

EDWARD C. HUTCHINSON)	BRB No. 93-2297
)	
Claimant-Respondent)	
)	
v.)	
)	
CRESCENT WHARF AND)	DATE ISSUED:
WAREHOUSE COMPANY/)	
STEVEDORING SERVICES)	
OF AMERICA)	
)	
and)	
)	
HOMEPORT INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Petitioner)	
)	
LARRY GOODLOE)	BRB No. 93-2383
)	
Claimant-Respondent)	
)	
v.)	
)	
TODD PACIFIC SHIPYARDS)	
CORPORATION)	
)	
and)	
)	
AETNA CASUALTY AND)	
SURETY COMPANY)	
)	
Employer/Carrier-)	
Respondents)	

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT)
OF LABOR)
Petitioner) DECISION and ORDER

Appeals of the Decisions and Orders Granting Modification of Edward C. Burch,
Administrative Law Judge, United States Department of Labor.

Yvette A. Boehnke (Samuelson, Gonzalez, Valenzuela & Sorkow), San Pedro, California,
for Todd Pacific Shipyards Corporation and Aetna Casualty and Surety Company.

Marianne Demetal Smith (J. Davitt McAtee, Acting Solicitor of Labor; Carol DeDeo,
Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C.,
for the Director, Office of Workers' Compensation Programs, United States
Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.
PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decisions and Orders Granting Modification (92-LHC-2305, 92-LHC-1897) of Administrative Law Judge Edward C. Burch on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).¹ 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).

By Decision and Order dated February 14, 1984, claimant Hutchinson was awarded temporary total and permanent partial disability benefits for a work-related back injury. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In 1992, employer sought modification pursuant to Section 22 of the Act, 33 U.S.C. §922, alleging that claimant no longer had a loss in wage-earning capacity. After a hearing on employer's motion and consideration of the evidence submitted, the administrative law judge found that claimant did not have a loss in wage-earning capacity as of the date employer filed its motion for modification, May 7, 1992, and he terminated claimant's benefits as of that date. He also ordered that "any assessments to be made against the employer for funds paid [to the Special Fund] during that time period [since May 7, 1992] be credited to the employer." Decision and Order at 7.

¹We hereby consolidate the Director's appeal in *Hutchinson*, BRB No. 93-2297, with his appeal in *Goodloe*, BRB No. 93-2383, for purposes of decision. 20 C.F.R. §802.104(a).

In a Decision and Order dated November 28, 1984, claimant Goodloe was awarded total temporary, permanent total and permanent partial disability benefits for a work-related back injury. Employer was awarded relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f). In 1992, employer sought modification pursuant to Section 22 of the Act, alleging that claimant no longer had a loss in wage-earning capacity. After a hearing on employer's motion and consideration of the evidence submitted, the administrative law judge found that claimant did not have a loss in wage-earning capacity as of the date employer filed its motion for modification, March 20, 1992, and he terminated claimant's benefits as of that date. The administrative law judge also ordered that "any assessments to be made against the employer for funds paid [to the Special Fund] during that time period [since March 20, 1992] be credited to the employer." Decision and Order at 5.

The Director appeals both decisions, contending that, pursuant to Section 22, compensation may not be terminated retroactively, citing the Board's decision in *Parks v. Metropolitan Stevedore Co.*, 26 BRBS 172 (1993). The Director also contends that, pursuant to *Parks*, employers are not entitled to a credit against their Section 8(f) assessments. Neither claimant has responded to these appeals. Employer Crescent Wharf and Warehouse, by letter, states it does not intend to oppose the Director's appeal in BRB No. 93-2297. Employer Todd Pacific Shipyards responds to the Director's appeal in BRB No. 93-2383, contending that as the Director did not appear at the modification hearing, he should be estopped from challenging the administrative law judge's Decision and Order. Employer contends that the Director's remedy in this case was to suspend payments to claimant from the Special Fund upon receipt of employer's motion for modification, and that employer should not be penalized by the Director's inaction in this regard.²

We agree with the Director that the administrative law judge erred in retroactively terminating claimants' compensation. In *Parks*, 26 BRBS at 172, the Board held that, with two exceptions, the plain language of Section 22 does not permit a retroactive termination of benefits.³ Neither exception is applicable to these cases. The first exception permits an increase in compensation to be effective from the date of injury; these cases do not involve an increase in compensation. The second exception states that if any compensation due is unpaid, an award decreasing the compensation rate may be effective from the date of injury. This provision also is inapplicable as no further compensation was due at the time of the "decrease" in compensation. *Parks*, 26 BRBS at 175. The administrative law judge's orders, therefore, erroneously affect compensation previously paid, in contravention of the plain language of Section 22, and we reverse the decisions retroactively terminating claimants' compensation.

As a result, we also reverse the administrative law judge's award of a credit to employers against their assessment to the Special Fund. *Id.* Initially, we reject Todd Pacific Shipyards' contention that the Director is estopped by his non-participation below from raising this issue on

²Employer recognizes the possibility that by doing so the Special Fund could have incurred a penalty pursuant to Section 14(f), 33 U.S.C. §914(f), if modification were not granted. *See Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

³Section 22 states that "such new order shall not affect compensation previously paid ..."'

appeal. The Director may raise issues concerning the Special Fund for the first time on appeal, *see generally Powell v. Brady-Hamilton Stevedore Co.*, 17 BRBS 1 (1984)(order), and the Fund was not required to suspend benefits in order to preserve issues regarding the fiscal integrity of the Fund. *See generally Parks*, 26 BRBS at 172.

In *Parks*, the Board held that an employer may not receive a credit against its assessment to the Special Fund via proceedings under Section 22, as Section 22 is limited to the modification of compensation awards, and the assessment pursuant to 33 U.S.C. §944 is not "compensation" under the Act. *Id.* at 176; 33 U.S.C. §902(12). The Board further held in *Parks* that Section 44(c) of the Act does not authorize a credit to employer, *id.* at 176-177, and that equitable principles also militate against the award of such a retroactive credit against future assessments. *Id.* at 177-178. Since we have reversed the administrative law judge's retroactive termination of claimants' benefits, we hold that these benefits were properly included in calculating employers' assessments under Section 44 for the years in question. *Id.* at 175.

Accordingly, for the reasons stated in *Parks*, 26 BRBS at 172, we reverse the administrative law judge's Decisions and Orders Granting Modification insofar as these decisions retroactively terminated claimants' awards and awarded employers a credit against subsequent assessments to the Special Fund. The decisions are modified to provide that no further benefits are due from the dates of the decisions. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge