BRB No. 93-2159

JOHN E. MARCATO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERNATIONAL UNDERWATER CONTRACTORS CORPORATION,	)	DATE ISSUED:
	)	
and	)	
	)	
ARGONAUT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Request for Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

John E. Marcato, Jekyll Island, Georgia, *pro se*.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

*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).

PER CURIAM:

Claimant appeals, *pro se*, the Decision and Order (84-LHC-2226) of Administrative Law Judge Thomas E. Burke denying a request for modification of 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This is the second time that this case has been before the Board. Claimant fractured two vertebrae and his pelvis in a non work-related accident in 1954. On January 25, 1975, while unloading a truck in the course of his employment at employer's shipyard, claimant slipped and fell on muddy ground and developed pain in his lower back and right leg as a result of this incident. Claimant continued working for three days following the incident, but was unable to work thereafter due to increasing back pain. Claimant remained off work and sought medical treatment until October 22, 1975, on which date he returned to work. After his return to work, claimant continued to seek medical treatment, as he was still experiencing back pain and difficulty in walking. Claimant terminated his employment with employer on September 17, 1976, due to increased back pain and difficulty in walking. Claimant sought compensation for his January 25, 1975, back injury.

In the original Decision and Order, Administrative Law Judge Murty found that claimant was entitled to temporary total disability benefits from February 3, 1975, to October 20, 1975, and from September 18, 1976, through October 8, 1976, the date on which the administrative law judge determined that claimant had reached maximum medical improvement. 33 U.S.C. §908(b). In addition, the administrative law judge awarded claimant permanent total disability benefits commencing on October 8, 1976, and continuing. 33 U.S.C. §908(a). Claimant's average weekly wage at the time of the accident was $740.03.[1]

This decision was appealed to the Board by claimant, *pro se*. *Marcato v. International Underwater Contractor, Inc.*, BRB No. 86-2321 (June 30, 1989). The administrative law judge's decision was affirmed by the Board, and claimant's motion for reconsideration also was denied. Subsequently, claimant wrote to the district director requesting that the "mistake [carrier made in recompensing claimant based on Judge Murty's order] be rectified in the manner herein outlined by the power and authority granted to you under Section 22 (Modification of Awards)." The case was referred to the Office of Administrative Law Judges for modification proceedings, and was heard by Administrative Law Judge Burke.

Judge Burke found that in seeking modification, claimant did not allege that there had been a change in condition or mistake in fact; rather, the administrative law judge found that claimant maintained that case law demonstrates that the administrative law judge misinterpreted the law with

[1]The administrative law judge also ordered employer to pay claimant's medical expenses and $5000 to claimant's wife as reimbursement for attendant home care she rendered to her husband. Finally, the administrative law judge granted employer relief pursuant to Section 8(f) of the Act. 33 U.S.C. §908(f).

regard to the proper rate of compensation in the original decision, or in the alternative, that the law has changed. The administrative law judge found that these legal issues were not properly before him as a modification request, but should have been the subject of an appeal. The administrative law judge also found that claimant appeared to argue that employer did not comply with Judge Murty's decision. The administrative law judge noted that the proper remedy for such a complaint lies in an action for a default order pursuant to Section 18 of the Act, 33 U.S.C. §918. Finally, the administrative law judge found that employer properly interpreted the original Decision and Order inasmuch as claimant's disability benefits are based on his average weekly wage subject to the maximum provisions in the statute and that this is the manner in which his benefits have been calculated. Therefore, the administrative law judge denied claimant's petition for modification.

Since claimant appeals the administrative law judge's decision without legal representation, we will review the decision in order to ascertain whether it is rational, supported by substantial evidence, and in accordance with law. *O'Keeffe, supra.* In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of modification.

Pursuant to Section 22, modification may be granted based on a change in condition or mistake in fact in the initial decision at any time prior to one year after the last payment of compensation. 33 U.S.C. §922; *Ryan v. Lane and Company*, 28 BRBS 132 (1994). A legal error or a change in law is not grounds for modification. *Ryan*, 28 BRBS at 135; *Swain v. Todd Shipyards Corp.*, 17 BRBS 124 (1985). The administrative law judge found that claimant cited legal authority to support the position that he is entitled to compensation greater than that which is being paid to him by employer and that the legal issues claimant raises were not properly the subject of modification.

Claimant contended, however, before the administrative law judge that the Department of Labor and/or employer improperly computed the rates of compensation paid. The fact-finder's authority to reopen the proceedings under Section 22 extends to all mistaken determinations of fact, including determinations of mixed questions of law and fact. *See Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989) (determination of residual wage-earning capacity after first injury and average weekly wage at time of second injury constitutes mixed question of law in fact). Claimant's contention that the district director and/or employer improperly computed the rates of compensation constitutes an allegation of a mistake in mixed question of law and fact, as it involves a determination of the applicable maximum rate of compensation payable to claimant. Therefore, we hold that the administrative law judge erred in finding that he had no authority to reopen the claim pursuant to the modification request. *Finch*, 22 BRBS at 201.

Initially, we reject claimant's contentions that temporary total disability benefits paid pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b), are subject to increases in the maximum compensation rate under Section 6(b)(1), 33 U.S.C. §§906(b)(1).[2] Based on the language of Section

[2]Section 6(b)(1), as added by the 1972 amendments, provided:

6(c), 33 U.S.C. §906(c),[3] the Board has held that inasmuch as claimants receiving temporary total disability benefits are not "currently receiving" permanent total disability or death benefits, temporary total disability benefits remain at the maximum level of entitlement under Section 6(b)(1) in effect at the commencement of their benefits, and are not raised to the new maximum each year. *Pucetti v. Ceres Gulf*, 24 BRBS 25 (1990).

We also reject claimant's contention that the administrative law judge erred in fixing the compensation rate pursuant to Section 6(b) rather than Section 8(b), which claimant contends is the exclusive rate for temporary total disability benefits. Although claimant is entitled to be compensated for the periods of temporary total disability pursuant to Section 8(b), all compensation for disability under the Act is subject to the maximum provisions of Section 6(b). *See Pucetti*, 24 BRBS at 29; *Dews v. Intercounty Associates*, 14 BRBS 1031 (1982). In addition, we reject the contention that claimant's temporary total disability benefits are subject to the annual cost-of-living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), as that section specifically applies to permanent total disability and death benefits only. *See Lozada v. Director, OWCP*, 903 F.2d 168, 23 BRBS 78 (CRT)(2d Cir. 1990).

Except as provided in subsection (c), compensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 percentum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 percentum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 percentum during the period beginning October 1, 1974 and ending September 30, 1975.

(D) 200 percentum beginning October 1, 1975.

33 U.S.C. §906(b)(1)(1982)(amended 1984). Since October 1, 1975, the rate has been 200 percent of the national average weekly wage, which was codified by the 1984 Amendments. *See* 33 U.S.C. §906(b), (1), (3) (1988).

[3]Section 6(c) states that determinations under subsection (b)(3), which provides for the Secretary to determine the National average weekly wage annually applicable each October 1 thru September 30 of the next year, with respect to a period shall apply to claimant's "currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period. 33 U.S.C. §906(c)(1988)(formerly codified at 33 U.S.C. §906(d)).

It is not disputed that claimant's average weekly wage at the time of the injury was $740.03. The maximum compensation rate in effect for the periods of temporary total disability benefits commencing on the date of injury, January 25, 1976, was $261 (175% of the national average weekly wage, $149.10). *See* 33 U.S.C. §906(b)(1)(c)(1982)(amended 1984). We affirm the administrative law judge's finding claimant was properly compensated at this rate for the periods of temporary total disability benefits. *See* Employer's Form 208; *Pucetti*, 24 BRBS at 29.

Claimant also was awarded permanent total disability benefits from the date of maximum medical improvement, October 8, 1976, and continuing, and claimant contends he was not been compensated at the proper rate for these benefits. Employer based claimant's compensation rate for permanent total disability on the maximum rate in effect at the time of injury, $261, rather than the maximum in effect on the date of maximum medical improvement. Claimant's average weekly wage for purposes of the permanent total disability award was $740.03, claimant's average weekly wage at the time of injury. *See Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994). However, the maximum rate effective on the date of the award for permanent total disability was $342.54 (200% of the national average weekly wage, $171.28). 33 U.S.C. §906(b)(1)(1982)(amended 1984). The award under Section 8(a) for permanent total disability is not dependent on claimant's compensation rate for temporary total disability benefits under Section 8(b), but rather is a comparison between claimant's average weekly wage at the time of injury and the maximum rate applicable at the time of permanency. *See* 33 U.S.C. §906(c) (1988) (formerly codified at 33 U.S.C. §906(d)(1982)). Therefore, claimant should have been compensated for his permanent total disability at the rate of $342.54 for the period beginning October 8, 1976, with annual adjustments under Section 10(f) continuing thereafter.[4] We modify the administrative law judge's decision accordingly.

Thus, we hold that the administrative law judge erred in finding that claimant did not allege a mistake in fact sufficient to bring the case within the scope of Section 22. *Finch*, 22 BRBS at 201. Moreover, we reverse the administrative law judge's finding that employer properly interpreted the original Decision and Order, and we modify the Decision and

Order on modification to reflect claimant's entitlement to permanent total disability benefits at the maximum applicable rate from October 8, 1976, and continuing.

Accordingly, the Decision and Order-Denying Request for Modification of the administrative law judge is modified to reflect claimant's entitlement to benefits for permanent total disability at a maximum compensation rate of $342.54 for the period beginning October 8, 1976 with annual adjustments under Section 10(f) continuing thereafter. In all other respects, the decision is affirmed.

SO ORDERED.

[4]We note that employer did pay annual cost-of-living adjustments under Section 10(f), but it was on the initial rate of $261, not $342.54.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge