U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 22-0400

OLIVER H. EDE	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ICTSI OREGON, INCORPORATED	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
JONES STEVEDORING COMPANY	)	DATE ISSUED: 09/30/2024
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
COLUMBIA EXPORT TERMINALS, LLC	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.	)	
	)	

Employer/Carrier	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

John Dudrey (John R. Dudrey, LLC), Lake Oswego, Oregon, for ICTSI Oregon, Inc. and Signal Mutual Indemnity Association, Ltd.

Stephen E. Verotsky (Sather Byerly & Holloway, LLP), Portland, Oregon, for Jones Stevedoring Company.

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Jennifer Feldman, Deputy Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: GRESH, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer ICTSI Oregon, Inc. (ICTSI) and its carrier appeal Administrative Law Judge (ALJ) Richard M. Clark's Decision and Order Granting Modification (2015-LHC-00212, 2020-LHC-00001, 2020-LHC-00102, 2020-LHC-00103) rendered on consolidated claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (Act).[1] We must affirm the ALJ's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because Claimant sustained his injury in Oregon. 33 U.S.C. §921(c); *see Roberts v. Custom Ship Interiors*, 35 BRBS 65, 67 n.2 (2001), *aff'd*, 300 F.3d 510, (4th Cir. 2002); 20 C.F.R. §702.201(a).

accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Background

On May 7, 2013, Claimant sustained a neck injury while working as a crane operator for Jones Stevedoring Company (Jones Stevedoring). TR at 208-210. He treated with Dr. Matthew Gambee and was later referred to Dr. John Kafrouni for injections and Dr. Norman Rokosz for surgery. Jones EXs 75, 76, 79, 82-84, 93, 96, 100-107. On March 24, 2014, Dr. Rokosz performed a left C5-6 laminoforaminotomy. Jones EXs 114-119. On June 17, 2014, Dr. Rokosz released Claimant "to try" to return to work "and see how things go." Jones EXs 120-121.

On June 20, 2014, Claimant returned to work on the waterfront for various employers, including Jones Stevedoring, ICTSI, and Columbia Export Terminals, LLC (CET). TR at 211-212, 234. He continued working until February 27, 2015, when he stopped to care for his wife while she underwent treatment for a medical condition. TR at 164-166, 182, 230. Meanwhile, he sought treatment for ongoing neck and arm pain from his primary care physician, Dr. Sharon Lawrence, and he ultimately decided to retire due to his pain. Jones EX 139; CET EX 3 at 37, 45-46, 77. Claimant's union approved his disability retirement, effective August 1, 2015. Jones EX 148.

Jones Stevedoring initially accepted the compensability of Claimant's May 7, 2013 work injury and paid him temporary total disability compensation from May 8, 2013, until February 7, 2014.[2] Jones EXs 108, 110. On March 29, 2016, Claimant filed claims against ICTSI and CET for cumulative trauma injuries to his neck and knees.[3] CX 4 at 24, 29; Jones EXs 166-167. Both of those employers controverted the claims. CX 3 at 25-26.[4]

In his Decision and Order Awarding Compensation and Benefits (D&O (2018)), the ALJ found Claimant's longshore work with various employers from June 2014 through February 2015 did not aggravate the 2013 work-related neck injury he sustained while

[2] Jones Stevedoring filed a notice of controversion of right to compensation related to Claimant's neck injury but later agreed to pay him temporary total disability benefits through June 19, 2014, as Claimant returned to work without restrictions on June 20, 2014. TR at 41-42, 211-213, 227-230; Jones EX 121.

[3] Claimant withdrew his knee injury claim at the hearing. TR at 43.

[4] The claims were subsequently consolidated with Claimant's pending claim against Jones Stevedoring for the May 2013 neck injury. *See* Jones EX 165.

working for Jones Stevedoring. As there was "no medical evidence" showing Claimant's subsequent employment "aggravated, accelerated, or contributed to his neck condition," the ALJ found Jones Stevedoring was the responsible employer and, therefore, liable for permanent total disability compensation and medical treatment for Claimant's neck condition from the date of his retirement on August 1, 2015, and continuing. D&O (2018) at 31-36.[5]

On August 9, 2018, Jones Stevedoring filed a petition for modification based on additional medical evidence, namely Dr. Kafrouni's opinion. Jones Stevedoring argued this evidence establishes a mistake in a determination of fact as to the last responsible employer.[6] CET EX 501. Both ICTSI and CET opposed Jones Stevedoring's petition, contending, among other things, that modification would not render justice under the Act.

On December 10, 2019, during the course of discovery, ICTSI served thirty-six requests for admission (RFA) on Jones Stevedoring. ICTSI EX 507 at 84. Jones Stevedoring responded to all the requests, except RFA No. 36, which asked it to admit: "Allowance of Jones Stevedoring Company's Petition would not do justice under the Longshore and Harbor Workers' Compensation Act." *Id.* Jones Stevedoring did not respond or object to the request. ICTSI EX 508.

On May 26, 2022, the ALJ issued his Decision and Order Granting Modification (D&O (2022)) based on a mistake of fact as to the last responsible employer. Before addressing the merits of Jones Stevedoring's modification request, the ALJ rejected ICTSI's arguments that Jones Stevedoring's petition must be denied because its failure to respond to RFA No. 36 constitutes a default admission that forecloses a finding that modification renders justice under the Act. The ALJ held that the RFA sought an admission as to "the truth of a legal conclusion at the heart of a Section 22 determination" and the question of whether Jones Stevedoring's modification would render justice under the Act

[5] On May 10, 2018, the ALJ amended his decision to clarify the maximum compensation rate and fiscal year applicable to Claimant's award. D&O (2018) at 1 n.1. As the amended decision did not change the substance of the original decision, all references to the ALJ's 2018 decision refer to the amended decision.

[6] Jones Stevedoring initially appealed the ALJ's 2018 decisions. The Board dismissed its first appeal, BRB No. 18-0346, as premature given Jones Stevedoring's pending Motion for Reconsideration. The Board also dismissed its second appeal, BRB No. 19-0429, after Jones Stevedoring notified the Board of its pending Petition for Modification. *See* Board Orders dated June 28, 2018, and August 29, 2018; 20 C.F.R. §802.301(c); ICTSI EX 505.

is "a key determination to be made by the adjudicator." D&O (2022) at 4-5. Thus, he concluded it was "inappropriate to resolve via a request for admission" and therefore "released" Jones Stevedoring from its "default admission" because the request was "improper in the first place." *Id.* at 5 n.4.

Turning to the merits, the ALJ found the medical evidence he admitted on modification establishes a mistake in determination of fact regarding the responsible employer because it shows Claimant aggravated his neck condition while working for ICTSI as a crane operator. With respect to whether modification would render justice under the Act, the ALJ determined Jones Stevedoring did not exhibit the "utmost diligence" in developing its evidence and engaged in "concerning" conduct by failing to pay Claimant benefits due under his initial decision. He found, however, that Jones Stevedoring's modification petition had merit, was not futile, its conduct was not "recalcitrant," and "whatever diligence [it] lacked" or "concerning conduct" it engaged in did not "overcome the preference for accuracy over finality under the Act." The ALJ therefore modified his initial decision to reflect ICTSI is the last responsible employer and is liable for permanent total disability compensation and medical benefits. *Id.* at 14-20.

On appeal, ICTSI contends the ALJ erred in granting modification. In response, Jones Stevedoring urges affirmance. The Director, Office of Workers' Compensation Programs (Director) responds, also urging affirmance. ICTSI filed a reply brief, reiterating its contentions. Claimant and CET did not participate in this appeal.

Section 22 Modification: "Justice Under the Act" is a Legal Determination Committed to the ALJ's Discretion

ICTSI challenges the ALJ's "justice under the Act" determination on two separate grounds. It first contends his rejection, *sua sponte*, of Jones Stevedoring's default admission was erroneous because he mischaracterized the RFA as being improperly directed towards a legal conclusion that only the adjudicator may decide. ICTSI Br. at 36-41. Second, it asserts the ALJ did not adequately address the relevant factors in making his "justice under the Act" determination and committed a "clear error of judgement" in concluding Jones Stevedoring's conduct did not overcome the preference for accuracy over finality under the Act. *Id.* at 41-43; ICTSI Reply Br. at 10.

With respect to its first argument, ICTSI asserts the "justice under the Act" inquiry addressed by its RFA is not a "legal conclusion" but, rather, is an admittable element of Jones Stevedoring's case because it involves a "mixed question" that requires the application of law to fact. The difference matters, according to ICTSI, because such mixed questions are properly within the scope of requests for admission under Rule 18.63 of the Office of Administrative Law Judges' Rules of Practice and Procedure (OALJ Rules), 29

C.F.R. §18.63. Because the rule deems all unanswered RFAs "admitted" and "conclusively established," and places limits on an ALJ's authority to rescind admissions, ICTSI contends the ALJ erred in disregarding RFA No. 36. It thus asserts Jones Stevedoring's default admission, that modification would not render justice under the Act, is dispositive of the issue, binding on the ALJ, and fatal to Jones Stevedoring's modification petition. ICTSI Br. at 36-41.

ICTSI's argument presents the question, previously unanswered by the Board, of whether the "justice under the Act" determination is, as ICTSI contends, a matter the parties may resolve by admission under OALJ Rule 18.63; or if it is a "legal conclusion," as the ALJ held, "to be made by the adjudicator." D&O (2022) at 4-5. Considering the "language, structure and case law interpreting Section 22," *Old Ben Coal Co. v. Director, OWCP*, 292 F.3d 533, 546 (7th Cir. 2002), we hold that the "justice under the Act" determination is a legal question reserved for the ALJ, not the parties by admission.

Section 22 of the Act, 33 U.S.C. §922,[7] vests ALJs with "extraordinarily broad" authority to modify otherwise final compensation orders if there has been a change in the claimant's physical or economic condition, or if the prior order was based on a mistake in a determination of fact. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497 (4th Cir. 1999); *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 301 (1995); *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 463-465 (1968). Even if those

[7] Section 22 provides,

> Upon his own initiative, or upon the application of any party in interest ... on the ground of a change in conditions or because of a mistake in a determination of fact by the [district director], the [district director] may, at any time prior to one year after the date of the last payment of compensation ... or at any time prior to one year after the rejection of a claim, review a compensation case ... in accordance with the procedure prescribed in respect of claims in section 919 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.

33 U.S.C. §922; 20 C.F.R. §§702.105, 702.373. While Section 22 specifically refers to the "deputy commissioner," the 1972 Amendments transferred the hearing functions formerly exercised by those officials to ALJs. 33 U.S.C. §919(d); *see Carter v. Merritt Ship Repair*, 19 BRBS 94 (1986); *Maine v. Brady-Hamilton Stevedore Co.*, 18 BRBS 129 (1986). By regulation, in 1990 the title "deputy commissioner" was changed to "district director." 20 C.F.R. §702.105.

factors are present, however, the ALJ may not modify the underlying decision unless he concludes that doing so "would render justice under the Act." *Banks*, 390 U.S. at 464; *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 255-256 (1971) (per curiam); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68, 72 (1999) (the existence of a mistake of fact does not automatically re-open a claim under Section 22), *aff'd mem.*, 238 F.3d 414 (4th Cir. 2000) (table); *Kincaid v. Island Creek Coal Co.*, 26 BLR 1-43 (2023);[8] *see also Duran v. Interport Maintenance Corp.*, 27 BRBS 8, 14 (1993).

The term "justice under the Act" is not found in the text of Section 22 but is derived from the structure of the statute and legislative history of the 1934 amendment to the law. In *O'Keeffe*, the Supreme Court of the United States explained that when Congress added a second ground for modification – mistake in a determination of fact – it did so "to broaden the grounds on which [an ALJ] can modify an award ... when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under the [A]ct." *O'Keeffe*, 404 U.S. at 255-256 (1971) (quoting S.Rep.No.588, 73d Cong., 2d Sess., 3-4 (1934); H.R.Rep.No.1244, 73d Cong., 2d Sess., 4 (1934)). Thus, the "plain import" of the statute is "to vest" ALJs with "broad discretion" to reopen otherwise final claims, even "upon his own initiative" and even if based "merely [upon] further reflection on the evidence initially submitted." *Id.*

The United States Courts of Appeals and the Board, in turn, have instructed ALJs to "consider a variety of factors" and weigh the competing equities when determining whether reopening a claim renders "justice under the Act." However, they have also made clear that the "language" and "structure" of Section 22 demonstrates a clear "preference for accuracy over finality." *Old Ben Coal Co.*, 292 F.3d at 546; *Sharpe v. Director, OWCP [Sharpe I]*, 495 F.3d 125, 133-134 (4th Cir. 2007); *Kincaid*, 26 BLR at 1-47 (citing *Westmoreland Coal Co. v. Sharpe [Sharpe II]*, 692 F.3d 317, 329-330 (4th Cir. 2012)).

In *Old Ben Coal Co.*, the United States Court of Appeals for the Seventh Circuit examined "justice under the Act" and explained how "the universe" of possible facts,

[8] In *Kincaid*, a claim arising under the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018), the Board clarified that, while the ALJ must decide whether modification renders justice under the Act before granting or denying any relief on the motion, he need not do so as a threshold matter before considering the merits of the petition, unless it is a case involving obvious bad faith. *Kincaid*, 26 BLR at 1-47. In cases where there is "no indication of improper motive," and "because accuracy is a relevant factor, … [the] ALJ must consider the evidence and render findings on the merits to properly assess whether modification is warranted." *Id.*

evidence, and actions in a particular case might factor into the "justice under the Act" inquiry:

> [W]e do not believe that only sanctionable conduct constitutes the universe of actions that overcomes the preference for accuracy. For example, just as the remedial purpose of the Act would be thwarted if an ALJ were required to brook sanctionable conduct, the purpose also would be thwarted if an ALJ were required to reopen proceedings if it were clear from the moving party's submissions that reopening could not alter the substantive award. So too, an ALJ would be entitled to determine that an employer was employing the reopening mechanism in an unreasonable effort to delay payment. The ALJ is in a unique position to assess the motivations of the party, the merits of the motion as well as institutional concerns. We do not think it wise or consonant with the grant of discretion in the statute, therefore, to unnecessarily cabin the ALJ's ability to address the complexities of a motion to reopen. To the extent that an ALJ determines that there are important reasons grounded in the language and policy of the Act that overcome the preference for accuracy, that determination should not be disturbed.
>
> In making that determination, the ALJ will no doubt need to take into consideration many factors including the diligence of the parties, the number of times that the party has sought reopening, and the quality of the new evidence which the party wishes to submit. These and other factors deemed relevant by the ALJ in a particular case ought to be weighed not under an amorphous "interest of justice" standard, but under the frequently articulated "justice under the Act" standard. This distinction is not simply one of semantics. The latter formulation cabins the discretion of the ALJ to keep in mind the basic determination of Congress that accuracy of determination is to be given great weight in all determinations under the Act.

Old Ben Coal Co., 292 F.3d at 546 (internal citations omitted).

Therefore, although the ALJ's conclusion "requires a weighing of competing equities," *Kinlaw*, 33 BRBS at 72, during which he "will no doubt need to take into consideration many factors," his ultimate "justice under the Act" determination must itself be "grounded in the language and policy of the Act" and apply "the specific policy choices made by Congress" when it enacted the statute. *Old Ben Coal Co.*, 292 F.3d at 546.

Because the law vests ALJs with broad discretion to reopen and modify claims where doing so renders justice under the Act, *O'Keeffe*, 404 U.S. at 256 (confirming "the need for a broad discretion in the [ALJ] to review factual errors in an effort to 'render

justice under the [A]ct'"), and that determination requires the ALJ to consider and apply the policies and purposes of the Act itself, *Old Ben Coal Co.*, 292 F.3d at 546, we hold that the ultimate "justice under the Act" determination is a legal conclusion to be made by the ALJ. *Kincaid*, 26 BLR at 1-47.

We are not persuaded by ICTSI's argument that an admission under OALJ Rule 18.63, that modification does not render justice under the Act, deprives the ALJ of authority to make that legal conclusion. OALJ Rule 18.63 permits the use of requests for admission, including admissions by default, during discovery before an ALJ. 29 C.F.R. §18.63; *see also* Fed. R. Civ. P. 36. In pertinent part, the scope of the discovery tool is limited to matters relating to "[f]acts, the application of law to fact, or opinions about either," 29 C.F.R. §18.63(a)(1)(i), but it "cannot be used to compel an admission of a conclusion of law." *See Sheren v. Lakeshore Eng'g Servs.*, 54 BRBS 17, 20 (2020) (quoting *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999)).

ICTSI's request for Jones Stevedoring to admit that modification would not render justice under the Act is, as the ALJ appropriately determined, a request to admit the truth of a legal determination and, therefore, beyond the scope of the regulation, 29 C.F.R. §18.63. *Sheren*, 54 BRBS at 20. In this regard, the ALJ's broad discretion cannot be "unnecessarily cabin[ed]," *Old Ben Coal Co.*, 292 F.3d at 546, nor his adjudicatory authority displaced, by a party's default admission to that legal conclusion. And, because an ALJ should not dismiss a modification request as a threshold matter without considering the accuracy of the underlying decision, *Kincaid*, 26 BLR at 1-47, it follows that an ALJ is not bound by an admission to the ultimate legal conclusion that modification must be denied because it would not render justice under the Act. Yet, by its terms, RFA No. 36 would require the ALJ to conclude that "[a]llow[ing] Jones Stevedoring Company's Modification Petition would not do justice under the [Longshore] Act," giving no consideration whatsoever to the statute's clear preference for accuracy over finality or any other relevant factors. Such a finding, wholly disconnected from the language and policy of the Act, is not permitted. *Old Ben Coal Co.*, 292 F.3d at 546 ("[giving] no credence to the statute's preference for accuracy over finality" violates the "proper legal standard").[9]

[9] In his brief, the Director suggests a "justice under the Act" determination is to be made only "where appropriate" and in limited circumstances. Dir. Resp. Br. at 2. In reply, ICTSI argues that adopting the Director's position "would improperly narrow the justice criterion." ICTSI Reply Br. at 2. ICSTI instead contends modification must always render justice under the Act. *Id.* at 2-3. We agree with ICTSI in this regard, as case law interpreting Section 22 makes clear that modification cannot be granted unless the ALJ determines doing so would render justice under the Act. *O'Keeffe*, 404 U.S. at 256 (the structure of the law necessitates broad authority for the ALJ to render justice under the

We therefore hold RFA No. 36 constitutes an improper request for admission that cannot bind the ALJ. *Sheren*, 54 BRBS at 20; *see also Martin v. Sundial Marine Tug & Barge Works, Inc.*, 12 F.4th 915, 919 (9th Cir. 2021) (a claimant's stipulation that his average weekly wage should be calculated under Section 910(a) rather than 910(c) of the Act is not binding because "whether [Section] 910(a) or (c) applies is a legal question"); *Navistar, Inc. v. Forester*, 767 F.3d 638, 644 (6th Cir. 2014) (an employer's stipulation to seventeen years of coal mine employment "is not binding with respect to the purely *legal* question" of whether that employment actually meets the definition of coal mine employment under the Black Lung Benefits Act) (emphasis in original). The ALJ thus did not err in concluding Jones Stevedoring need not have answered the RFA or filed a motion to withdraw its "default admission." *Thompson v. Beasley*, 309 F.R.D. 236, 242 (N.D. Miss. 2015). Indeed, as there was no proper request, there could be no "default admission."[10]

Accordingly, we affirm the ALJ's rejection of RFA No. 36 and his rationale for doing so, as it was neither arbitrary, capricious, an abuse of discretion, nor contrary to law.[11] *See Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010); *Olsen v. Triple A*

Act); *McCord*, 532 F.2d at 1380 ("basic criterion is whether reopening will render justice under the Act") (internal quotations and citations omitted); *Kincaid*, slip op. at 4 (*supra* note 8); *R.V. v. Friede Goldman Halter* [*Vina*], 43 BRBS 22, 23 (2009) ("modification *must* render justice under the Act") (emphasis added); *Kinlaw*, 33 BRBS at 73 (ALJ "*should* consider whether reopening will render justice under the Act") (emphasis added and internal citations omitted); *Duran*, 27 BRBS at 14 ("ALJ *must* decide whether modification would render justice under the Act.") (emphasis added); *Sharpe I*, 495 F.3d at 132-133 (failure to consider whether modification would render justice under the Act is an abuse of discretion).

[10] We are not persuaded by ICTSI's argument that the ALJ's rejection of Jones Stevedoring's "default admission" was improper under *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007) (discussing Fed. R. Civ. P. 36), as that case is factually distinguishable. In *Conlon*, the requests deemed admitted connected specific facts to an element of the underlying negligence claim, whereas here, ICTSI's request sought the truth of a legal determination. Though we do not condone or make light of Jones Stevedoring's failure to timely respond to the request or to withdraw what could have been a default admission, ICTSI's request for Jones Stevedoring to admit to the legal conclusion that granting modification would not render justice under the Act cannot bind the ALJ, whether admitted affirmatively or by default.

[11] ICTSI's appeal would fail even if its RFA could somehow be construed as simply involving "the application of law to fact." *See Sheren*, 54 BRBS at 20 (admissions are not

Machine Shops, Inc., 25 BRBS 40 (1991), *aff'd mem. sub nom*. *Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993).[12]

The ALJ Rationally Weighed the Relevant "Justice Under the Act" Factors

ICTSI next contends the ALJ erroneously interpreted *Jensen v. Weeks Marine, Inc.*, 346 F.3d 273 (2d Cir. 2003), and *R.V. v. Friede Goldman Halter* [*Vina*], 43 BRBS 22 (2009),[13] as prohibiting him from factoring into his justice under the Act analysis Jones Stevedoring's lack of diligence in submitting evidence on modification that could have been developed prior to the initial hearing. ICTSI alleges the ALJ did not adequately

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determinative of "legal question[s]" that require "a conclusion of law based on application of the law to the facts"). Any RFA that contains a "legally-related request" must at a minimum "connect the relevant legal proposition to specific facts and circumstances of the case." *Thompson*, 309 F.R.D. at 242. Here, Employer's RFA No. 36 makes no effort whatsoever to connect the two, opting instead for an "improper" request for an admission to the truth of a legal conclusion. *Id*. at 241-242.

[12] ICTSI also contends the ALJ's ruling on the RFA was reversible error because it formed the basis for his admission of Dr. Kafrouni's deposition testimony on modification. ICTSI Br. at 38. Specifically, it asserts the ALJ "premised what he termed his mistake of fact in the 2018 D&O on the absence of Dr. Kafrouni's opinion regarding causation," and "absent Dr. Kafrouni's testimony, there is no support for Jones Stevedoring's mistake of fact theory to support modification." ICTSI Br. at 38 (citations omitted). In his modification decision, the ALJ overruled ICTSI's objection to Dr. Kafrouni's deposition transcript because he found ICTSI's request sought the truth of a "purely legal conclusion" and rejected Jones Stevedoring's default admission. D&O (2022) at 8 n.7. Because we affirm the ALJ's rejection of Jones Stevedoring's purported admission, we reject ICTSI's argument as moot.

[13] In *Jensen*, the United States Court of Appeals for the Second Circuit held that the party requesting modification need not "make some threshold proffer of new evidence" or "show that the evidence it developed was not available before [the] first hearing in order to secure a modification hearing." *Jensen*, 346 F.3d at 276-277. Citing *Jensen* and *Old Ben Coal Co.*, the Board held in *Vina* that denying modification because the petitioner failed to produce its evidence at the initial hearing is at odds with the Act's preference for "accuracy over finality." The Board therefore overruled its prior decisions imposing such "limitations on evidence." *Vina*, 43 BRBS at 24-26 (overruling *Feld v. General Dynamics Corp.*, 34 BRBS 131 (2000), and *Lombardi v. Universal Maritime Serv. Corp.*, 32 BRBS 83 (1998)).

consider Jones Stevedoring's "litigation strategy" and additional factors such as improper motive that weigh against a finding that Jones Stevedoring's motion for modification renders justice under the Act. ICTSI Br. at 34-36, 41-43; ICTSI Reply Br. at 4-5, 13-14. We disagree.

As we have previously emphasized, Section 22 reflects a preference for accuracy over finality, *Vina*, 43 BRBS at 25, and gives the ALJ broad discretion to reopen a case in order to correct any mistake of fact. *O'Keeffe*, 404 U.S. at 256. To properly exercise this discretion, the ALJ must assess factors relevant to whether modification would render justice under the Act. *Sharpe I*, 495 F.3d at 132-134; *Old Ben Coal Co.*, 292 F.3d at 547; *Kinlaw*, 33 BRBS at 72. In exercising his discretion here, the ALJ correctly noted the fact that evidence could have been developed prior to the initial hearing does not, in and of itself, defeat a petition for modification. D&O (2022) at 14; *Jenson*, 346 F.3d at 276-277 (movant need not show evidence offered on modification was not available before the initial hearing); *see also Vina*, 43 BRBS at 25-26 (limitations on evidence offered on modification are inconsistent with the Act's preference for accuracy over finality).

The ALJ also adequately assessed factors relevant to whether modification would render justice under the Act and addressed ICTSI's allegations of Jones Stevedoring's lack of diligence and improper motive.[14] He found some of Jones Stevedoring's conduct "concerning," but it ultimately did not overcome the Act's preference for accuracy over finality. D&O (2022) at 14. Because ICTSI has not established the ALJ abused his discretion in weighing the relevant factors, we affirm the ALJ's determination that granting modification to correct a mistake in determination of fact in this case renders justice under the Act.

The ALJ's Aggravation and Last Responsible Employer Determinations are Supported by Substantial Evidence and in Accord with Law

ICTSI contends the ALJ applied "an unusually broad understanding" of aggravation, and his factual determinations are not supported by substantial evidence. In support of its arguments, ICTSI asserts Claimant's testimony establishes he did not

[14] Collectively, ICTSI listed eight instances of Jones Stevedoring's alleged misconduct and argued modification would be futile because it would not change the substantive award of benefits. *See* ICTSI Pre-Hearing Mem.; ICTSI Post-Hearing Br.; ICTSI Br.; ICTSI Reply Br.

aggravate his neck condition,[15] and Dr. Kafrouni's opinion is insufficient to support any aggravation.[16] ICTSI Br. at 43-47. We reject ICTSI's contentions.

Under the aggravation rule, an employer is liable for the claimant's full disability if a work-related injury aggravates, accelerates, or combines with a pre-existing injury or condition to result in the disability. *Port of Portland v. Director, OWCP [Ronne]*, 932 F.2d 836 (9th Cir. 1991); *Foundation Constructors, Inc. v. Director, OWCP [Vanover]*, 950 F.2d 621, 624 (9th Cir. 1991). The aggravation rule applies to both the causation inquiry and in identifying the responsible employer in traumatic injury cases. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co.* [*Price*], 339 F.3d 1102 (9th Cir. 2003) (responsible employer); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966) (causation); *Obadiaru v. ITT Corp.*, 45 BRBS 17 (2011) (responsible carrier).

With respect to the responsible employer in a traumatic injury case such as this, the applicable rule is:

> If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Vanover, 950 F.2d at 624 (citing *Kelaita v. Director,* OWCP, 799 F.2d 1308, 1311 (9th Cir. 1986)); *see also Buchanan v. Int'l Transp. Servs. [Buchanan II]*, 33 BRBS 32, 35

[15] Claimant testified that: he did not sustain any injuries when he returned to work in June 2014 through when he stopped working in March 2015, TR at 227; he was ready, able, and willing to work on March 1, 2015, TR at 232; and his symptoms progressed since the May 2013 work injury and 2014 surgery, TR at 237-238; CET EX 3 at 45-46, 80, and continued to go "downhill" even after he stopped working in March 2015, TR at 214-216; CET EX 3 at 35-38, and since retiring in August 2015, CET EX 3 at 68.

[16] Dr. Kafrouni testified he did not know whether Claimant's condition stayed the same, improved, or worsened between the time he stopped working in March 2015 until he treated Claimant in October 2016. Jones EX 503 at 60. Between January 2014 and October 29, 2016, Claimant did not receive treatment from Dr. Kafrouni. Claimant testified he did not seek treatment because he feared needing another surgery. TR at 213.

(1999), *aff'd mem. sub nom. Int'l Transp. Servs. v. Kaiser Permanente Hospital*, 7 F. App'x 547 (9th Cir. 2001).

Contrary to ICTSI's contentions, the ALJ's finding that Claimant aggravated his neck condition while working for ICTSI as a crane operator[17] is supported by substantial evidence in the record and is in accordance with law. All three doctors in question, Dr. Kafrouni,[18] Dr. John W. Swanson,[19] and Dr. Christopher Morgan,[20] stated the physical requirements of Claimant's crane operator job could increase or contribute to his symptoms. Although Dr. Thomas Rosenbaum and Dr. Swanson opined there were no pathological changes to Claimant's neck condition due to any of his continued work activities following the 2014 surgery, Jones EX 172 at 393-394; CET EXs 5 at 191-192; 504 at 160, with which Dr. Kafrouni to some extent agreed, Jones EX 503 at 30-31, 49-50,

[17] Claimant last worked for Jones Stevedoring as a winch driver on December 14, 2014, for ICTSI as a crane operator on February 24, 2015, and for CET as a winch driver/bulk loader on February 27, 2015. CX 5 at 45-47, 52. The parties stipulated Claimant's "last day of actual work" was on February 27, 2015, with CET. TR at 46; *see also* D&O (2018) at 3, Stip. 5.

[18] Dr. Kafrouni testified it was "entirely probably [sic]" that Claimant's work activities aggravated his cervical radiculopathy. Jones EX 503 at 36. He stated activities "such as overhead lifting" and "having to keep the neck in an extended position[] or disadvantageous position" could "certainly render the radiculopathy symptomatic once again," which could last "days, week, months or years," *id.* at 56-57, and agreed that overall, the progression of Claimant's condition was "in part" due to his continued work activities, *id* at 61.

[19] Dr. Swanson disagreed that Claimant's subsequent employment worsened his neck *conditions*, but he agreed Claimant's crane operator activities "are known to cause a temporary increase in *symptoms*." CET EX 504 at 160 (emphasis in original); *see also* CET EX 5 at 191-192.

[20] Dr. Morgan stated Claimant's work activities for ICTSI (climbing ladders while looking up, operating cranes while looking up, and looking down between his knees while squatting) "would put stress on the neck." He noted the presence of pain when performing these activities indicates they are "likely causing damage to an already damaged area." Jones EX 501 at 4-5. The ALJ gave less weight to Dr. Morgan's opinion than to Dr. Kafrouni's and Dr. Swanson's; however, he found Dr. Morgan's observation regarding Claimant's pain symptoms while working is "logical, if not terribly convincing on its own." D&O (2022) at 19.

an increase in symptoms is sufficient to show a work injury, an aggravation, or both. *Kelaita*, 799 F.2d at 1311; *see also Pittman v. Jeffboat, Inc.*, 18 BRBS 212, 214 (1986).

In this regard, the ALJ permissibly credited Claimant's testimony that he had pain and radicular symptoms while working as a crane operator, his symptoms and neck condition got progressively worse when he returned to work, and he retired because of his symptoms, TR at 212-213, 237; CET EX 3 at 31, 37-38, 45-46, 77. He also permissibly credited Dr. Kafrouni's explanation as to why it was "entirely probabl[e]" that Claimant's crane operator activities rendered his radiculopathy symptomatic and aggravated his condition, Jones EX 503 at 26-30, 56-57. D&O (2022) at 16-19; *see also* D&O (2018) at 30-36. Thus, substantial evidence supports the ALJ's finding that Claimant's crane operator work aggravated his neck condition and contributed to his ultimate disability. *See Lamon v. A-Z Corp.*, 46 BRBS 27, 28 (2012), *vacating on recon.* 45 BRBS 73 (2011).[21]

Finally, the ALJ thoroughly addressed ICTSI's arguments regarding the credibility of Dr. Kafrouni's testimony. While the ALJ described Dr. Kafrouni's answers as "somewhat hesitant" and "at times equivocal," the ALJ permissibly credited his opinion, noting that the physician stated: Claimant became "symptomatic" when he returned to work as a crane operator following his 2014 surgery; the crane operator position was "very problematic for an individual such as [Claimant];" and it was entirely probable such work aggravated his condition. Jones EX 503 at 30-36; D&O (2022) at 18. Dr. Kafrouni opined Claimant's symptoms were "more than a waxing or waning" of his underlying condition, as his crane operator work was "certainly enough to create a wors[en]ing of nerve root irritation," and in his case, did cause "a worsening that persisted for months to years." Jones EX 503 at 36.

The ALJ also considered Dr. Kafrouni's acknowledgment that radiculopathy can "progress" even "without contributions from work activities." Jones EX 503 at 58-59. However, the ALJ reasoned it did not "warrant disregarding" the physician's opinion and

[21] Even if alternative findings and inferences could have been made from Claimant's testimony, *see supra* note 15, as the ALJ made in his initial decision, D&O (2018) at 34-35, the choice among reasonable inferences is left to the ALJ, and he is free to disregard parts of a witness's testimony while crediting other parts of it. *Mijangos v. Avondale, Inc.*, 948 F.2d 941 (5th Cir. 1991). Moreover, the ALJ is permitted to correct any mistake of fact on modification, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe*, 404 U.S. 254. Here, the ALJ's "further reflection" on the evidence initially submitted (Claimant's testimony), in conjunction with newly submitted evidence (Dr. Kafrouni's testimony) led him to a different conclusion which is supported by substantial evidence.

did not "invalidate his explanation regarding the impact of Claimant's work on his condition" because, overall, Dr. Kafrouni specifically opined Claimant's subsequent employment "was at least partially responsible" for the progression of his neck condition. D&O (2022) at 18; Jones EX 503 at 61.[22]

As the ALJ's reasons for crediting Dr. Kafrouni's testimony are rational, *Hawaii Stevedores Inc. v. Ogawa*, 608 F.3d 642, 650 (9th Cir. 2010), and his credibility determinations are not "inherently incredible and patently unreasonable," *Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1321, (9th Cir. 1990), we decline to disturb them.

Accordingly, we affirm the ALJ's Decision and Order Granting Modification.

SO ORDERED.

DANIEL T. GRESH, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[22] During his deposition, Dr. Kafrouni agreed that, overall and based on Claimant's description and clinical exam (and less so on the radiology reports), the progression of his condition was "in part" due to his continued work activities. Jones EX 503 at 61.