BRB No. 00-0853

GARY DAUGHERTY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
STEVENS SHIPPING & TERMINAL COMPANY	)	
	)	
	)	
and	)	
	)	
ARM INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order on Petition for Modification of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Mary Nelson Morgan (Cole, Stone, Stoudemire, Morgan & Dore, P.A.), Jacksonville, Florida, for employer/carrier.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Petition for Modification (99-LHC-2255) of Administrative Law Judge Stuart A. Levin 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

On March 12, 1995, claimant fell from the gangway of a ship and injured his back.

He was diagnosed as suffering from a lumbosacral sprain, and he reached maximum medical improvement on June 26, 1995. Claimant was unable to return to his former duties and sought benefits under the Act. In a Decision and Order dated June 12, 1997, Administrative Law Judge John C. Holmes found that employer established the availability of suitable alternate employment in the Jacksonville community and that claimant has a residual wage-earning capacity of $12 per hour or $480 per week. Therefore, he awarded claimant continuing permanent partial disability benefits pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21).

At the time of the first hearing, claimant had moved to the Pensacola area and was working as a security guard earning minimum wage. Claimant continues to work and reside in the Pensacola community, but now works as a lens grinder trainee earning $7 per hour. He sought modification of the original award based on his contention that he is unable to earn $12 per hour in Pensacola, asserting that his wage-earning capacity is lower than that initially found by Judge Holmes.

In his Decision and Order on Petition for Modification, Administrative Law Judge Stuart A. Levin (the administrative law judge) found that claimant established a change in his economic condition based on labor market conditions in Pensacola. The administrative law judge found that claimant's relocation to Pensacola was reasonable and justified by his economic concerns. Thus, he concluded that Pensacola is the relevant market in which to assess claimant's wage-earning capacity. In weighing the conflicting testimony regarding wage rates of available employment in the Pensacola area, the administrative law judge gave greater weight to the opinion of Ms. Justice. After considering Ms. Justice's labor market survey, claimant's actual job and claimant's earning potential as a security guard, the administrative law judge modified claimant's award of benefits to reflect a post-injury wage-earning capacity of $8.75 per hour or $350 per week.

On appeal, employer contends that the administrative law judge erred in finding that there has been a change in economic condition since the initial hearing sufficient to justify a modification of the award of benefits. Employer asserts that the administrative law judge erred in finding that Pensacola is the relevant market in which to assess claimant's wage-earning capacity. Claimant responds, urging affirmance of the administrative law judge's decision.

Section 22 of the Act, 33 U.S.C. §922, authorizes the modification of a Decision and Order, based on a change in condition or mistake of fact, at any time prior to one year after the last payment of compensation. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995). The party requesting modification based on a change in condition has the burden of showing the change. *See Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)

(1997); *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990). Section 22 modification may be based on a change in a claimant's wage-earning capacity. *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT)*; Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). In the present case, in support of his motion for modification, claimant introduced evidence that his wage-earning capacity in the Pensacola area is lower than that found by Administrative Law Judge Holmes. The administrative law judge found that this evidence was sufficient to grant the motion for modification. For the following reasons, we affirm the administrative law judge's finding that the evidence claimant submitted on modification is sufficient to bring the claim within the scope of Section 22. *See generally Jensen v. Weeks Marine, Inc.*, 34 BRBS 147 (2000).

Claimant in this case bore the burden of demonstrating a change in his economic condition. In doing so, the general standards for determining disability are the same in a Section 22 proceeding as in the initial proceeding. *See Rambo I*, 515 U.S. at 296, 30 BRBS at 3(CRT); *Vasquez*, 23 BRBS at 431. Since claimant's assertion regarding a change in his economic condition involves the job opportunities available to him in Pensacola, where claimant relocated following his injury in Jacksonville, the initial inquiry concerns the relevant labor market in which to assess job availability for purposes of determining claimant's wage-earning capacity. Following the lead of the United States Courts of Appeals for the Fourth and First Circuits, the Board has held that in instances where claimant relocates following an injury, the administrative law judge should determine the relevant labor market after considering such factors as claimant's residence at the time he files for benefits, his motivation for relocating, the legitimacy of that motivation, the duration of his stay in the new community, his ties to the new community, the availability of suitable jobs in the community as opposed to those in his former residence and the degree of undue prejudice to employer in proving suitable alternate employment in a new location. *See Holder v. Texas Eastern Products Pipeline, Inc.*, __ BRBS __, BRB No. 00-0602 (March 12, 2001); *see also Wood v. U.S. Dept of Labor*, 112 F.3d 592, 31 BRBS 43(CRT) (1st Cir. 1997); *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 28 BRBS 96(CRT) (4th Cir. 1994); *Wilson v. Crowley Maritime*, 30 BRBS 199 (1996).

At the time of the initial hearing, claimant was employed in Pensacola as a security guard earning $5 per hour. Administrative Law Judge Holmes found that given claimant's Associate of Arts degree in electronics and his supervisory work experience, he is qualified for positions paying more than minimum wage. He concluded that claimant's experience would lead to higher wages in the future, and that his actual earnings were thus not representative of his wage-earning capacity. He found that claimant's true wage-earning capacity is $12 per hour, crediting the opinion of Jerry Albert, a vocational counselor, who performed a labor market survey in the Jacksonville area. Subsequent to the award of benefits, claimant began a retraining program with the Department of Labor. At the time of the modification proceeding, he had been employed in a training program as a lens grinder in

the Pensacola area for two years.

In ruling on modification, the administrative law judge applied the factors outlined in *See* and *Wood*, and concluded that claimant's relocation was reasonable and adequately justified by his economic concerns. Decision and Order on Petition for Modification at 4. He noted that claimant was unable to pay his bills while living in Jacksonville and not receiving compensation, and thus moved to Pensacola to live with family members. He found that claimant's ties to the Pensacola area have become substantial since the original hearing, as claimant has lived in the area since 1996 and has held his current job as a lens grinder for the past two years. We affirm these findings as they are rational and supported by substantial evidence. *See generally Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961).

Employer contends that the administrative law judge failed to consider the "undue prejudice to [e]mployer as a result of the disparity in wages between Pensacola and Jacksonville," based on the difference in claimant's wage-earning capacity found by Administrative Law Judge Holmes of $12 per hour and the wage-earning capacity of $8.75 per hour found by Administrative Law Judge Levin. Contrary to employer's assertion, the fact that claimant's wage-earning-capacity in Pensacola is lower than his wage-earning-capacity in Jacksonville is not sufficient to establish undue prejudice to employer. The administrative law judge weighed the evidence regarding claimant's earning potential and found that Mr. Albert's testimony that a trainee in lens grinding could earn $10 to $12 per hour was not credible as the average wage for a fully licensed optician in Florida is $12.83 per hour. Moreover, the administrative law judge noted that it was not credible that claimant could have earned $12 per hour after advancement in his former position as a security guard, as the evidence established a potential salary of $350 per week or $8.75 per hour.[1] Therefore, the administrative law judge concluded that claimant's current wage-earning capacity in the Pensacola area does not exceed $8.75 per hour, based on claimant's education, skills and training, and his physical limitations. Employer has not identified any other source of prejudice regarding the choice of the Pensacola area as the relevant market in which to assess claimant's wage-earning capacity. Thus, inasmuch as it is supported by substantial evidence, and employer has raised no error on appeal, we affirm the administrative law judge's findings that Pensacola is the relevant market in which to assess claimant's wage-earning capacity and that claimant has a residual wage-earning capacity of $8.75 per hour. Therefore, we affirm the administrative law judge's grant of modification, as

[1]The administrative law judge noted that the security guard position is the only wage data derived from the Pensacola labor market considered by Administrative Law Judge Holmes.

claimant established a change in his economic condition. *See Rambo I*, 515 U.S. 291, 30 BRBS 1(CRT).

Accordingly, the Decision and Order on Petition for Modification of the administrative law judge is affirmed.

SO ORDERED

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge