumption of causation, noting that Dr. Stokes' testimony was insufficient to preclude the possibility that aspects of claimant's accident other than the placement of the pail of salad oil on his hand caused or aggravated his neck condition, and that claimant's failure to inform his physicians of his injury was not sufficient, by itself, to establish that the injury did not occur. *See Alexander*, 23 BRBS at 189-190.

In subsequently vacating the Board's decision, the United States Court of Appeals for the Fifth Circuit noted that claimant never clarified the point at which his neck pain began, and that it was not clear whether claimant's neck pain radiated from his arm up to his neck, a common symptom of carpal tunnel syndrome, or from the neck down to the arm, a symptom associated with cervical disc problems. The court found the medical opinions confusing on this issue. After reviewing the medical evidence, the court held that the testimony of Drs. Haddad and Stokes provided substantial evidence rebutting the Section 20(a) presumption of causation with regard to claimant's neck condition.[7] The court also held, without further discussion, that the administrative law judge improperly discredited the testimony of Dr. Stokes. Thus, the court vacated the Board's decision and remanded the case to the administrative law judge for reconsideration of the causation issue. *See Ryan-Walsh Stevedoring Co., Inc. v. Alexander*, No. 90-4670, slip op. at 10 (5th Cir. Feb. 14, 1991).

[7]Dr. Haddad testified that claimant's cervical disc problems were responsible for his neck and shoulder pain, *see* Cl. Ex. 28 at 17-18, and that if there was some causal connection between the accident and his neck condition, claimant would have had some manifestation of a cervical sprain at least within a year of the accident. *Id*. at 33-34. Dr. Stokes, when asked whether claimant would have exhibited symptoms immediately after having fallen down after being struck on the hand, stated, "I think he would have something. If he had cervical degenerative disc disease enough to be aggravated by an injury, I think that the man would not have cleared up and be able to go back to the labor market as he did." *See* Emp. Ex. 10 at 22.

On remand, the administrative law judge, in accordance with the opinion of the Fifth Circuit, found that employer established rebuttal of the Section 20(a) presumption. Thereafter, the administrative law judge considered the totality of the evidence in addressing the issue of causation regarding claimant's neck condition. First, the administrative law judge again relied on the testimony of Charles Johnson that claimant fell and hit his head on January 28, 1986. The administrative law judge additionally reaffirmed his finding that claimant's testimony on the issue of his pain was credible; in this regard, claimant testified that after the accident he had pain in his shoulder, and that when he went to Ochsner Hospital in January 1987, he had pain in his left hand, arm and neck. Tr. 64, 80-81.

Next, the administrative law judge credited the opinion of Dr. Manale over that of Dr. Stokes. The administrative law judge noted that Dr. Manale is a qualified orthopedic surgeon, that he began treating claimant on October 19, 1987, and continued to do so for the next one and one-half years. The administrative law judge further noted claimant reported to Dr. Manale that he twisted his neck on January 28, 1986, that Dr. Manale believed that claimant's neck pain comes from abnormal discs as revealed by the CT scan, and that he also believed that claimant has a double crush syndrome. Decision on Remand at 7. Dr. Manale explained during his deposition that the cell body of the nerve that ends in one hand is in the neck; if that nerve is damaged at one place along its course, it is more susceptible to an injury at a second place. Dr. Manale concurred with the opinion of Dr. King that claimant injured the nerve in his wrist which irritated the nerve in his neck, in addition to his diabetic neuropathy. Cl. Ex. 27 at 17-19; *see also* Cl. Ex. 21. Thus, Dr. Manale concluded that claimant's current complaints are causally related to his January 28, 1986 accident. In crediting this opinion over that of Dr. Stokes, who opined that claimant's neck pain was not related to the work accident, the administrative law judge stated that Dr. Stokes wrongly believed claimant was "symptom free" for eight months following the accident; additionally, the administrative law judge noted Dr. Stokes' testimony that if claimant had experienced pain after the accident, there could have been some ongoing aggravation. Emp. Ex. 10 at 44. Based upon the foregoing, and after noting that all doubts must be resolved in favor of claimant, the administrative law judge found that claimant has a disabling "shoulder" injury which was causally related to the work accident of January 28, 1986. *See* Decision and Order Upon Remand at 7. Lastly, since employer did not offer evidence of suitable alternate employment, the administrative law judge reaffirmed his finding that claimant has a permanent total disability.

On appeal, employer asserts that it was irrational for the administrative law judge to find that claimant hit his head when he fell on January 28, 1986, since Charles Johnson's testimony is not supported by claimant's testimony, and claimant gave different accounts of the accident to various doctors. Employer also contends that it was irrational for the administrative law judge to rely on the opinion of Dr. Manale since no other medical report makes a reference to claimant's twisting his neck on January 28, 1986, and there is no mention in any report of neck pain until 20 months after the accident.

It is well established that an employment injury need not be the sole cause of a disability; rather, if the employment injury aggravates, accelerates, or combines with an underlying condition, the entire resultant condition is compensable. *See Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Insurance Company of North America v. U.S. Department of Labor,* 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993); *Kooley v. Marine Industries Northwest,* 22 BRBS 142 (1989). Thus, in the instant case, questions of when claimant first experienced neck pain and whether he fell and twisted his neck on January 28, 1986, are collateral issues when considering the issue of causation. Rather, as it is uncontroverted that claimant suffers from spondylosis, based on the findings from x-rays and a CT scan, *see* Cl. Exs. 16 at 31; 19, 21, claimant has sustained a compensable condition if his work-related carpal tunnel syndrome aggravated his neck condition.

In this regard, the credited testimony of Dr. Manale indicates that claimant has double crush syndrome, whereby the work-related injury to his hand has affected the nerve in his neck, which has added to his pain. Cl. Ex. 27 at 17-19. Dr. Manale referred to the finding of Dr. King who, after examining claimant predominately for neck pain, opined that claimant "has double jeopardy syndrome, i.e., cervical spondylosis, causing some nerve root irritation in the neck and accompanied by distal nerve root impingement at the wrist." Cl. Ex. 21.

In rendering his findings regarding causation, we note that the administrative law judge did not address the testimony of Dr. Haddad. As set forth by the Fifth Circuit in its decision, Dr. Haddad testified that he believed claimant's cervical disc problem, specifically, his cervical spondylosis and degenerative disc disease, were responsible for claimant's neck pain, not his carpal tunnel syndrome. *See Alexander*, No. 90-4670, slip op. at 7; Cl. Ex. 28 at 17-18. Dr. Haddad, claimant's treating physician, reported on September 23, 1987, that claimant's neck pain radiated down to his shoulders; furthermore, Dr. Haddad stated that claimant's cervical spondylosis was the cause of a good bit of his neck pain. Cl. Ex. 3. In addition to not addressing Dr. Haddad's testimony, the administrative law judge on remand discredited Dr. Stokes' opinion, in part, because that physician conceded that if claimant continued to have pain after the accident, it would change his opinion as to whether the pain was causally connected to the trauma. Dr. Stokes' testimony, however, appears to refer to the pain in claimant's hand, not neck.[8] Emp. Ex. 10 at 43-44.

It is well-established that the administrative law judge is not bound to accept the opinion or theory of any particular medical examiner, *see Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and is entitled to evaluate the credibility of all witnesses and draw his own inferences from the evidence. *See John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). In rendering his decision, however, the administrative law judge must independently analyze and discuss all of the medical evidence of record; failure to do so will violate the Administrative Procedure Act's requirement for a reasoned analysis. *See* 5 U.S.C. §557(c)(3)(A); *see generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). In the instant case, as the

[8]Dr. Stokes was of the opinion that claimant's carpal tunnel syndrome was caused by his diabetes, not the traumatic event of January 28, 1986.

administrative law judge did not address the testimony of Dr. Haddad, we vacate his finding that claimant's neck pain is related to his work injury of January 28, 1986, and we remand the case for the administrative law judge to reconsider this issue. On remand, the administrative law judge must weigh the evidence in the record as a whole.[9]

IV. *Modification*

Lastly, employer contends that the administrative law judge erred in denying its motion for modification pursuant to Section 22 of the Act, 33 U.S.C. §922. We agree. In its letter dated February 25, 1991, to the administrative law judge, employer stated that if the administrative law judge was inclined to decide the case on remand on the present record, it wished to request modification pursuant to Section 22 based on a mistake in fact or change in condition with regard to claimant's earning capacity. On June 26, 1991, employer filed a motion to compel claimant to submit to an evaluation by a vocational counselor with the administrative law judge. The administrative law judge subsequently denied this motion. Thereafter, in his Decision and Order Upon Remand, the administrative law judge reaffirmed his finding of permanent total disability, stating that employer had not offered evidence of suitable alternate employment.

Employer argues it should have been granted the opportunity to have claimant evaluated by a vocational counselor. Additionally, employer contends that the administrative law judge erred in issuing his decision on remand without affording employer the opportunity to submit evidence on its request for modification. In response, claimant contends that the administrative law judge properly denied employer's motion to compel and, furthermore, that employer's February 25, 1991, letter does not constitute a formal application for modification. The Director also responds, asserting that employer properly requested Section 22 modification and that the administrative law judge erred in refusing to admit additional evidence to support the Section 22 application.

Section 22 of the Act provides, in pertinent part, that the administrative law judge may issue a new compensation order based on a mistake in fact or change in condition. *See* 33 U.S.C. §922. Accordingly, to reopen the record under Section 22, the moving party must allege a mistake of fact or change in condition, and assert that evidence to be produced or of record would bring the case within the scope of Section 22. *Moore v. Washington Metropolitan Area Transit Authority*, 23 BRBS 49, 52-53 (1989). A request for modification need not be formal in nature. *See Madrid v.*

[9]We note that the administrative law judge, in addition to weighing the evidence regarding causation, stated that he was mindful of the statutory policy that all doubts must be resolved in favor of the injured employee. Subsequent to the administrative law judge's decision in this case, the United States Supreme Court issued its decision in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), wherein the Court held that the "true doubt rule" was not consistent with Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d). On remand, pursuant to *Greenwich Collieries*, the administrative law judge in this case must address the causation issue without reference to the "true doubt rule," and ultimately determine whether claimant has met his burden of persuasion.

Coast Marine Construction Co., 22 BRBS 148 (1989); *Fireman's Fund Insurance Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). It is well- established that the party requesting modification due to a change in condition has the burden of showing the change in condition. *See Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

Alleging partial disability when the Decision and Order awarded total disability raises the possibility of a mistake of fact or change in condition. *See Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Moore*, 23 BRBS at 52. In the instant case, it is apparent that employer raised the possibility of a mistake in fact or a change in condition in claimant's earning capacity by virtue of its February 25, 1991, letter and by moving that claimant undergo an evaluation before a vocational counselor; thus, the administrative law judge should have reopened the record to allow employer the opportunity to submit evidence in support of its motion.[10] Accordingly, we hold that the administrative law judge abused his discretion by summarily denying employer's motion for modification. On remand, therefore, the administrative law judge shall permit the parties to submit evidence and present their cases on the issue raised in employer's request for modification in accordance with the requirements of Section 22. *See Duran*, 27 BRBS at 14-15.

Accordingly, with regard to BRB No. 93-1741, the Compensation Order Change of Physician Section 7(b) of the district director is modified to reflect that employer is liable for all treatment by Dr. Harris which the district director deems necessary and appropriate by virtue of the effects of claimant's January 28, 1986 work-related hand injury. With regard

[10]Claimant's contention that a request for modification can only be made before the district director is without merit, and is thus rejected. *See Duran*, 27 BRBS at 14.

to BRB No. 92-812, the Decision and Order Upon Remand - Awarding Benefits and Decision and Order Denying Employer's Motion for Reconsideration of the administrative law judge are vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge