BRB Nos. 93-2552
and 97-0448

GARY G. PLEW, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW YORKER BAKERY	)	DATE ISSUED:
	)	
and	)	
	)	
EBI COMPANIES/ORION GROUP d\b\a\ SECURITY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeals of the Decision and Order of Reno E. Bonfanti and the Decision and Order of Mollie Neal, Administrative Law Judges, United States Department of Labor.

Gary G. Plew, Sr., Lanham, Maryland, *pro se*.

Alan D. Sundburg (Friedlander, Misler, Friedlander, Sloan & Herz), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, representing himself, appeals the August 27, 1993, Decision and Order of Administrative Law Judge Reno E. Bonfanti and the November 12, 1996, Decision and Order of Administrative Law Judge Mollie Neal (87-DCW-177) 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*., as extended by the District of Columbia Workmen's Compensation Act, 36 D.C. Code §§ 501-502 (1973) (the Act). In reviewing an appeal where claimant is not represented by counsel, the Board will review the findings of fact and conclusions of law made by the administrative law judge to determine whether they are rational, supported by substantial evidence, and in accordance with law; if so, they must be

affirmed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3); 20 C.F.R. §§802.211(e), 802.220.

On October 23, 1980, while working for employer as a route driver, claimant fell and twisted his back while lifting some bread into a delivery van. He was treated and returned to full duty work, but his job with employer terminated when employer filed for bankruptcy in 1981. Although claimant had some continuing problems with his back, he was able to work in various jobs from 1981 to 1986, most recently as a route driver for another bakery. On July 17, 1986, claimant experienced severe back pain when getting off the couch at home, and has not worked since. Claimant sought temporary total disability benefits and medical benefits under the Act.

This case has been before the Office of Administrative Law Judges on five different occasions. Initially, in a Decision and Order dated June 21, 1988, Judge Robert Shea determined that claimant's 1986 back episode was related to his 1980 injury at work and awarded him temporary total disability compensation from July 17, 1986 to September 17, 1986, temporary partial disability from September 18, 1986 to October 12, 1987 and permanent partial disability thereafter. *Plew v. New Yorker Bakery*, No. 87-DCW-177 (June 21, 1988). Thereafter, claimant, through counsel, moved for modification of the prior decision.

In a Decision and Order - Granting Request for Modification dated May 30, 1990, Judge Edward Terhune Miller found that claimant established a change in both his physical and economic conditions in that his back injury, initially thought to have been a soft tissue injury, had been diagnosed as a herniated disc. In addition, Judge Miller found that claimant's condition had deteriorated to the point that he was no longer able to perform suitable alternate employment or engage in vocational rehabilitation. He also found that given claimant's new diagnosis, Judge Shea's finding regarding maximum medical improvement was no longer valid. Accordingly, he awarded claimant continuing temporary total disability benefits commencing January 22, 1988, and ongoing chiropractic and other reasonable and necessary medical treatment . *Plew v. New Yorker Bakery*, No. 87-DCW-177 (May 30, 1990). Employer sought modification.

In a Decision and Order - Granting Petition for Modification dated July 1, 1992, Judge Reno Bonfanti determined that, based on newly submitted evidence, including two surveillance videotapes taken on June 6, 1990 and April 18, 1991, and a November 1990 vocational survey, claimant was exaggerating his complaints. In addition, he found that claimant was capable of engaging in suitable alternate employment identified by employer which paid an average of $198.85 per week in 1980 wages as of July 3, 1991, when he reached maximum medical improvement. Accordingly, he awarded claimant permanent partial disability compensation commencing July 3, 1991 based on a loss of wage-earning capacity of $208.83 per week. In addition, he agreed with employer that based on Dr. Dennis's testimony and the surveillance evidence, claimant's condition was no longer such that he required ongoing regular chiropractic treatment. *Plew v. New Yorker Bakery*, No.

87-DCW-177 (July 1, 1992). Thereafter, claimant, again sought modification. The following two decisions from the Office of Administrative Law Judge are under review in the current appeal.

In an August 27, 1993, Decision and Order, Judge Bonfanti rejected claimant's argument that a mistake of fact had been made with regard to the authenticity of the June 6, 1990, surveillance video. He concluded, however, that as claimant had undergone surgery for excision of a herniated disc at L5-S1 on May 4, 1992, he had established a change in his physical condition which entitled him to temporary total disability compensation from that date until he reached maximum medical improvement on December 17, 1992. In addition, he awarded claimant permanent partial disability benefits thereafter, finding that employer had established the availability of suitable alternate employment in nine different job areas paying an average of $198.95 in 1980 wages based on the results of a March 1993 vocational survey. Judge Bonfanti also awarded claimant reimbursement for all of the medical services relating to claimant's 1992 surgery. *Plew v. New Yorker Bakery*, No. 87-DCW-177 (Aug. 27, 1993).

Claimant filed an appeal of Judge Bonfanti's August 27, 1993, Decision and Order with the Board which was assigned BRB No. 93-2552. Thereafter, at claimant's request, this appeal was dismissed and the case was remanded to the Office of Administrative Law Judges for consideration of claimant's new request for modification. *Plew v. New Yorker Bakery*, BRB No. 93-2552 (November 19, 1995)(Order). In a Decision and Order dated November 12, 1996, Judge Neal denied claimant's modification request, finding that various questionnaires submitted by claimant were insufficient to establish a mistake in fact regarding Judge Bonfanti's crediting of Ms. Yano's vocational testimony. In addition, Judge Neal found that claimant failed to establish a change in his physical condition based on his complaints of pain in the absence of corroborating objective findings of a worsening or a progression of his level of pain or impairment and that claimant's separation from his spouse did not provide a proper basis for granting modification based on a change in his economic condition. *Plew v. New Yorker Bakery*, No. 87-DCW-177 (Nov. 12, 1996). Claimant, appearing without legal representation, filed an appeal of Judge Neal's Decision and Order and asked the Board to reinstate his former appeal. By Order dated January 17, 1997, the Board granted claimant's motion and consolidated the appeals. *Plew v. New Yorker Bakery*, BRB Nos. 93-2552 and 97-0448 (Jan. 17, 1997). Employer responds, urging affirmance in both appeals.

Under Section 22, 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 based on a mistake of fact or change in conditions. Modification based on a change in conditions may be granted where claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 30 BRBS 1 (CRT)(1995); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Wynn v. Clevenger Corp.*, 21 BRBS 290 (1988). It is

well-established that the party requesting modification has the burden of showing a change in condition or mistake in fact. *See, e.g., Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Once this burden has been met, then the same standards for determining disability and allocation of the burden of proof apply during Section 22 modification proceedings as during the initial adjudicatory proceedings under the Act. *Id.*

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At the August 13, 1991, modification hearing, employer submitted two videotapes, one dated June 6, 1990, and another dated April 18, 1991. In his July 1, 1992, Decision and Order, after noting that these tapes showed claimant vigorously cleaning, scrubbing and washing his boat and car with a water hose, and engaging in bending, lifting, and carrying objects without hesitation or guarding, Judge Bonfanti determined that claimant exaggerated his complaints and had more functional capacity than he claimed in his testimony and in the history he provided to his doctors. Based on the surveillance evidence, Judge Bonfanti inferred that although claimant did have a problem which his back, in that it occasionally would "lock up," he did not have the chronic type of debilitating pain of which he complained. Based on the surveillance evidence, Dr. Dennis's testimony that claimant has the capacity to perform sedentary to light work, and Ms. Yano's identification of at least eight suitable job opportunities paying an average of $248.08 in 1980, the administrative law judge found that claimant was limited to permanent partial disability benefits as of July 21, 1991, when he reached maximum medical improvement.

When the case came before Judge Bonfanti for the second time pursuant to claimant's modification petition, claimant attempted to establish that the June 6, 1990, surveillance video, upon which Judge Bonfanti had relied, had been altered and placed into evidence under false pretenses to embarrass or discredit him. In support of this position, claimant cited his wife's testimony at the prior hearing that the person depicted in the first video was not claimant, but his brother. In addition, he attempted to establish that the boat depicted in that video could not have been his because it was 102 miles away at the time and he did not purchase it until after June 6, 1990.

We affirm Judge Bonfanti's finding in his August 27, 1993, Decision and Order that claimant failed to establish a mistake in fact regarding employer's June 1990 surveillance evidence. *See generally Finch v. Newport News Shipbuilding and Dry Dock Co.*, 22 BRBS 196, 201 (1989). After considering claimant's evidence and reviewing the June 6, 1990, surveillance tape, Judge Bonfanti reaffirmed his prior finding that claimant's wife's testimony was not credible. In addition, he rationally found that the tapes had not been altered and that accordingly claimant had failed to prove the alleged mistake of fact. Moreover, Judge Bonfanti specifically found that even if the June 1990 videotape had been stricken from the record, he would nonetheless have reached the same conclusion regarding claimant's disability based on the unchallenged April 18, 1991, videotape and the other evidence in the record. August 27, 1993 Decision and Order at 3. Inasmuch as

the administrative law judge's finding that claimant failed to establish a mistake in fact with regard to the June 1990 videotape is rational and supported by substantial evidence, it is affirmed. *See O'Keeffe,* 350 U.S. at 359.

Judge Bonfanti nonetheless found that modification was warranted because claimant had established a change in his physical condition, as claimant had undergone surgery for excision of a herniated disc at L5-S1 on May 4, 1992. Accordingly, he awarded claimant temporary total disability compensation from May 4, 1992 until December 17, 1992, when Dr. Ammerman opined that claimant's condition reached permanency. Subsequent to the date, Judge Bonfanti found that claimant was limited to permanent partial disability benefits based on employer's showing of suitable alternate employment in nine different job areas paying an average of $198.95 in 1980 wages.

Where, as in the instant case, it is uncontroverted that claimant is unable to perform his usual employment duties, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D.C. Cir. 1990); *Wilson v. Crowley Maritime*, 30 BRBS 199, 203 (1996). Upon a showing of available, suitable employment, the employee's disability is partial, not total. *Berkstresser*, 921 F.2d at 308, 24 BRBS at 73 (CRT). In such a case, the wages which the alternate job would have paid at the time of claimant's injury are compared to claimant's pre-injury average weekly wage to determine if claimant has sustained a loss of wage-earning capacity as a result of his injury; specifically, a claimant's post-injury wage-earning capacity must be adjusted to the wages that the post-injury job paid at the time of claimant's injury in order to neutralize the effects of inflation. *See Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100 (CRT)(D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980).

In the present case, employer attempted to meet its burden of establishing suitable alternate employment after claimant's recuperation from his May 1992 surgery through the vocational testimony of its expert, Ms. Yano. After reviewing medical reports from Drs. Dennis and Ammerman, Ms. Yano conducted a labor market survey on March 14, 1993, and identified a number of job opportunities which she considered suitable for claimant. After reviewing the medical opinions of record and noting that while Dr. Dennis was of the opinion that claimant could lift 30 pounds, Drs. Ammerman and Silby would limit him to 10 pounds, the administrative law judge found that the following jobs were within claimant's 10 pounds lifting limit, and would qualify as suitable alternate employment: security officer for Ogden; courtesy van driver at Ray Burnette Volkswagen; cashier for Mr. Wash Car Wash; security officer at Merrifield; purchase agent for Mid-South; and office assistant for Charles Products. He then determined that inasmuch as employer met its burden of establishing suitable alternate employment in nine employment areas paying an average of $198.85 per week in 1980, the time of claimant's injury, and claimant testified that he was able to perform some of the jobs listed, claimant was permanently partially disabled as of the time he reached maximum medical improvement on December 17, 1992.

Judge Bonfanti's finding that claimant's condition reached maximum medical improvement following his May 1992 back surgery on December 17, 1992, is affirmed. An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *Sketoe v. Dolphin Titan International*, 28 BRBS 212, 221 (1994)(Smith, J., dissenting on other grounds); *see also Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 61 (1985). In the present case, the administrative law judge reasonably determined that maximum medical improvement was reached as of December 17, 1992, based upon Dr. Silby's assessment of a 15 percent permanent physical impairment on that date. CX-1 at 5. Inasmuch as Dr. Silby's medical opinion provides substantial evidence to support the permanency finding made by the administrative law judge and his decision to credit this testimony is neither inherently incredible nor patently unreasonable, we affirm his determination that claimant's condition reached maximum medical improvement on December 17, 1992. *See generally Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989).

Although we affirm Judge Bonfanti's permanency determination, we are unable to affirm his determination that claimant was limited to permanent partial disability compensation after reaching maximum medical improvement on December 16, 1992, because it is unclear whether all of the alternate jobs upon which he relied in determining claimant's post-injury wage-earning capacity were in fact suitable, and available at that time. Initially, although Judge Bonfanti cited the August 12, 1992, opinion of Dr. Ammerman that claimant was capable of performing non-arduous sedentary work but not a job involving a lot of driving in his recitation of the evidence,[1] in evaluating whether the alternate jobs identified by Ms. Yano were suitable he simply listed the jobs which met the 10 pound lifting restriction imposed by Drs. Ammerman and Silby.[2] The average wages paid in those jobs then formed the basis for determining claimant's wage-earning capacity. At least one of the jobs which Judge Bonfanti found suitable, that of a courtesy van driver for Ray Burnette, involved considerable driving as well as requiring claimant to work a split shift.[3] Moreover, while several of the jobs relied upon by the administrative law judge are

[1]Dr. Ammerman reiterated this opinion on October 15, 1992. Ex.-2.

[2]Contrary to claimant's contention, the fact that claimant did not receive a copy of Ms. Yano's vocational report until the hearing is irrelevant, inasmuch as the Act does not require the vocational expert to inform claimant of prospective job openings. See *Fox v. West State Inc.*, BRBS , BRB Nos. 96-1781/A, (September 25, 1997); *Hogan v. Schiavone Terminal Inc.*, 23 BRBS 290 (1990).

[3] The record reflects that Dr. Ammerman noted that he had discussed with claimant that it may be impractical for him to return to work as a route driver, or in an occupation which involves a great deal of driving. CX-1.

located within Prince George's County, Maryland, where claimant lives, other jobs he credited were located in Fairfax and Alexandria, Virginia, and Rockville, Maryland. In view of Dr. Ammerman's opinion that claimant's ability to drive is limited and the potential impact of this limitation, if credited, on the suitable jobs, we vacate the administrative law judge's finding regarding suitable alternate employment. If the administrative law judge finds on remand employer has established suitable alternate employment was available, he should consider whether claimant demonstrated that he diligently pursued alternate employment opportunities, but was unable to secure a position. *Palombo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2d Cir. 1991); *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10 (CRT) (4th Cir. 1988); *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75 (1997).

On remand, if the administrative law judge again finds employer established suitable alternate employment and claimant is only partially disabled, the administrative law judge must recalculate claimant's post-injury wage-earning capacity based on the jobs he finds suitable and available. In this regard, we note that Judge Bonfanti determined the average wages paid in suitable jobs and properly attempted to make an adjustment for inflation. *See Bethard*, 12 BRBS at 691. His method for doing so, however, cannot be affirmed. Judge Bonfanti's reduced the wages paid in the alternate jobs by 65 percent, based on Ms. Yano's testimony that truck driver's wages had increased by 65 percent since the time of claimant's injury. The administrative law judge erred in using this percentage as a basis for accounting for inflation given that the none of the suitable jobs involved truck driving. While Ms. Yano also testified at the hearing that there had been a 73 percent differential in the minimum wage since the time of claimant's injury, the Board has held that in the absence of evidence concerning what specific post-injury jobs paid at the time of claimant's injury, the use of the percentage change in the National Average Weekly Wage (NAWW) provides a more accurate reflection of the increase in wages over time than the percentage increase in the minimum wage. *See Quan v. Marine Power & Equipment Co.,* 30 BRBS 124, 127 (1996); *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990); *see also Walker,* 793 F.2d at 322 n.5, 18 BRBS at 105 n.5 (CRT); *Bethard,* 12 BRBS at 691 n.5. Thus, on remand, the administrative law judge must reconsider claimant's wage-earning capacity and adjust for the effects of inflation consistent with the case law and this decision.

Finally, we cannot affirm Judge Bonfanti's finding that claimant was partially disabled as of the date of maximum medical improvement. Maximum medical improvement separates temporary from permanent partial disability, but not total from partial disability. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 24 BRBS 69 (CRT)(D. C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89 (CRT) (1990), *cert. denied*, 498 U.S. 1073 (1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). A showing of suitable alternate employment may not be automatically applied retroactively to the date of maximum medical improvement. Rather, an employee's disability becomes partial on the earliest date that employer shows suitable alternate employment to be available. *Id.* In addition, in order for employer to meet its burden of establishing suitable alternate employment, it must show that the jobs are available during the critical period when claimant was able to work. *See Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199, 202, 16 BRBS 74 (CRT)(4th Cir. 1984); *Hawthorne v. Ingalls Shipbuilding, Inc.,* 28 BRBS 73 (1994), *modified on other grounds on recon*, 29 BRBS 103 (1995). In the present case, some of the jobs identified in Ms. Yano's survey were available between May 15, 1992 and June 15, 1992, a period immediately following claimant's surgery when claimant was unable to work. Other positions, however, were available as of February 1993, after claimant had reached maximum medical improvement, and could if credited serve to limit claimant to partial disability compensation. On remand, the administrative law judge should address jobs available after maximum medical improvement and determine when suitable alternate employment was first shown to be available, commencing any award of permanent partial disability on a date consistent with these findings.

BRB No. 97-0448

After consideration of Judge Neal's Decision and Order in light of the relevant evidence, we affirm this decision in its entirety because it is rational, supported by substantial evidence and in accordance with applicable law. *O'Keeffe*, 380 U.S. at 359. When the case came before Judge Neal on modification, claimant, appearing again without legal representation, argued that his physical condition had deteriorated since Judge Bonfanti's 1993 Decision and introduced various medical reports and vocational evidence to support his position. CXS. 2, 3, 4, 6. In addition, claimant argued that modification was warranted because his separation from his wife had created a change in his economic condition, and that Judge Bonfanti's reliance on the reports and testimony of Ms. Yano was premised on a mistake in fact in that the jobs she identified in March 1993 were neither suitable nor available.

After considering claimant's newly submitted evidence and comparing it with that previously before Judge Bonfanti, Judge Neal determined that the evidence in the two proceedings was substantially identical in that claimant is described as suffering from back pain, limited range of motion, and is restricted to non-arduous sedentary work not requiring lifting over 10 pounds. In addition, she was not persuaded by claimant's argument that his pain had progressed to the level of a change in condition, and determined that there was no objective evidence of a progression or worsening of pain but merely differing descriptions

with some being more specific than others. While noting that claimant also argued that his range of motion had decreased to such a degree that it is now described as "marked" rather than "moderate," Judge Neal rejected claimant's argument that this description established a worsening of his condition. Inasmuch as Judge Neal's finding that claimant failed to establish a change in his physical condition is rational and supported by substantial evidence, we affirm this determination. *See O'Keeffe*, 380 U.S. at 359.

We also affirm Judge Neal's determination that while claimant's separation from his spouse may have resulted in a change in his economic circumstances, this type of economic change does not provide a proper basis for granting modification. An award of compensation under the Act is premised on claimant's sustaining a loss in his wage-earning capacity due to his work-related injury. Only those economic changes relating to claimant's wage-earning capacity can properly serve as a basis for granting modification. *See generally Rambo,* 515 U.S. at 297, 30 BRBS at 4 (CRT).

Judge Neal's determination that claimant failed to establish a mistake in fact regarding Judge Bonfanti's crediting of Ms. Yano's vocational testimony is also affirmed. In support of his argument on modification that the jobs identified in Ms. Yano's March 1993 survey were neither suitable nor available, claimant submitted "Job Availability" questionnaires which he sent to nine different employers taken from the list of sixteen employers on the 1993 Labor Market Survey. Four of these involved jobs which Judge Bonfanti did not include in his list of suitable positions. In general, these questionnaires asked the employers whether they had been contacted by Ms. Yano previously; whether she had described claimant's work history as including no clerical, typing, data entry or sales skills; whether she had informed them that claimant had undergone back surgery and described all of his limitations in detail; and whether given the above information they would have been willing to hire claimant. Although Judge Neal admitted these questionnaires into evidence over employer's objection, she rationally found them to be of dubious relevancy based on the fact that under the Act the vocational expert is not required to contact the prospective employers directly or inform them of claimant's limitations in order to render a valid opinion regarding the availability of suitable alternate employment. *See Hogan v. Schiavone Terminal, Inc.*, 23 BRBS 290 (1993). The administrative law judge also found that the limitations expressed by claimant in his questionnaire were those characterized by claimant himself, and were not necessarily borne out by the other evidence in the record. Finally, she noted that the questionnaire had not been sent to all the employers offering work which Judge Bonfanti had found to be suitable, and concluded that those which had been sent to employers relied upon by Judge Bonfanti contained vague and incomplete answers which were insufficient to establish a mistake in fact regarding his crediting of Ms. Yano's vocational testimony. Inasmuch as it is within the discretion of the administrative law judge to accept or reject all or any part of evidence submitted, and Judge Neal provided rational reasons for discrediting claimant's "Job Availability" questionnaires, her determination that modification was not warranted based on this evidence is affirmed. *See Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

Claimant also introduced six "Job Search Questionnaires" which he sent to Neal's Auto Parts, Marine Specialties, 84 Lumbar, Staples, Track Auto, and Bill's Hardware.[4] After considering this evidence, Judge Neal rationally found that these questionnaires were not persuasive because the jobs discussed therein were not the same as those credited by Judge Bonfanti previously. In addition, she discredited this evidence based on the fact that no job title was listed on the questionnaires, and the fact that only two questionnaires were notarized. Inasmuch as the administrative law judge rationally discounted this evidence, her finding that claimant's "Job Search" questionnaires did not establish a mistake in fact regarding the credibility of Ms. Yano's testimony is also affirmed. *See Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Accordingly, the Decision and Order of Judge Bonfanti dated August 27, 1993, is affirmed in part, and vacated in part, and the case is remanded for further consideration of suitable alternate employment and claimant's post-injury wage-earning capacity consistent with this opinion. BRB No. 93-2552. Judge Neal's November 12, 1996, Decision and Order denying claimant's motion for modification is affirmed. BRB No. 97-448.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4] These questionnaires asked if the employer would hypothetically hire someone who could not lift more than 20 pounds, was not able to do a lot of driving, was not able to sit more than six hours in an eight hour day, was not able to use his feet for repetitive movements, and must have rest periods totaling at least 10 minutes per hour in an eight hour day.