

TOPIC 22 MODIFICATION

22.1 GENERALLY

Section 22 of the LHWCA provides:

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 908(f) of this title), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case (including a case under which payments are made pursuant to section 944(i) in accordance with the procedure prescribed in respect of claims in section 19 of this title), and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

33 U.S.C. § 922.

Section 22 states, in essence, that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in condition. However, a “request for modification” that is merely an attempt to preserve indefinitely the right to seek modification, is a protective filing and is not permitted. Meekins v. Newport News Shipbuilding & Dry Dock Co., 34 BRBS 5 (2000) (Letter was an anticipatory filing inasmuch as it does not identify a particular disability).

Traditional notions of res judicata do not govern Section 22 modification proceedings, which may be brought whenever changed conditions or a mistake in a determination of fact makes such

modification desirable in order to render justice under the LHWCA. Bath Iron Works Corp. v. Director, OWCP, [Hutchins], 244 F.3d 222 (1st Cir. 2001) (“The ALJ in considering the record of [Claimant’s] medical and employment history thus had broad discretion to revisit issues already decided and, if appropriate, to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.”).

Section 22 is not intended to provide a back-door route to retry a case, or to protect litigants from their counsels’ litigation mistakes. Kinlaw v. Stevens Shipping and Terminal Co., 33 BRBS 68 (1999) (Board upheld the ALJ’s denial of a Section 22 modification request where the employer’s only explanation for not developing testimony previously was its erroneous belief that it was unnecessary.)

The 1984 Amendments made two major additions: (1) a party may seek a modification to request or alter special fund relief; and (2) Section 22 explicitly does not authorize the modification of settlements. (See 33 U.S.C. § 908(i)). The 1984 Amendments are applicable to motions for modification pending at the time of enactment. McDonald v. Director, OWCP, 897 F.2d 1510 (9th Cir. 1990), rev’g McDonald v. Todd Shipyards Corp., 21 BRBS 184 (1988); Lambert v. Atlantic & Gulf Stevedores, 17 BRBS 68 (1985). Prior to the 1984 Amendments, case law had interpreted Section 22 as excluding settlements as well, so that under no circumstance is a settlement which complies with the criteria of the LHWCA subject to modification. Lambert, 17 BRBS 68.

The rationale for allowing modification is to render justice under the LHWCA. Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989). To that end, the trier of fact is given wide discretion to modify a compensation order. O’Keeffe v. Aerojet-General Shipyards, 404 U.S. 254 (1971). Section 22 was

intended by Congress to displace traditional notions of *res judicata*, and to allow the fact-finder, within the proper time frame after a final decision or order, to consider newly submitted evidence or to further reflect on the evidence initially submitted.

Hudson v. Southwestern Barge Fleet Services, Inc., 16 BRBS 367 (1984) (citations omitted). When reopening a claim, “a court must balance the need to render justice against the need for finality in decision making. ...” General Dynamics Corp. v. Director, OWCP, 673 F.2d 23 (1st Cir. 1982).

The Section 22 modification procedure is not applicable where there has not been an award, e.g., where voluntary payments only have been made. Daigle v. Scully Bros. Boat Builders, 19 BRBS 74 (1986). It is available only when a compensation order has been issued. Intercounty Constr. Corp. v. Walter, 422 U.S. 1 (1975), aff’g 500 F.2d 815 (D.C. Cir. 1974).

The Board noted that it had previously held that an employer may attempt to modify a total disability award pursuant to Section 22 by offering evidence establishing the availability of suitable alternate employment. In the instant case, the Board concluded that such evidence must demonstrate that there was, in fact, a change in Claimant’s economic condition from the time of the award to the

time modification was sought. The Board noted that at the initial hearing in this matter, Employer's counsel made a tactical decision not to argue that Claimant was capable of performing suitable alternate employment and unequivocally declined the opportunity to hold the record open for submission of evidence regarding such employment. Employer cannot seek for the first time, on modification, to present evidence of suitable alternate employment in support of its allegation of a change in Claimant's condition. Lombardi v. Universal Maritime Service Corp., 32 BRBS 83 (1998).

However, compare this with Jensen v. Weeks Marine, Inc. (Jensen II), 34 BRBS 147 (2000) where the employer had presented evidence of suitable alternate employment at the original hearing although the ALJ found it lacked the specificity for him to determine if the jobs were suitable. On modification in Jensen II, one of the employer's vocational experts testified that the job market had improved since the initial labor market survey. Thus, the Board found that the employer had offered evidence of a change in general economic conditions. More importantly in Jensen II, the Board found that the claimant cooperated with the employer's vocational experts subsequent to the initial adjudication, which the employer alleged had allowed it to obtain better evidence of alternate employment suitable for the claimant. The Board found that these factors brought the claim within the scope of Section 22. In Jensen II, the Board explicitly instructed the ALJ that he "is required to evaluate the medical and vocational evidence submitted by both parties, and to determine the weight it should be accorded, applying the same standards of proof that are required in an initial adjudication in determining if there has been a change in claimant's physical or economic condition."

In its second Decision and Order on Remand, Jensen v. Weeks Marine, Inc., ___ BRBS ___ (BRB No. 01-0532) (Nov. 30, 2001), the Board remanded this matter once again. The Board distinguished Lombardi v. Universal Maritime Service Corp., 32 BRBS 83 (1998) (When an employer presents no evidence of extenuating circumstances that prevented it from doing so, or of a change in the claimant's economic position, the employer is not entitled to a modification based on evidence of the current availability of jobs. Under these circumstances, the new submission reflects nothing more than a change in litigation strategy for which modification is not available.). The Board noted that the instant employer presented evidence of suitable alternate employment at the initial hearing, and, on modification, put forth evidence of a change in the claimant's economic position, i.e., evidence of the claimant's subsequent cooperation and of an improvement in the local labor market.. Further, the Board found that, on remand, the ALJ must also fully consider the effect of the claimant's subsequent cooperation with the employer's vocational experts, and may, if necessary, elect to reopen the record for submission of additional relevant evidence, previously excluded on this issue.

It is proper to file a Section 22 Motion for Modification to establish that a previous motion for modification was timely. Moore v. Virginia International Terminals, Inc., 35 BRBS 28 (2001) ("Section 22 permits a final decision to be re-evaluated upon a showing of a change in conditions or a mistake in the determination of a fact. While Section 22 extends to mixed questions of law and fact, ..., it cannot be used to raise issues involving only a new legal interpretation or to correct errors of law."). In Moore, the Board found that the claimant's motion raised the question of whether there

was a mistake in the determination that his prior motion was untimely filed, as opposed to a new request for benefits, and this allegation properly raised an issue under Section 22. However, in this particular case, the Board found that the claimant has not raised an issue involving any facts, but rather only new legal theories and therefore, the Board denied relief.

22.1.1 Section 22 allows credit but no retroactive termination

While Section 22 states that compensation may be terminated, it does not provide for retroactive termination. Parks v. Metropolitan Stevedore Co., 26 BRBS 172 (1993).

A modification order decreasing compensation may not affect any compensation previously paid, although an employer is entitled to credit any excess payments already made against any compensation as yet unpaid. (See 33 U.S.C. § 914(j).)

An employer, who paid a claimant compensation benefits for a temporary total disability during a period after he recovered from his injuries and became capable of returning to his usual employment, is entitled to a credit for such overpayment to be applied to a schedule award for a permanent partial binaural hearing loss arising out of the same accident. Universal Maritime Service Corp. v. Spitalieri and Director, OWCP, 226 F.3d 167 (2nd Cir. 2000), cert. denied, 532 U.S. 1007 (2001), rev'g 33 BRBS 164 (1999) (en banc, with 2 Administrative Appeals Judges dissenting)(Board held: On modification, when claimant was no longer disabled from traumatic injuries, but found to have sustained a work-related hearing loss caused by the injury; employer was not entitled to a credit for an overpayment of traumatic injury benefits because the traumatic injury benefits had been *terminated as opposed to decreased*). **In overruling the Board, the Second Circuit** described the Board's position as "a narrowly technical and impractical construction" which is "demonstrably at odds with the intentions of the drafters" and "has no basis in common sense or in the statute." The court found that the exception for a "decrease" in the second sentence of Section 22 should be read to include a decrease to zero, i.e., a termination of benefits.

Neither the Special Fund nor an employer can obtain recompense under the LHWCA when a claimant receives payment of compensation to which he later is determined not to be entitled. They can only receive a credit against future compensation due the claimant. See generally Ceres Gulf v. Cooper, 957 F.2d 1199, 25 BRBS 125 (CRT) (5th Cir. 1992); Stevedoring Servs. of America v. Eggert, 953 F.2d 552, 25 BRBS 92 (CRT) (9th Cir.), cert. denied, 505 U.S. 1230 (1992); Vitola v. Navy Resale & Servs. Support Office, 26 BRBS 88 (1992); 33 U.S.C. §§ 914(j), 922.

Similarly, where an employer has overpaid a claimant, Section 22 does not authorize awarding an employer a credit on its subsequent Section 44 future annual assessment of money to be paid into the Special Fund. Parks v. Metropolitan Stevedore Co., 26 BRBS 172 (1993).

A modification order increasing compensation may be applied retroactively if the fact-finder determines that according retroactive effect to the modification order renders justice under the LHWCA. McCord v. Cephas, 532 F.2d 1377 (D.C. Cir. 1976), rev'g 1 BRBS 81 (1974).

22.1.2 Scope of modification

The scope of modification is not narrowed because the employer is seeking to terminate or decrease an award. McCord, 532 F.2d 1377.

On modification, the judge may not, *sua sponte*, address procedural or jurisdictional aspects of a claim, particularly if approval of a settlement has become final. The judge may only consider certain factual issues which may not have been resolved originally or where there was a mistake of fact. Kelley v. Bureau of Nat'l Affairs, 20 BRBS 169 (1988). (See discussion, infra.)

The judge must **re-open the record** to allow in new evidence in a modification proceeding. Moore v. Washington Metro. Area Transit Auth., 23 BRBS 49 (1989); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998).

22.2 INAPPLICABILITY TO SETTLEMENTS AND ATTORNEYS' FEES

Settlements

It is now well-established that agreed settlements cannot be modified under Section 22. See Downs v. Director, OWCP, 803 F.2d 193 (5th Cir. 1986), affg Downs v. Texas Star Shipping Co., 18 BRBS 37 (1986). (See 33 U.S.C. § 908(i) and **Topic 8.10**, supra, for what constitutes a valid settlement.)

However, one must note that Section 8(i) settlements are distinguishable from stipulations. In Lawrence v. Toledo Lake Front Docks, 21 BRBS 282 (1988), the Board held that it was error below to construe the deputy commissioner's order as a Section 8(i) settlement. Rather than making findings regarding whether the compensation awarded was in the claimant's best interests or completely discharging the employer's liability, the order merely stated that the file would be closed "subject to the limitations of the Act or until further Order of the deputy commissioner."

Thus, in Lawrence, the Board held that the order constituted an award based upon the agreements and stipulations of the parties pursuant to 20 C.F.R. § 702.315. Such awards are subject to Section 22 modification because they do not provide for the complete discharge of employer's liability or terminate claimant's right to benefits. See also Ramos v. Global Terminal & Container Services, Inc., 34 BRBS 83 (2000) (compensation order issued by district director and based on stipulations can subsequently be modified via a § 22 modification request); Bonilla v. Director, OWCP, 859 F.2d 1484 (D.C. Cir. 1988); Downs, 803 F.2d 193; House v. Southern Stevedoring Co., 703 F.2d 87 (4th Cir. 1983), affg 14 BRBS 979 (1982); Stock v. Management Support Assocs., 18 BRBS 50 (1986).

Therefore, as a threshold matter, in order for a settlement to be binding and not subject to modification, it must: (1) provide for complete discharge of the employer's liability, and (2) terminate the claimant's right to benefits. Thus, the inquiry is highly fact-dependent and the language of each purported settlement must be examined individually.

For example, in Olsen v. General Engineering & Machine Works, 25 BRBS 169 (1991), the Board affirmed the deputy commissioner's denial of vocational rehabilitation services in light of a prior settlement reciting that the settlement was not procured under duress. The Board held that the approval of the settlement discharged the liability of the employer for further compensation, and that the claimant had relinquished any entitlement to benefits through the settlement.

A settlement is final when approved and paid. Downs, 803 F.2d 193.

[ED. NOTE: For more on settlements and stipulations, see Topic 8.10.]

22.2.1 Attorney's Fees

Section 22 applies to the modification of an award of compensation only, and thus cannot apply to an attorney's fee award. Fortier v. Bath Iron Works Corp., 15 BRBS 261 (1982). This type of situation is distinguishable from that where the employer must pay an attorney's fee to the claimant's counsel because additional compensation was awarded in a modification proceeding.

The Board has affirmed a judge's determination that an employer was liable for an attorney's fee, even where the employer had assumed any additional compensation awarded would be paid by the Special Fund, pursuant to a prior award of section 8(f) relief. Coats v. Newport News Shipbuilding & Dry Dock Co., 21 BRBS 77 (1988). The Board reasoned that since the claimant had obtained additional compensation as a result of the modification proceedings and had been required to be represented by an attorney throughout the proceedings due in part to the employer's failure to concede liability for the additional amount requested, and given that the employer had actively participated in the proceedings, the imposition of attorney-fee liability on the employer was proper. Coats, 21 BRBS at 82.

22.3 REQUESTING MODIFICATION

22.3.1 Determining What Constitutes a Valid Request

A request for modification need not be formal. It simply must be a writing or verbal notice which indicates a clear intention to seek further compensation. I.T.O. Corp. of Virginia v. Pettus, 73 F.3d 523, 527 (4th Cir. 1996), cert denied, 519 U.S. 807 (1996)(denying a one sentence letter claiming benefits for unspecified injuries: “Please be advised that we herewith make claim for any and all benefits my client may be entitled to pursuant to the [LHWCA].”); Gilliam v. Newport News Shipbuilding & Dry Dock Co., 35 BRBS 69 (2001) (Request can be in the form of a letter; request here is valid because it specifically notes that the party is seeking modification, claims a deteriorating condition and references a claimed disability purportedly in existence at the time that the request was made.); Banks v. Chicago Grain Trimmers Ass'n, 390 U.S. 459 (1968); Fireman's Fund Ins. Co. v. Bergeron, 493 F.2d 545 (5th Cir. 1974); Madrid v. Coast Marine Constr. Co., 22 BRBS 148 (1989) (failure to seek further action after telephone calls to the deputy commissioner constituted a modification request and was not claim abandonment); Hudson, 16 BRBS 367; Butts v. Newport News Shipbuilding & Dry Dock Co., (BRB No. 00-0440) (Jan. 17, 2001)(Unpublished)(The analysis regarding the sufficiency of a writing is generally the same under Sections 13 and 22.).

A letter, requesting modification, is sufficient if: (1) it contains a statement of intent to seek compensation for a specific injury; and (2) is clear and informative enough that the district director recognizes the request and takes proper action to initiate proceedings. I.T.O., 73 F.3d at 527. Such an intent is demonstrated by a reference to “any change in claimant’s condition, to a mistake of fact in the earlier order, to additional evidence concerning the claimant’s disability, to dissatisfaction with the earlier order, or to anything that would alert a reasonable person that the earlier compensation might warrant modification.” Id. The letter in I.T.O., consisting of one sentence that announced an intent to make a claim for all the benefits the claimant was entitled to receive, was found to be vague since it did not refer to a specific injury and did not prompt the director into taking any action. Id.

For example, a deputy commissioner's written memorandum summarizing his telephone conversation with a claimant was held sufficient to constitute a modification request under Section 22 because the memorandum indicated that claimant was dissatisfied with his compensation. Cobb v. Schirmer Stevedoring Co., 2 BRBS 132 (1975), aff'd, 577 F.2d 750 (9th Cir. 1978).

Any person acting on claimant's behalf, including an attorney who has not been formally authorized to represent the claimant, may make a modification request. Hudson, 16 BRBS 367. It is clear, however, that the request for modification must be made to an employee of the Department of Labor. In one case, the Board held that a physician's chart notes which did not indicate any intention to seek further compensation, but merely stated that the claimant was experiencing continued knee problems which may require surgery in the future, did not constitute a valid request for modification pursuant to Section 22. Raimer v. Willamette Iron & Steel Co., 21 BRBS 98 (1988).

It is irrelevant whether an action is labeled an application for modification or a claim for compensation, so long as the action comes within the provisions of Section 22. Banks, 390 U.S. 459. Similarly, a claimant is not required to characterize the modification request as being based on either a change in condition or a mistake in a determination of fact. Cobb v. Marine Terminals Corp., 2 BRBS 282 (1975), aff'd sub nom. Cobb v. Schirmer Stevedoring Co., 577 F.2d 750 (9th Cir. 1978).

A judge is not precluded from modifying a previous order on the basis of a mistake in fact even though the modification was originally sought for a change in condition. Thompson v. Quinton Eng'rs, Inc., 6 BRBS 62 (1977); Pinizzotto v. Marra Bros., Inc., 1 BRBS 241 (1974).

Upon considering a request for modification, it is permissible for the judge to have before him the record from the prior hearing that resulted in the award or denial. Baker v. New Orleans Stevedores Co., 6 BRBS 382 (1977). The judge is not bound by the standard rules of law as to substantial evidence that would bind an appeals body under the LHWCA, but may make new findings in the interests of justice. Dean v. Marine Terminals Corp., 7 BRBS 234 (1977); Baker, 6 BRBS 382.

It is error for the deputy commissioner (district director) to modify a judge's decision. Director, OWCP v. Kaiser Steel Corp., 860 F.2d 377 (10th Cir. 1988); Hernandez v. Bethlehem Steel Corp., 20 BRBS 49 (1987); Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

[ED. NOTE: There is **contrary authority**, however, in the **Seventh Circuit** and from the Board, in a black lung case, that Section 22 of the LHWCA authorizes the district director to modify an order of the judge or the Board only if the mistake in fact was the deputy commissioner's (district director's) own. Director, OWCP v. Peabody Coal Co., 837 F.2d 295 (7th Cir. 1988), aff'g Sisk v. Peabody Coal Co., 9 BLR 1-213 (1986).]

Where no appeal is pending or where an appeal has already been decided, a modification petition is properly initiated with the district director. The district director may hold an informal conference for the purpose of getting the parties to agree on the dispositive issues, but if no agreement is reached, the district director cannot modify the award but rather must refer the case to the administrative law judge. Arbizu v. Triple A Mach. Shop, 15 BRBS 46 (1982).

Upon its own initiative or that of any party, the district director may recommend modification within one year from the date of last payment. If the parties accept the recommendation and request a formal order, the district director will issue one within 30 days of such request. Should the parties not agree to the recommendation, the district director will refer the case to the Office of Administrative Law Judges for formal hearing. Carter v. Merritt Ship Repair, 19 BRBS 94 (1986); Arbizu, 15 BRBS 46; 20 C.F.R. §§ 702.311-317, 702.373.

Neither due process nor the regulations require that a Section 22 claim for modification be heard before the judge assigned to the original claim. In one case, the Board held there was no error in assigning a modification proceeding to a judge who did not preside at the initial hearing. The

record developed at the initial hearing, and subsequently at the modification hearing, did not raise decisive witness credibility issues that would be best weighed by the judge who presided at the initial hearing. Wynn v. Clevenger Corp., 21 BRBS 290 (1988); see also Finch v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 196 (1989).

22.3.2 Filing a Timely Request

Denial of a Claim

A compensation order becomes final within 30 days after entry if it is not appealed. After exhaustion of remedies, a decision and order becomes final as prescribed in Section 21(a). The one-year time period within which modification of a **denial of a claim** must be sought by any party begins to run on the date the decision denying the claim becomes final, not on the date of the decision. Thus, modification may be requested within one year after the conclusion of the appellate process or rejection of appeal. Black v. Bethlehem Steel Corp., 16 BRBS 138, 142-43 n.7 (1984), appeal dismissed sub nom. Black v. Director, OWCP, 760 F.2d 274 (9th Cir. 1985); Dean, 7 BRBS 234; Cobb, 2 BRBS 282; Cobb, 2 BRBS 132.

Award of Benefits

In the case of an **award of benefits**, the motion for modification must be filed within one year of the last actual payment of compensation. Metropolitan Stevedore Company v. Rambo (Rambo II), 521 U.S. 121 (1997); Intercounty Constr. Corp., 422 U.S. 1; Madrid, 22 BRBS 148. The Board and the **Fourth Circuit** have rejected the argument that the motion (or request) for modification must be made within one year of the date the last payment would have been made if the compensation had been paid in installments rather than in a lump sum. House, 14 BRBS 979. Where payment of compensation is made in a lump sum, the one-year time for requesting modification runs from the date of the lump sum payment. Raimer, 21 BRBS 98.

In the situation where the post-injury earning capacity is higher than the pre-injury earning capacity the **Supreme Court** has held that a routine, weekly or yearly, nominal award may, under certain circumstances, be granted to preserve the ability of the claimant to apply for a Section 22 modification following a subsequent change in condition. Rambo II, 521 U.S. at 135 (1997). The continued ability to file for a Section 22 Modification Order is needed to “account for potential future effects in a present determination of wage-earning capacity (and thus disability) when capacity does not immediately decline,” but there is significant potential that the injury will cause diminished capacity under future conditions. Id.

The modification of an order awarding death benefits paid by the Special Fund may be made at any point within a year of the last payment by the Fund, not just within a year of the last payment by an employer; however, the employer must receive adequate notice of the district director’s review of the case. Nerantzis v. Hilton Hotels Corporation, (BRB No. 94-0219)(Jan 17, 1997)(Unpublished); Intercounty Construction Corp. v. Walter, 442 U.S. 1 (1975); Abbott v.

Universal Iron Works, Inc., 24 BRBS 169, 171-72 (1991), modifying in part on recon, 23 BRBS 196 (1990). The employer must be given time to request a hearing and/or ascertain current facts relevant to the claim. If the employer is not given notice, or lacks the time needed to prepare, then there can be a strong presumption in favor of finding that the employer's due process rights have been violated.

The one-year limitation under Section 22 applies to the power to modify previously entered orders, however, and does not bar consideration of a claim where the claim was timely filed under Section 13 but the merits were never adjudicated. Thus, in those cases where a claimant initially receives compensation and then files a timely claim under the LHWCA that is never adjudicated, any subsequent request for benefits should be treated as an initial adjudication, not a modification.

In such cases, Section 22 does not bar consideration of the case more than one year after the last payment. Intercounty Constr. Corp., 422 U.S. 1; Jackson v. Ingalls Shipbuilding Div., Litton Sys., Inc., 8 BRBS 587 (1978), aff'd, 615 F.2d 916 (5th Cir. 1980); Gutierrez v. Giant Food Stores, 3 BRBS 203 (1976); Szymanski v. Erie Lackawanna Ry. Co., 2 BRBS 73 (1975).

As discussed above, where a settlement between the claimant and the employer is invalid because it does not meet the requirements of Section 8(i) or 20 C.F.R. § 702.241, the claimant's request for modification is not time-barred because there is no valid approval of a settlement, and as a result the claim remains open. Bowen v. Alaska Interstate Co., 12 BRBS 577 (1980). But see Rodriguez v. California Stevedore & Ballast Co., 16 BRBS 371 (1984) (as a matter of policy, old claims cannot be reopened and litigated years after the last payment of compensation).

A district court's affirmation of the district director's order does not prevent the later modification of that order. Pinizzotto v. Marra Bros., Inc., 1 BRBS 241 (1974).

22.3.3 De Minimis Awards

[ED. NOTE: For more on de minimis, see Topic 8.2.2 Extent of Disability—De Minimis Awards.]

The **practical effect** of a *de minimis* award is that the one-year limitations period for modification does not run (that is, it is tolled indefinitely) and the claimant may seek modification at any time. Metropolitan Stevedore Company v. Rambo (Rambo II), 521 U.S. at 132 (1997); Randall v. Comfort Control, Inc., 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984); Hole v. Miami Shipyards Corp., 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).

Prior to the **Supreme Court's** decision in Rambo II, there had been a major split between the **Fifth, Second, and District of Columbia Circuits**, who supported *de minimis* awards, and the **Ninth Circuit** that had struck them down. The **Fifth, Second, and District of Columbia Circuits** had held that a *de minimis* award was an appropriate form of relief in cases where there was proof of a present medical disability and a reasonable expectation of future loss of wage-earning capacity. See La Faille v. Benefits Review Bd., 884 F.2d 54 (2d Cir. 1989), rev'g La Faille v. General

Dynamics Corp., 18 BRBS 88 (1986); Randall v. Comfort Control, 725 F.2d 791 (**D.C. Cir.** 1984), *rev'g* 15 BRBS 233 (1983); Hole v. Miami Shipyards Corp., 640 F.2d 769 (**5th Cir.** 1981), *rev'g* 12 BRBS 38 (1980); Reagan v. Horne Bros., 24 BRBS 63 (CRT) (**4th Cir.** 1991); Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 1234 n.9 (**4th Cir.** 1985).

The Board had reached a contrary result. In a case arising in the **Ninth Circuit**, the Board reversed a judge's decision that a *de minimis* award was appropriate, based on both the factual issues of the case and the Board's position. The Board objected to such awards because they extended indefinitely the time period for Section 22 modification and because of the difficulty identifying what constitutes substantial evidence establishing a significant possibility claimant's disability will at some time result in economic harm. Mavar v. Matson Terminals, Inc., 21 BRBS 336 (1988).

The **Supreme Court** ended the debate on *de minimis* awards with its holding in Rambo II. The case was before the **Court** on a grant of *certiorari* following the **Ninth Circuit's** holding approving a nominal award in recognition of the lack of change in the physical disability while still taking into account that Rambo was earning roughly three times more in his post-injury position. Rambo II, 521 U.S. at 125 (1997). The **Supreme Court** upheld the use of *de minimis* awards as an appropriate method of preserving the claimant's ability to apply for a Section 22 modification in the event of a future change in condition (physical or economic). The **Court's** rationale is based on a study of the LHWCA's construction, paying special attention to the parallel importance of physical and economic ability in determining capacity to work. It is the reduction in future capacity that determines the disability. Rambo II, 521 U.S. at 128. The *de minimis* award is important to protecting the claimant's ability to recover for a change in capacity in the future, while recognizing that for the short term he is better off as a result of the injury. Rambo II, 521 U.S. at 135.

*[Editor's Note: It is important to note that the **Supreme Court** has held that a *de minimis* award is permissible so long as there is a **significant potential** for a future reduction in the claimant's earning capacity stemming from the current injury. Rambo II, 521 U.S. at 137 (1997) J.]*

See also Crawford v. Director, OWCP, 932 F.2d 152 (**2d Cir.** 1991); Murphy v. Pro-Football, Inc., 24 BRBS 187 (1991), *on recon.*, 25 BRBS 14 (1992) (following the **D.C. Circuit** and allowing a *de minimis* award); Burkhardt v. Bethlehem Steel Corp., 23 BRBS 273 (1990); Porras v. Todd Shipyards Corp., 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489 (**9th Cir.** 1986).

In Gilliam v. Newport News Shipbuilding & Dry Dock Co., 35 BRBS 69 (2001), the ALJ had rationally found that the credible evidence of record did not support a finding that there was a significant possibility that the claimant would sustain future economic harm as a result of his injury. This finding was supported by substantial evidence, i.e., the ALJ found determinative the absence of any direct statement by claimant's doctor attesting to the significant possibility of surgery in the future and the presence in another doctor's written record of a statement approving the claimant's decision not to have surgery.

*[ED. NOTE: Even after the Supreme Court’s ruling in Rambo, the Board has shown some reluctance to follow the spirit of the holding. Barbera v. Director, OWCP, 245 F.3d 282 (3rd Cir. 2001). In Barbera, in overturning the Board’s holding in this de minimis issue case, the **Third Circuit** noted that it is “troubled by the Board’s continued unwillingness to uphold properly-supported nominal awards, in the face of clear direction from four courts of appeals and even the Supreme Court.” The court found that, “Under the guise of interpreting [the ALJ’s] decision, the Board has in effect substituted its own contrary factual determination, in contravention of our holding...” The **Third Circuit** noted that the ALJ reasonably inferred from the medical evidence that there was at least a “significant possibility” that the claimant would at some future time suffer economic harm as a result of his injury.]*

22.3.4 Change in Condition

Modification based on a change in condition is granted where the claimant's physical condition has **improved** or **deteriorated** following entry of the award but before the request for modification. See Rizzi v. Four Boro Contracting Corp., 1 BRBS 130 (1974).

[ED. NOTE: Recall, however, that the running of the one-year period for requesting modification begins upon finality, not entry of the award. Practically speaking, if new evidence becomes available or there is a change in condition prior to entry of an award, the remedy would be a motion to re-open the record, rather than a request for modification.]

Where a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant’s condition. Jensen v. Weeks Marine, Inc. (Jensen II), 34 BRBS 147 (2000), decision and order on remand at ___ BRBS ___ (BRB No. 01-0532) (Nov. 30, 2001). This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, the ALJ must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in the claimant’s physical or economic condition from the time of the initial award to the time modification is sought. Once the petitioner meets its initial burden of demonstrating a basis for modification, the standards for determining the extent of disability are the same as in the initial proceeding.

In Fleetwood, 16 BRBS 282, the Board reversed its prior precedent. A change in the claimant's **economic** condition may be properly considered for Section 22 modification, even without a change in physical condition. Metropolitan Stevedore Co. v. Rambo (Rambo I), 515 U.S. 291 (1995).

It is clear that physical and economic condition are interrelated under the LHWCA and at times a determination of one factor resolves an issue regarding the other. This situation is

particularly true when the issue on modification relates to the availability of suitable alternative employment.

Under the LHWCA, an employer may attempt to modify a total disability award pursuant to Section 22 by offering to establish the availability of suitable alternative employment. The employer is allowed this modification attempt because the factors initially considered by the judge may be revisited on modification. See Fleetwood, 776 F.2d 1225; Blake v. Ceres Inc., 19 BRBS 219 (1987).

The party requesting modification has the **burden of proof** in showing a change in condition. See Vasquez v. Continental Maritime of San Francisco, Inc., 23 BRBS 428 (1990); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984). The Section 20(a) presumption is inapplicable to the issue of whether a claimant's condition has changed since the prior award. Leach v. Thompson's Dairy, Inc., 6 BRBS 184 (1977).

Change in Physical Condition

Modification based on a change in condition may be granted where a claimant's physical or economic condition has improved or deteriorated following the entry of an award of compensation. Wynn, 21 BRBS 290. The parties will not, however, be allowed to revisit the issue of causal relationship on a motion for modification (unless a mistake of fact can be proved). See Thompson, 6 BRBS 62.

There is no "bright line rule" as to what constitutes a change in physical condition sufficient to establish necessity for a modification proceeding or to award or decrease benefits. The cases below are given as examples of what might constitute a sufficient change in condition.

In Lawson v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 482 (ALJ) (1990), for example, it was considered a change in condition where the claimant's asbestosis became more apparent. For more examples of what the courts, Board, and individual judges have determined does or does not constitute a change in physical condition, see also: Director, OWCP v. Edward Minte Co., 803 F.2d 731 (**D.C. Cir.** 1986); Downs, 803 F.2d 193; Kendall v. Director, OWCP, 19 BRBS 54 (CRT) (**4th Cir.** 1986); Fleetwood, 776 F.2d 1225; Cobb, 577 F.2d 750; Presley v. Tinsley Maintenance Service, 529 F.2d 433 (**5th Cir.** 1976); Strachan Shipping Co. v. Hollis, 460 F.2d 1108 (**5th Cir.** 1972), aff'g and rev'g in part 323 F. Supp. 1122 (**S.D. Tex.** 1970), cert. denied, 409 U.S. 887 (1972); Bethlehem Shipbuilding Corp. v. Cardillo (Adams), 102 F.2d 299 (**1st Cir.** 1939), cert. denied, 307 U.S. 645 (1939); Zepeda v. National Steel & Shipbuilding Co., 24 BRBS 163 (1991); Allison v. Washington Soc'y for the Blind, 24 BRBS 150 (1988), rev'd, 919 F.2d 763 (**D.C. Cir.** 1990); Vasquez, 23 BRBS 428; Moore, 23 BRBS 49; Lawrence, 21 BRBS 282; Boone v. Newport News Shipbuilding & Dry Dock Co., 22 BRBS 419 (ALJ) (1989).

Change in Economic Condition

Request for modification due to change in economic circumstances falls mainly into two categories:

- 1) the claimant alleges that employment opportunities previously considered suitable are not suitable; or
- 2) the employer contends that suitable alternative employment has become available.

It follows then that the standards for establishing suitable alternative employment (or lack thereof) apply in a modification proceeding. Blake, 19 BRBS 219.

A change in economic condition need not be "substantial" in order to warrant a Section 22 modification. Ramirez v. Southern Stevedores, 25 BRBS 260 (1992). However, a rise in the national weekly wage rate is insufficient to establish a change in a claimant's economic condition. Mason v. West State, Inc., (BRB No. 99-0454) (Jan. 21, 2000) (Unpublished) (Increases in the national average weekly wage do not necessarily represent an increase in the actual wages of an individual claimant, and more importantly, cannot demonstrate that a claimant's wage-earning capacity has increased above his wages at the time of injury once inflation has been factored out; it is this comparison that is crucial in assessing a claimant's entitlement to continuing benefits.) An alleged change in economic condition with sufficient support should be granted a modification hearing and not summary judgment. Lucas v. Louisiana Insurance Guaranty Ass'n, 28 BRBS 1 (1994).

When a claimant's income increases to the point that he has no loss of wage-earning capacity, that constitutes a change in economic condition. Fleetwood, 776 F.2d 1225. (But see discussion of *de minimis* awards, supra). For more cases considering the issue of modification for change in economic condition, see also: Moore, 23 BRBS 49; Vasquez, 23 BRBS 428; Dean, 15 BRBS 394; Vilen v. Agmarine Contracting, 12 BRBS 769 (1980); Miller v. Sundial Marine Tug & Barge, 23 BRBS 601 (ALJ) (1990).

In a third, less common, situation, the employer or the claimant may request, and the district director or judge may grant, a modification due to a change in economic condition where a collateral source (e.g., state workers' compensation) has ordered or is due repayment. The purpose is to prevent duplicate or concurrent awards, or to make certain that the employer is the party ultimately liable for repayment of an award paid erroneously by a collateral source when it has been determined that compensation for the injury is the responsibility of the employer. Remember, however, that this change in economic condition must have occurred after the award became final but within one year of that date. See Finch, 22 BRBS 196; McDougall v. E.P. Paup Co., 21 BRBS 204 (1988); 33 U.S.C. § 903(e).

22.3.5 Mistake of Fact

A mistake of fact is also a basis for a Section 22 modification. Authority to re-open proceedings extends to all mistaken determinations of fact. O’Keeffe, 404 U.S. 254. A party seeking to modify a decision on the basis of a mistake of fact is not barred from modification even if the prior award based on the alleged mistake was affirmed on appeal. Hudson, 16 BRBS 367.

The concept of mistake in determination of fact includes mixed questions of law and fact. Therefore, it is treated as a mistake of fact. McDougall, 21 BRBS 204; Presley, 9 BRBS 588 (1979).

For example, a mistake in the determination of wage-earning capacity under Section 8(c)(21) is a mistake of fact. Presley, 9 BRBS 588. A challenge to the initial judge’s jurisdictional findings based on mistake of fact in the determination is proper as a request for modification pursuant to Section 22. Jenkins, 17 BRBS 183.

The standard for obtaining a modification for mistake of fact is the same as that for all modification proceedings: it must render justice under the LHWCA. An allegation of mistake of fact should not be allowed to become a back door route to retry a case. O’Keeffe, 404 U.S. at 255-56; McCord, 532 F.2d 1377.

In McCord, on remand from the **District of Columbia Circuit**, the Board held that modification did not render justice under the LHWCA where an employer sought to relitigate the question of employer-employee relationship four years later, and its prior actions had shown contempt and disregard for the legal process. Cephas v. McCord, 4 BRBS 224 (1976), petition for review denied, 566 F.2d 797 (**D.C. Cir.** 1977). Modification based on mistake of fact need not automatically re-open the case, however, if it does not render justice under the LHWCA. Wynn, 21 BRBS 90.

Case law does not support the contention that an ALJ must reopen a claim when a party alleges a mistake in fact, absent egregious circumstances. Kinlaw v. Stevens Shipping and Terminal Co., 33 BRBS 68 (1999). In Kinlaw, the Board upheld the ALJ’s denial of a Section 22 modification request where the employer’s only explanation for not developing testimony previously was its erroneous belief that it was unnecessary. Section 22 is not intended to provide a back-door route to retry a case, or to protect litigants from their counsel’s litigation mistakes.

The majority of cases relating to Section 22 modification reported thus far deal with "mistake of fact" issues. As a general rule, the **threshold determinations** are:

- 1) whether there was a mistake by the original fact-finder, and
- 2) if so, whether the mistake was a mistake of law or fact.

A remedy exists for a factual mistake only.

The fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. O'Keefe, 404 U.S. 254; Jenkins, 17 BRBS 183; Dean, 7 BRBS 234.

Refusal to re-open the record for relevant new evidence is an abuse of discretion. Dobson v. Todd Pac. Shipyards Corp., 21 BRBS 174 (1988); Kellis v. Newport News Shipbuilding & Dry Dock Co., 17 BRBS 109 (1985); Woods v. Bethlehem Steel Corp., 17 BRBS 243 (1985); see also Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998) (Board held ALJ abused discretion by not permitting employer to introduce new evidence which was not available at the time of the hearing).

In Jourdan v. Equitable Equipment Co., 25 BRBS 317 (1992), the employer contended a mistake of fact in its petition for modification, seeking joinder of an additional insurer. The judge denied the petition, finding that any mistake of fact was due to the fault of the employer. The Board reversed, finding that the employer was able to secure new evidence of the proper insurer. In the hearing below, the only carrier a party to the suit, Wassau, was determined not to be the responsible carrier. The Board held that the judge should have reopened the case after finding that Wassau was not the responsible carrier, and remanded the case for determination of the last responsible carrier.

A modification proceeding is the only vehicle which allows for consideration of evidence not previously filed with the judge or district director, because such new information cannot be considered *de novo* by the Board. Woods, 17 BRBS 243; Ries v. Harry Kane, Inc., 15 BRBS 460; Williams v. Nicole Enters., 15 BRBS 453 (1983); Delay v. Jones Washington Stevedoring Co., 31 BRBS 197 (1998).

In Hudson, 16 BRBS 367, the Board held that a judge may make new determinations of fact following a district court judgment where the judgment was limited to the narrow issue of whether the deputy commissioner's order was supported by substantial evidence and in accordance with law.

Facts relating to the nature and extent of a claimant's disability have been deemed a proper subject of modification proceedings. See, e.g., Allen v. Strachan Shipping Co., 11 BRBS 864 (1980); Steele v. Associated Banning Co., 7 BRBS 501 (1978). Other "mistakes of fact" include: a previous Section 8(f) determination, Coats, 21 BRBS 77, a demand for reimbursement and employer credit pursuant to Section 3(e), Jenkins, 17 BRBS 183, average weekly wage, Sutton v. Genco, Inc., 15 BRBS 25 (1982), cosmetic disfigurement, Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168 (1984), timeliness of claim, Nasem v. Singer Business Machines, 13 BRBS 429 (1981), aff'd mem., 691 F.2d 495 (4th Cir. 1982), and member of the crew, Williams, 19 BRBS 66.

In Wynn, 21 BRBS 90, the Board remanded the decision on modification because the judge failed to render specific findings on the change in the claimant's condition or mistake of fact, which the judge relied upon to reach a different result regarding causation than did the judge who presided at the initial hearing.

22.3.6 Legal Error or Change in the Law

Section 22 modification is not available for strictly legal error. That is, it is generally not available when an issue could have been raised in the original proceedings but was not. Stokes v. George Hyman Constr. Co., 19 BRBS 110 (1986).

Any legal error committed by the judge, such as the exclusion of certain evidence, is not grounds for a Section 22 modification. Swain v. Todd Shipyards Corp., 17 BRBS 124 (1985). For example, the issue of whether an employer met its burden of showing suitable alternative employment in the original proceeding is a question of law. Smith v. The American Univ., 14 BRBS 875 (1982). Similarly, failure to raise an applicable code section below is a pure question of law not subject to modification. Jones v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 442 (ALJ) (1990).

A party must challenge an error of law by a timely motion for reconsideration or a timely appeal pursuant to Section 21. See 33 U.S.C. § 921. In Downs v. Texas Star Shipping Co., 18 BRBS 37 (1986), aff'd sub nom. Downs v. Director, OWCP, 803 F.2d 193 (5th Cir. 1986), the Board held that failure by the claimant and district director to challenge the judge's legal authority to approve a settlement in the original proceeding or appeal on that issue precluded raising the issue under Section 22.

The district director has no authority under Section 22 to modify a purely legal determination of the Board. The Board has held that Section 22 can not be used to modify an order involving a legal interpretation/change in law that goes against a party. The only remedy is a timely appeal under Section 21. Darmon v. Todd Shipyards Corporation, (BRB No. 92-1134)(Sep. 29, 1995)(Unpublished), citing Ryan v. Lane & Co., 28 BRBS 132, 133-34 (1994); See Maples v. Marine Disposal Co., 16 BRBS 241 (1984). Cf. Jenkins, 17 BRBS 183.

The **rule** seems to be that where a case is "**pending**" (defined by the courts broadly to mean when a case is not final or is on appeal) on the date of the change in the law, the modification motion is proper. See also Downs, 803 F.2d 193.

Retroactivity

The **Supreme Court** recently announced a new standard for the retroactivity of case law. In Harper v. Virginia Dept. of Taxation, 509 U.S. 86 (1993), the **Court** stated:

When this Court applies a rule of federal law to the parties before it, the rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

In pertinent part, the **Court** overruled the retroactivity test set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), and relying on Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991), decided that when the **Court** applies a rule of federal law to the parties before it that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate the announcement of the rule. This extends to civil cases the ban against "selective application of new rules" in criminal cases. See Griffith v. Kentucky, 479 U.S. 314 (1987).

In Feld v. General Dynamics Corp., 34 BRBS 131 (2000), the 1984 amendment changing the assessment formula of Section 44 (the Trust Fund) was insufficient to justify a modification request. [Prior to the 1984 amendments the assessment formula under Section 44 did not take into account the number of claims any one employer placed into the Special Fund. After the 1984 amendments and implementing regulations, employers now have an incentive to mitigate a total award to partial as the employer's assessment is now directly tied to its use of the Special Fund.

In rejecting the employer's modification request in Feld, the Board noted that an employer is not assured at the time of the initial proceeding that it would be awarded Section 8(f) relief. The Board reasoned that in order to reduce its liability to the fullest extent possible in the event Section 8(f) relief was not awarded, the employer should have presented evidence of suitable alternate employment. Moreover, the Board noted that, in Feld, "the passage of more than 10 years between the 1984 Amendments and the employer's modification petition certainly forecloses a finding that it is in the interest of justice to modify claimant's award, assuming arguendo, that this is a proper basis for modification...Under the [ALJ's rationale, employer should have been aware of the ramifications of its decision not to offer evidence of suitable alternate employment soon after the enactment of the 1984 Amendments."

The Board has held that Section 22 is unavailable to reopen a final award based upon a legal issue which is decided against a party. See Ring v. I.T.O. Corp. of Virginia, 31 BRBS 212 (1998). The Board determined that an employer is not entitled to a credit where claimant received post-injury payments of container royalty pay, pursuant to his union contract, because he worked the requisite 700 hours before his injury rather than having received the pay as a result of hours accrued while on disability, see Branch v. Ceres Corp., 29 BRBS 53 (1995), aff'd. mem., 96 F.3d 1438 (4th Cir. 1996). The seminal issue is whether the payments in question are actually indicative of claimant's true post-injury wage earning capacity, and thus do not merely represent a measure of pre-injury earning capacity.

22.3.7 Raising Section 8(f)

Employer cannot raise the issue of Section 8(f) in a Section 22 proceeding if the issue was not raised and litigated in the initial hearing unless special circumstances exist which, in the interests of justice, outweigh the need for finality in judicial decision-making.

The Board has held that the special circumstances exception was met where the judge failed to correct employer's misunderstanding regarding the applicability of Section 8(f) at the initial hearing. Adams v. Brady-Hamilton Stevedore Co., 16 BRBS 350 (1984), aff'd sub nom. Brady-Hamilton Stevedore Co. v. Director, OWCP, 779 F.2d 512 (9th Cir. 1985); Tibbetts v. Bath Iron Works Corp., 10 BRBS 245 (1979); see also Egger v. Willamette Iron & Steel Co., 9 BRBS 897 (1979).

The Board has affirmed a judge's finding that special circumstances existed where invocation of Section 8(f) in connection with a 1966 award would have been futile because the Special Fund was inadequately funded at that time. Dixon v. Edward Minte Co., 16 BRBS 314 (1984). If Section 8(f) was not applicable to the injury before the modification was sought, the employer may seek it for the first time in a Section 22 proceeding. Director, OWCP v. Edward Minte Co., 803 F.2d 731 (D.C. Cir. 1986), aff'g Dixon, 16 BRBS 314 (1984).

In Champion v. S & M Traylor Brothers, 19 BRBS 36 (1986) (decision after remand), the Board held that the issue of Section 8(f) applicability, although not raised initially before the judge because only temporary benefits were sought, was properly raised on remand. The Board held that it was abuse of discretion to deny the employer's motion to reopen the record for submission of evidence bearing on permanency, given the "special circumstances," and that the employer's motion could be construed as a petition for modification based on a change in the claimant's medical condition.

The Board has held that the **fact that a claim is processed pursuant to Section 22 is of no relevance to the applicability of Section 8(f)(3)**(Request for §8(f) relief shall be presented to the district director prior to consideration of the claim and failure to do so shall be an absolute defense.) Firth v. Newport News Shipbuilding & Dry Dock Company, 33 BRBS 75 (1999) (Request to modify award of temporary partial disability to permanent partial disability due to change in condition must comply with §8(f)(3).). In Firth, the Board held that “[a]lthough a district director may not ‘modify’ a decision of an [ALJ] regarding an issue in dispute, modification proceedings are properly initiated at the district director level and the district director does have the power, pursuant to Section 22, to review a compensation case in accordance with the procedure prescribed in respect of claims under Section 19 [of the LHWCA].” The statute does not provide an exception, applicable in modification cases, to the rule that a claim for Section 8(f)(3) relief must be raised before the district director; by its specific terms Section 8(f)(3) applies to all claims for Section 8(f) relief.

Similarly, if there is a mistake of fact contained in a previous Section 8(f) determination, the "law of the case" doctrine does not preclude re-opening the previously decided issue of Section 8(f). Coats, 21 BRBS 77.

In other cases, however, the Board and the courts have rejected the contention that "special circumstances" existed so that Section 8(f) could be raised for the first time in a modification proceeding. The employer's failure to prepare an alternative litigation strategy does not constitute special circumstances. Adams, 16 BRBS 350. The employer's failure to raise Section 8(f) because

it would require proof of inconsistent defenses also does not constitute special circumstances since a party may state its claims or defenses alternately or hypothetically and may state as many separate claims and defenses regardless of consistency. Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775 (11th Cir. 1985); Price v. Cactus Int'l, Inc., 15 BRBS 360 (1983), aff'd, 733 F.2d 903 (5th Cir. 1984) (Table); Carroll v. American Bridge Div., U.S. Steel Corp., 13 BRBS 759 (1981), aff'd sub nom. American Bridge Div., U.S. Steel Corp. v. Director, OWCP, 679 F.2d 81 (5th Cir. 1982).

At least one case has held that a subsequent change in the law in existence at the time of the initial hearing also is not a sufficient reason to reopen the proceedings in order to allow an employer to raise Section 8(f). General Dynamics Corp. v. Director, OWCP, 673 F.2d 23 (1st Cir. 1982). Given the lenient definition of "pending," however, it is likely that a change in the law within the prescriptive period for filing modification would be proper grounds for a modification proceeding.

In Allison, 20 BRBS 158, the Board stated that a request for Section 8(f) relief must be raised and litigated at the first hearing wherein permanent disability is at issue. In that case, as employer had received notice of the deputy commissioner's intent to modify the claimant's temporary partial disability benefits to permanent partial status in 1969, employer should have raised the Section 8(f) issue at that time.

22.3.8. Modification of Orders Which Are on Appeal

Non-final orders can be modified. Thus, a party may simultaneously appeal a decision and order to the Board, proper circuit court, or the **Supreme Court** and seek modification under Section 22. Craig v. United Church of Christ, Comm'n for Racial Justice, 13 BRBS 567 (1981). The judge is not divested of jurisdiction over modification proceedings when an appeal is pending. Wynn, 21 BRBS 290; Miller v. Central Dispatch, Inc., 16 BRBS 64 (1984), on remand, 673 F.2d 773 (5th Cir. 1982), rev'g 12 BRBS 793 (1980); Williams v. Geosource, Inc., Hunt Shipyard Div., 13 BRBS 643 (1981).

A party does not circumvent proper appellate procedure by simultaneously appealing to the Board and requesting a Section 22 modification before the judge, because the Board may not consider new evidence. Wynn, 21 BRBS 290.

In Piceynski v. Dyncorp, (BRB No. 97-1451) (Dec. 7, 1998) (Unpublished) the Board issued a **remand on the appeal and the modification request simultaneously**. The Employer filed a "Motion to Annul Void Decision arguing that the Board's decision was a legal nullity because the Board violated its own procedural rule, 20 C.F.R. § 802.301(c), when it denied the claimant's request to have the appeal stayed pending resolution of the claimant's modification petition before the ALJ. Section 802.301(c) states that where a modification request has been filed, the Board "shall dismiss the case [on appeal] without prejudice. This codification had its origins in Molnar v. Harman Coal Co., (BRB No. 83-576 BLA) (Jan. 9, 1985)(Unpublished order).

In Piceynski, the Board stated that its action complied with the regulation “as the Board’s decision effectuates the action contemplated by the regulation” since, at the time the Board learned of the claimant’s modification request, its decision remanding the case on the merits was “pending.” The Board concluded:

Accordingly, it was a more efficient use of administrative resources for the Board to act on the notice of modification in its Decision and Order, since remand was required due to both the original appeal and the request for modification.... Finally, any error the Board may have made remanding for modification in its decision, rather than in a separate order, is harmless as employer has not been prejudiced.

Under the Board's rules, **if the case is on appeal**, the party seeking modification should apply directly to the judge and send a copy of the modification petition to the Board, with a motion asking the Board to remand the case. The Board will dismiss the case without prejudice. If the petition for modification is denied, the petitioning party may file a request for reinstatement of the appeal within 30 days of the date the petition was denied. If the petition for modification is granted, any party may file a new appeal with the Board within 30 days of the date the decision or order on modification is filed. 20 C.F.R. § 802.301.

***[ED. NOTE:** As noted above in the subsection on what constitutes a petition for modification, it is questionable whether such formality is required of parties under the LHWCA. For example, in Williams, 19 BRBS 66, the judge erroneously determined that he did not retain jurisdiction to admit or consider relevant evidence on reconsideration. Although the Board would ordinarily remand to consider admitting this evidence, to avoid further delay, the Board interpreted the submission of new evidence as a post-decision motion for modification and instructed the judge to consider all post-hearing evidence.]*

In a black lung case, the **Sixth Circuit** has reversed the Board and held that a request for modification of a judge's decision regarding entitlement to benefits must be filed with a deputy commissioner (district director), rather than a judge, where an appeal is pending before the Board. Saginaw Mining Co. v. Mazzulli, 818 F.2d 1278 (**6th Cir.** 1987).

In Maria v. Del Monte/Southern Stevedore, 22 BRBS 132 (1989), the Board held that an associate director's letter informing a claimant of a delay in payment from the Special Fund is not a final, appealable action (nor an attempt to modify a prior decision). In that case, the claimant's remedy was to seek a default order pursuant to Section 18, in accordance with 20 C.F.R. § 702.372.

An issue may be considered for the first time on appeal when a pertinent statute or regulation has been overlooked or when there is a change in the law while the case is pending on appeal and the new law might materially alter the result. Bukovi v. Albina Engine/Dillingham, 22 BRBS 97 (1988). (But see Topic 22.3.6, supra, for examples of cases where an error of law was held not to be the proper grounds for modification.).