BRB No. 01-0532

RUSSELL JENSEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEEKS MARINE, INCORPORATED	)	DATE ISSUED: Nov. 30, 2001
	)	
	)	
Self Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James R. Campbell, Middle Island, New York, for claimant.

Christopher J. Field (Field, Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Employer appeals the Second Decision and Order on Remand (95-LHC-0217) of Administrative Law Judge Ralph A. Romano 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*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). This case is before the Board for a fourth time.

To recapitulate, on July 22, 1991, claimant sustained work-related injuries to his left foot, left hip and right knee as a result of a trip and fall accident. Employer voluntarily paid compensation for temporary total disability and medical benefits from July 23, 1991, through June 22, 1994, as well as for a four percent permanent partial impairment to claimant's right leg. Thereafter, claimant, who has not returned to his pre-injury or any other employment, filed a claim seeking the continuation of temporary total disability compensation from June 22, 1994, and additional medical benefits due to the work-related injury to his right knee as

well as to an alleged lower back injury which had subsequently developed as a result of the right knee injury.

In a Decision and Order dated March 25, 1996, Administrative Law Judge Nicodemo DeGregorio initially determined that claimant failed to establish any injury to his lower back, and thus, denied that claim for compensation and medical benefits. Judge DeGregorio then found that claimant could not return to his usual employment as a result of his right knee injury, and that employer did not show with any specificity the availability of suitable alternate employment. Accordingly, Judge DeGregorio ordered employer to pay temporary total disability from June 22, 1994, to August 22, 1994, and then permanent total disability from August 23, 1994, and continuing.[1] In addition, Judge DeGregorio ordered employer to pay claimant for all related medical care and treatment. Employer appealed Judge DeGregorio's decision to the Board, but its appeal was subsequently dismissed in light of employer's petition for modification under 33 U.S.C. §922. On modification, the case was reassigned to Administrative Law Judge Ralph A. Romano (the administrative law judge).

In his Order dated June 5, 1998, Judge Romano denied employer's request for modification, finding that employer did not establish that the identified jobs were unavailable at the time of the first proceeding. He concluded that employer was merely attempting to retry, with better evidence, issues it could have presented at the initial hearing.[2]

Employer's subsequent appeal of Judge Romano's Order of Denial of Request for Modification and the fee award was consolidated with employer's reinstated appeal of Judge DeGregorio's award of total disability benefits.

In its decision, the Board affirmed Judge DeGregorio's award of total disability benefits. *Jensen v. Weeks Marine, Inc.* [*Jensen I*], 33 BRBS 97 (1999). The Board, however, vacated Judge Romano's denial of employer's petition for modification, holding that the evidence employer submitted on modification is sufficient to bring the claim within

[1]Judge DeGregorio determined that claimant had reached maximum medical improvement with regard to his right knee injury as of August 22, 1994.

[2]Judge Romano also issued a Supplemental Decision and Order Awarding Attorney Fees, in which he awarded an attorney's fee totaling $13,350 representing 53.4 hours at the requested hourly rate of $250, and $2,100.45 in costs.

the scope of Section 22 as it could support a finding of a change in claimant's physical and economic condition since the time of Judge DeGregorio's award. Specifically, the Board noted that Dr. Greifinger opined that claimant could no longer engage in any overhead lifting, but that claimant's ability to walk had increased. Moreover, the Board stated that because claimant subsequently cooperated with employer's vocational rehabilitation efforts, employer's attempt to improve its evidence of suitable alternate employment should not be precluded in the modification proceeding. Thus, the Board concluded that the evidence employer submitted on modification "is sufficient to bring the claim within the scope of Section 22 . . . ." *Id.* at 101. Therefore, the case was remanded for further consideration. Additionally, the Board vacated Judge Romano's award of an attorney's fee and remanded for a more detailed discussion of employer's objections to the attorney's fee petition. *Id.*

In his Decision and Order on Remand, Judge Romano (the administrative law judge) stated that the Board did not address the propriety of his determination that employer was inappropriately attempting to retry its case, but instead: (1) held that employer established an improvement in claimant's medical condition contrary to his finding in his Order denying modification; (2) found that claimant's belated cooperation with the vocational expert constituted an additional ground for modification; and (3) remanded the case for the administrative law judge to determine if the new jobs identified constituted suitable alternate employment. The administrative law judge thus felt constrained to find, summarily, that suitable alternate employment was established. He further found that claimant did not diligently seek alternate work and therefore is limited to an award of permanent partial disability benefits. Thus, he granted employer's petition for modification and awarded claimant permanent partial disability benefits as of March 2, 1998, pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on a weekly loss in wage-earning capacity of $127.50.

Employer appealed and claimant cross-appealed the administrative law judge's Decision and Order on Remand. Specifically, employer challenged the administrative law judge's award of permanent partial disability benefits pursuant to Section 8(c)(21), contending that claimant is limited to an award under the schedule, 33 U.S.C. §908(c)(2), for the permanent partial disability to his knee. In his cross-appeal, claimant challenged the denial of total disability benefits.

In *Jensen v. Weeks Marine, Inc.* [*Jensen II*], 34 BRBS 147 (2000), the Board clarified its decision in *Jensen I,* 33 BRBS 97, to hold merely that employer produced sufficient evidence to bring the claim within the scope of Section 22, and thus again remanded the case to the administrative law judge to determine whether claimant's award of total disability benefits should be modified. The Board explicitly instructed the administrative law judge 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." *Jensen II,* 34 BRBS at 151. The Board also

held that pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), any permanent partial disability award must be made under the schedule, *i.e.*, 33 U.S.C. §908(c)(2), (19); *Jensen II*, 34 BRBS at 152. Accordingly, the administrative law judge's award of continuing permanent partial disability benefits from March 2, 1998, was vacated, and the case was remanded for further findings.

In his Second Decision and Order on Remand, which is the subject of the current appeal, the administrative law judge determined that employer did not establish a change in claimant's economic condition. Specifically, the administrative law judge found that employer did not present sufficient evidence of suitable alternate employment to warrant modification of the award of total disability. In addition, the administrative law judge declined to address whether claimant's physical condition had changed/improved as employer conceded that claimant cannot return to his previous work, and there is insufficient evidence of suitable alternate employment to alter claimant's totally disabling condition. Employer's request for modification was therefore denied.

On appeal, employer challenges the administrative law judge's denial of its petition for modification and his finding that claimant remains entitled to total disability benefits.

Employer contends that the administrative law judge failed to follow the Board's remand instructions to undertake a complete review of all medical and vocational evidence of record in denying its request for modification. In particular, employer asserts that the administrative law judge's decision is entirely devoid of any evaluation or mention of the medical evidence of record and thus is not in compliance with the Board's decision in *Jensen II*. Additionally, employer asserts that the administrative law judge did not perform the proper analysis, *i.e.*, a *de novo* review of all of the evidence under the standard for determining the extent of claimant's disability. Employer maintains that it has provided sufficient vocational evidence to establish the availability of suitable alternate employment, and that claimant has not sought any employment.[3] Consequently, employer asserts that, contrary to the administrative law judge's determination, claimant is not entitled to continuing total disability benefits.

[3]Employer also maintains that the administrative law judge erred by not allowing it to produce evidence regarding the effects of claimant's cooperation with employer's vocational experts subsequent to the initial proceeding before Judge DeGregorio.

As previously noted, the Board, in *Jensen II*, explicitly instructed the administrative law judge "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." *Jensen II*, 34 BRBS at 151, *citing Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In his decision, the administrative law judge determined that employer did not establish a change in claimant's economic conditions. Initially, he noted that employer put forth some evidence of a change in economic conditions, *i.e.*, vocational expert testimony that the local job market expanded since the initial hearing, and that employer was able to garnish "better" vocational evidence in the modification proceeding by way of claimant's cooperation with the vocational expert, which was not offered prior to the first hearing. The administrative law judge, however, rejected this evidence as employer did not show that these "new" jobs were any different than those originally put forth and rejected by Judge DeGregorio, or that they were unavailable to claimant at the time of that initial proceeding.[4] Moreover, the administrative law judge found that while claimant's cooperation may have aided the vocational experts in expanding/qualifying the prospective pool of jobs which claimant is capable of performing, there is no assertion by employer that the substance or nature of that cooperation, in fact, enabled employer to identify jobs which did not exist at the time of the first hearing before Judge DeGregorio. The administrative law judge therefore concluded that employer did not present evidence sufficient to modify the previous award of total disability. The administrative law judge further declined to address the issue of whether claimant's medical/physical condition changed as employer conceded that claimant cannot return to his

[4]Specifically, the administrative law judge found that the vocational expert testimony is wholly lacking in terms of proof that any of the "new" jobs identified were not previously identified at the first hearing. In support of this finding, the administrative law judge noted striking similarities among the generic clerk jobs put forth by employer at each of the proceedings, including those offered by employer in support of modification and those originally rejected by Judge DeGregorio for lack of specificity. The administrative law judge also noted that there is no evidence that any of the jobs identified by employer at the modification proceeding were, in fact, the alleged additional jobs, previously unavailable at the time of Judge DeGregorio's original decision in this case.

previous work, and the evidence is insufficient to establish the existence of suitable alternate employment, thereby justifying claimant's continued entitlement to total disability benefits.

At the time of the initial hearing, employer submitted the vocational report of Dr. Ehrenreich in which he provided a list of 29 representative alternative job areas which he felt were appropriate for claimant.[5] *See* Employer's Exhibit 8. For each area, Dr. Ehrenreich provided general descriptions of the job duties, the work environment, and the requisite skills and education required in order to obtain the job. Additionally, he provided an address as to "where to write" for further information regarding these job areas, *e.g.*, addresses for the relevant trade associations. In his decision, Judge DeGregorio determined Dr. Ehrenreich's report lacked specificity as he did not identify specific jobs with particular employers, or describe the duties to be performed and the physical and mental abilities required. Judge DeGregorio's rejection of this suitable alternate employment was affirmed by the Board. *Jensen I*, 33 BRBS at 99.

On modification, employer submitted a vocational analysis by Mr. Pascuiti, a labor market survey performed by Mr. Steckler, and testimony and an accompanying labor market survey of Dr. Ehrenreich. Mr. Pascuiti's report is, much like the initial report of Dr. Ehrenreich, flawed as it lacks the identification of any specific jobs, and/or their resulting qualifications and duties. Additionally, while Dr. Ehrenreich's subsequent report identifies 12 specific jobs, it too is flawed, for as the administrative law judge has repeatedly determined, there is no evidence that these jobs were not available at the time of the initial hearing or that they were based on evidence of a change in claimant's physical condition, or due to an upswing in the local labor market. This determination is supported by the statement of Dr. Ehrenreich, that "such sedentary and light duty positions have been available since [claimant] reached a point of maximum medical improvement in March of 1993." Affidavit of Dr. Ehrenreich dated July 30, 1996; *see also* Hearing Transcript of Modification (HTM) at 168. Dr. Ehrenreich also testified that claimant's uncooperativeness was a problem in his job search and that it prevented referral to several employers. HTM at 172-73. Dr. Ehrenreich's testimony regarding the effects of claimant's cooperation however was quickly halted by the administrative law judge, who ruled that he was "not going to hear anything more about the lack of cooperation," as "despite the lack of cooperation it has been found that the employer was still in a position to show suitable alternate employment."[6] HTM at

[5]The job areas included: billing, cost and rate clerks; bindery machine operators; chemical plant and system operators; composing data keyers; computer operators; counter and rental clerks; electronics repairers; employment interviewers; food service and lodging managers; industrial production managers; loan and credit clerks; payroll and timekeeping clerks; real estate managers; transportation supervisors; and welfare eligibility workers.

[6]The administrative law judge further stated to claimant's counsel that he "wouldn't cross to any extent," Dr. Ehrenreich, as he did not see "any value" to his testimony. HTM at 174.

173.

As the Board noted in *Jensen I*, Mr. Steckler's report included 14 specific positions and listed the potential employers, the basic duties and qualifications of each position. *Jensen I*, 33 BRBS at 100. In particular, Mr. Steckler listed seven jobs as a security guard, four jobs as a driver, and three jobs as a dispatcher/clerk which he believed claimant was capable of performing, given his background and physical capabilities. In addition, the Board, in *Jensen I*, acknowledged that Mr. Steckler took into account the most recent medical opinions of Dr. Greifinger, who opined that claimant's ability to walk had increased from three hours to five or six hours a day, and that Dr. Greifinger, did, in fact, opine that claimant should be able to perform a number of the jobs listed in Mr. Steckler's labor market survey. *Id.*

We must again remand this case to the administrative law judge, as his findings cannot be affirmed. The administrative law judge did not separately address each piece of employer's evidence on modification, *e.g.*, there is no mention of or differentiation between Mr. Steckler's report and the report of Dr. Ehrenreich. It is therefore not entirely clear whether the administrative law judge considered all of employer's evidence, and in particular Mr. Steckler's labor market survey, on second remand. Mr. Steckler's labor market survey identifying seven positions as a security guard, which were all approved by Dr. Greifinger after consideration of claimant's present physical condition, constitutes evidence of jobs different in kind from those previously submitted by employer. While the dispatcher/clerk jobs are similar to those generally listed by Dr. Ehrenreich at the time of the initial hearing, the seven security guard positions are not similar to any of those compiled at the time of the first hearing.[7]

The administrative law judge also failed to appreciate the impact of claimant's subsequent cooperation with employer's vocational expert. Subsequent to the initial hearing, claimant met with both Dr. Ehrenreich and Mr. Steckler. As previously noted, at the hearing on modification, employer began to address the cooperation issue with Dr. Ehrenreich but was abruptly stopped by the administrative law judge who refused to hear any testimony on

[7]In addition, a comparison of the original labor market survey by Dr. Ehrenreich and the subsequent one produced by Mr. Steckler reveals that the four driver positions identified in the latter document are likewise not similar to any previously identified as suitable. However, Dr. Greifinger did not, as was the case in the security guard positions, give outright approval to three of these positions. Rather, he cautiously approved three driver positions so long as they did not involve additional physical requirements, *e.g.*, Domino's pizza delivery driver is acceptable so long as he did not have to climb several flights of stairs to make a delivery; fuel oil delivery driver is acceptable so long as he did not have to drag the fuel hose around; bus driver is acceptable as long as it did not involve helping people board or get out of the bus. *See* EXM 41-45.

that issue. HTM at 172-173. While the scope of any additional testimony on this issue by Dr. Ehrenreich is purely speculative, given that claimant's lack of cooperation at the initial hearing may have hindered employer's efforts at establishing suitable alternate employment, employer is entitled to the opportunity to establish suitable alternate employment on modification. As the Board has repeatedly stated in this case, claimant should not be able to benefit from his lack of cooperation with vocational experts. *See Jensen II*, 34 BRBS at 151, n. 3, *Jensen I*, 33 BRBS at 101. Moreover, the Act must be construed "in a manner which encourages employees to return to jobs within their skills and abilities." *Blake v. Ceres Inc.*, 19 BRBS 219, 211 (1987); *see generally Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1989).

Employer's modification request and litigation strategy in this case have always been to show that claimant is not totally disabled by producing evidence of suitable alternate employment. This serves as the primary reason for distinguishing this case from *Lombardi v. Universal Maritime Service Corp.*, 32 BRBS 83 (1998), and why we again, in contrast to the administrative law judge's statements, *see* Second Decision and Order on Remand at 2, n. 1, distinguish the case at hand from *Lombardi*. In *Jensen II*, the Board stated that *Feld v. General Dynamics Corp*., 34 BRBS 131 (2000), and *Lombardi*, 32 BRBS 83, "stand for the proposition that when an employer presents no evidence of suitable alternate employment at the initial proceeding, and, on modification, no evidence of extenuating circumstances that prevented it from doing so, or of a *change* in the claimant's economic position, employer is not entitled to 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." *Jensen II*, 34 BRBS at 151. In this regard, *Feld*, 34 BRBS 131, and *Lombardi*, 32 BRBS 83, are to be narrowly construed. The Board then proceeded to distinguish the instant case from *Feld*, 34 BRBS 131, and *Lombardi*, 32 BRBS 83, since employer herein presented evidence of suitable alternate employment at the initial hearing, and, on modification, put forth evidence of a change in claimant's economic position, *i.e.*, evidence of claimant's subsequent cooperation and of an improvement in the local labor market. *Id.* Consequently, in contrast to the administrative law judge's statements on second remand, the instant case is factually distinguishable from *Lombardi*.

Thus, we must again vacate the administrative law judge's finding that employer is not entitled to modification. On remand, the administrative law judge must specifically consider Mr. Steckler's labor market survey, and in particular, the seven security guard positions found appropriate by Dr. Greifinger, to determine whether these positions are sufficient to meet employer's burden of establishing suitable alternate employment. In addition, the administrative law judge must also fully consider the effect of claimant's subsequent cooperation with employer's vocational experts, and may, if necessary, elect to reopen the record for submission of additional relevant evidence, previously excluded, on this issue. If the administrative law judge determines that suitable alternate employment is established, claimant is limited to a scheduled award of permanent partial disability benefits based on the degree of permanent physical impairment to his right leg. 33 U.S.C. §908(c)(2);

Jensen II, 34 BRBS at 152.

Accordingly, the Second Decision and Order on Remand is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge