BRB No. 96-0317

VERN J. STEINER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCKHEED SHIPBUILDING	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANIES	)	DATE ISSUED:
	)	
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 of Steven E. Halpern, Administrative Law Judge, United States Department of Labor.

William D. Hochberg (Levinson, Friedman, Vhugen, Duggan & Bland), Edmonds, Washington, for claimant.

Thomas Owen McElmeel, Seattle, Washington, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-2363) of Administrative Law Judge Steven E. Halgern 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 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).

Claimant injured his back on February 8, 1977, while working as a rigger for employer. In a

Decision and Order dated December 8, 1982, Administrative Law Judge Edward C. Burch awarded claimant permanent total disability benefits from April 1, 1979 until November 16, 1980. He also awarded claimant $88.53 per week in permanent partial disability compensation thereafter, based on 66 and 2/3 percent of the difference between claimant's average weekly wage in 1977 of $302.80 and his post-injury wage-earning capacity of $170 per week based on his actual earnings as an auto parts sales clerk. 33 U.S.C. §908(c)(21),(h). In addition, employer was granted relief under Section 8(f) of the Act, 33 U.S.C. §908(f).

Subsequent to the issuance of this decision, claimant worked as a sheet metal fabricator at Shoemaker between 1984 and 1989, earning $332.75 per week. In March 1989, claimant was hired by Boeing as a special project mechanic, and he was earning $15 per hour prior to being laid off in May 1992. Thereafter, claimant did not work for approximately two years while he waited, hoping to be called back to Boeing. On March 17, 1994, however, after undergoing a training course and obtaining his license, claimant obtained employment as a truck driver with Okanogon-Seattle Transport; he remained employed there as of the time of the hearing, earning $422.24 per week.

On December 21, 1993, employer filed a petition for modification under Section 22 of the Act, 33 U.S.C. §922, seeking to terminate claimant's right to permanent partial disability compensation. In its petition, employer argued that claimant's economic condition had changed, in that while the award of permanent partial disability benefits was premised on claimant's being able to earn only $170 per week post-injury, claimant was earning $332.75 per week by 1984 and about $690 per week by 1989. In the alternative, employer argued that the administrative law judge's determination that claimant had a residual post-injury wage-earning capacity of only $170 per week in his initial Decision and Order was based on a mistake in a determination of fact.

Based on the evidence submitted by employer, Administrative Law Judge Steven Halpern found that modification based on a change in claimant's economic condition was available to employer, *see Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995), and that claimant no longer has a loss in his wage-earning capacity. The initial Decision and Order was thus modified to terminate claimant's permanent partial disability compensation. In so concluding, the administrative law judge initially determined that there did not appear to be any dispute between the parties regarding the amount of claimant's earnings or that they reflected his wage-earning capacity. He then noted that since 1984 claimant had been gainfully employed, earning substantially more than the $170 per week residual wage-earning capacity on which the award of permanent partial disability was based. As claimant's post-injury earnings were higher than the $170 residual wage-earning capacity figure even when claimant's post-injury earnings were adjusted for inflation, the administrative law judge concluded that claimant no longer suffers from a loss in his wage-earning capacity.[1] Claimant appeals the administrative law judge's

[1]The administrative law judge also stated that claimant had not encountered problems in obtaining work and that claimant testified that he had not missed any work due to the low back injury. Moreover, he noted that after participating in a six week long truck driver training program in 1994, claimant obtained a job as a truck driver, a profession which employer's vocational expert, Mr.

termination of his award of permanent partial disability compensation on modification, and employer responds, urging affirmance.

Claimant argues on appeal that inasmuch as Mr. Shafer, employer's vocational expert, testified that claimant's actual post-injury earnings of $422.24 as a truck driver equate to $212.77 in 1977 wages, and this figure is less than claimant's $302.80 average weekly wage, the administrative law judge should have awarded him permanent partial disability compensation under Section 8(c)(21) at the rate of $60.02 per week (66 and 2/3 percent of $302.80 - $212.77). Claimant avers that his post-injury wage-earning capacity should have been determined based solely on his actual post-injury earnings as a truck driver and not the unrealistic and no longer available Boeing wages or the hypothetical wages of a truck driver. Claimant avers that the burden of proof was on employer to establish that claimant's actual post-injury earnings as a truck driver are not representative of his post-injury wage-earning capacity and that while employer established through Mr. Shafer's testimony that other similar trucking jobs existed which paid more than claimant was actually making, it did not establish that claimant's actual post-injury earnings did not represent his post-injury wage-earning capacity.

Under Section 22 of the Act, any party-in-interest, at any time within one year of the last payment of compensation or within one year of the rejection of a claim, may request modification because of a mistake in fact or change in condition. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985); *Ramirez v. Southern Stevedores*, 25 BRBS 260 (1992). A disability award may be modified under Section 22 where there is a change in an employee's wage-earning capacity, even in the absence of any change in the employee's physical condition. *Rambo*, ___ U.S. at ___, 115 S.Ct. at 2144, 30 BRBS at 1 (CRT). The standard for determining disability is the same in a Section 22 modification proceeding as it is for an initial proceeding under the Act. *See generally Lucas v. Louisiana Ins. Guaranty Ass'n*, 28 BRBS 1 (1994).

Under Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213 (CRT)(9th Cir. 1991). Wage-earning capacity is determined under Section 8(h), which provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. If such earnings do not represent claimant's wage-earning capacity, the administrative law judge must consider relevant factors and calculate a dollar amount which reasonably represents claimant's wage-earning capacity. The party seeking to prove that claimant's actual post-injury wages are not representative of claimant's wage-earning capacity bears the burden of proof. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992). The objective of the inquiry concerning claimant's wage-earning capacity is to determine

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Shafer, testified represented a growing market, and determined based on claimant's testimony and that provided by Mr. Shafer, that claimant is capable of continuing in his present career as a truck driver for the foreseeable future.

the post-injury wage to be paid under normal employment conditions to claimant as injured. *See Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT)(9th Cir. 1985); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 6 (1988). Section 8(c)(21), (h), requires that wages earned in a post-injury job be adjusted to the wages that job paid at the time of claimant's injury and then compared with claimant's average weekly wage to compensate for inflationary effects. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *Cook*, 21 BRBS at 4; *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

The administrative law judge's termination of claimant's permanent partial disability award on modification cannot be affirmed, because his finding that claimant no longer suffers from a loss in his wage-earning capacity is based on an erroneous assumption and does not comport with applicable law. In determining that claimant no longer suffers from a loss in his wage-earning capacity, the administrative law judge initially determined that the question of whether claimant's actual post-injury earnings represented his post-injury wage-earning capacity was not in dispute. In his post-hearing brief, however, claimant specifically asserted that if a change in claimant's economic condition could provide a basis for granting modification, the determination of his post-injury wage-earning capacity should be based on his actual earnings as a truck driver and not on his earnings at Boeing which were no longer obtainable. Thus, there is an issue regarding which of claimant's actual earnings represented his wage-earning capacity at the time of modification. The administrative law judge did not address claimant's arguments that his earnings at Boeing do not represent his wage-earning capacity; he merely listed all of claimant's earnings back to 1984 and summarily found claimant's earnings exceed the $170 residual earning capacity found in the 1982 decision. Inasmuch as the administrative law judge did not address claimant's arguments, we vacate the Decision and Order granting modification and remand for him to reconsider claimant's wage-earning capacity and his actual earnings.

We further hold that, in any event, the administrative law judge erred in concluding that claimant no longer suffered a loss in his wage-earning capacity because his actual earnings since 1984 adjusted for inflation exceed the $170 residual wage-earning capacity found in the initial Decision and Order. The relevant standard for determining whether claimant has a loss in his wage-earning capacity under Section 8(c)(21) is not the comparison between claimant's residual wage-earning capacity in 1982 and his post-injury wage-earning capacity thereafter. Rather, claimant's new post-injury earning capacity must be compared to claimant's pre-injury average weekly wage to determine if claimant has sustained a loss of wage-earning capacity. *See generally Container Stevedoring Co.*, 935 F.2d at 1544, 24 BRBS at 213 (CRT). While the fact that claimant's actual post-injury earnings exceed the $170 per week residual wage-earning capacity found in 1982 indicates that claimant's wage-earning capacity has increased since the initial Decision and Order, this fact alone cannot result in termination of all compensation. Rather, termination is only warranted if claimant's actual post-injury earnings are found to represent his post-injury wage-earning capacity and, when adjusted for inflation, are equal to or greater than his average weekly wage of $302.80.

In this regard, Mr. Shafer, employer's vocational expert, testified that claimant's post-injury

job at Shoemaker would have paid $5.83 per hour in 1977 or $233.20 per week, Tr. at 68, while his post-injury job at Boeing, where he earned $15 per hour, would have paid $7.31 per hour in 1977 or $292.40 per week, Tr. at 66-67. Mr. Shafer also testified that claimant's post-injury job as a truck driver, which paid $422.24 per week at the time of modification, would have paid $212.77 at the time of claimant's 1977 injury.[2] Inasmuch as Mr. Shafer's testimony, the only relevant evidence, suggests that claimant's actual post-injury earnings adjusted for inflation are less than his average weekly wage, if on remand the administrative law judge finds that claimant's actual post-injury earnings reasonably represent his post-injury wage-earning capacity, he must compare claimant's average weekly wage with his post-injury wage-earning capacity after adjustment for inflation to determine whether and to what extent claimant continues to suffer a loss in his wage-earning capacity as a result of the February 1, 1977 work injury.[3]

Accordingly, the administrative law judge's Decision and Order granting modification is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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[2]Mr. Shafer also testified that based on the latest Washington Occupation Information Survey for the year between 1992 and 1993, there were truck driving jobs available which would have paid $359.60 in 1977 wage rates, which is higher than claimant's average weekly wage of $302.80. Contrary to employer's assertions in its response brief, this testimony of general job availability does not provide substantial evidence to support the administrative law judge's finding that claimant no longer suffers from a loss in his wage-earning capacity. First, the administrative law judge's decision indicates it is based on actual earnings, and if claimant's actual earnings represent his earning capacity, then hypothetical earnings are irrelevant. In addition, the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that employer must point to *specific available* jobs that the claimant can perform in order to meet its suitable alternate employment burden and thereby establish claimant's post-injury wage-earning capacity. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81 (CRT)(9th Cir. 1993), *rev'g Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988), *quoting Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 1329, 12 BRBS 660, 662 (9th Cir. 1980). There is no evidence here regarding the nature of these potential jobs or whether they were suitable for claimant.

[3]If on remand the administrative law judge determines that claimant's actual post-injury earnings do not reasonably represent his post-injury wage-earning capacity, he should calculate a dollar amount which does so based on the relevant factors under Section 8(h). This figure adjusted for inflation should be compared with claimant's average weekly wage.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge