



USL&H Modification of Compensation Awards

Most longshore compensation claims involve a loss-of-wage-earning-capacity analysis, and benefits are paid for the wage loss. (Scheduled awards are paid based on permanent disability, provided there is any wage-earning capacity.) Compensation indemnity payments are made weekly for as long as the loss of wage-earning capacity exists, which means for the natural life, not the work life, of the claimant if the disability extends permanently.

The Longshore Act provides a method for adjusting the weekly payments if circumstances change after a compensation order is issued. Section 22 (Modification of Awards) provides two reasons a compensation order may be modified:

- Change in condition
- Mistake of fact

A mistake of fact is rare, but this provision allows an ALJ to make equitable corrections to an award when necessary. The Supreme Court has confirmed that “condition” is not limited only to physical condition but also applies to economic circumstances. Any party to a compensation claim can initiate a request for modification. Thus, an injured worker whose physical condition deteriorates over time can seek modification to obtain additional compensation. If an employer finds the claimant who, when compensation was awarded, was unable to work but is later actually working or capable of work, can request modification to reduce the weekly benefits.

Section 22 does not apply to 8(i) (lump sum) settlements. One advantage to such settlements is that they are final 30 days after approval and cannot thereafter be changed. These agreements bring finality to a compensation claim and allow the parties to close their files. However, an ALJ’s compensation order will only address disability from the date of the injury to the date of the hearing. If the ALJ finds an existing wage-loss disability under § 8(c)(21), he or she will award weekly benefits to be paid for the duration of that disability. If circumstances change, any party can request modification.

The Supreme Court validated the use of Section 22 to award nominal or “de minimis” compensation, e.g., \$1 a week or \$1 a year, to keep a claim open until such time as claimant’s condition deteriorates. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121 (1997). The Court held “a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.” *Id. at 138*. In the Court’s view, disability is a flexible and forward-looking concept. It considers the impact of the injury on wage earnings whenever there is a significant effect, either positive or negative, on the claimant’s ability to work.

The main purpose of the Longshore Act is to compensate injured workers for economic harm resulting from their decreased ability to earn wages. The Act defines that economic harm as disability in Section 2(10). For general injuries, i.e., unscheduled injuries, compensation depends on the loss of wage-earning capacity as determined in accordance with § 8(h) of the Act. The flexible language of § 8(h) allows considerable latitude in fixing post-injury wage-earning capacity.

The claimant’s own earnings are to be used unless they do not fairly represent his wage-earning capacity. In those circumstances, the administrative law judge may “in the interest of justice” determine a loss of wage-earning capacity based on extrinsic factors. When there is a demonstrable wage loss, this calculation may be fairly mechanical. In circumstances such as

Rambo's, i.e., when current earnings equal or surpass those at the time of the injury but medical evidence shows a significant probability of future deterioration and work restriction, the issue becomes more complicated. Thus, an ALJ could award nominal compensation if he finds the evidence shows that there is a "significant possibility" of future wage-loss due to deteriorating physical condition even when current earnings are significantly higher than the Average Weekly Wage.

Once made, a modification request takes the path of an original claim. If the parties voluntarily agree that circumstances have changed and also agree on the extent of the change, a district director can modify any existing award. However, this is done only with the complete agreement between the parties. Should any side disagree, an informal conference will be held, and if that does not bring a resolution, the modification request will be referred for a formal hearing.

At the hearing, the burden of proof rests on the party seeking modification. Since employees have lifetime medical care for work injuries, they are constantly submitting medical reports showing their physical condition. Employers providing compensation are able to compel claimants to see the employer's doctors at regular intervals to verify their condition and suitability for work.

Employers paying compensation are allowed through § 8(j) to require workers receiving benefits to report any earnings. Failure to report or intentionally misreporting by claimants has harsh consequences.

The modification procedure distinguishes workers' compensation from tort suits. In litigation, finality of result is important; however, in workers' compensation the adjustment of benefits to a claimant's actual wage-earning capacity when that ability changes with time achieves the purposes of the Act. In *Rambo*, the Court noted that liberally permitting modifications brought the Longshore Act in line with virtually every other modern workers' compensation act. (See 3 A. LARSON AND L. LARSON WORKMEN'S COMPENSATION LAW § 81.10 p. 15-1045 (1996)). Larson observes that a flexible approach to modification is preferable to extending the limitation period for filing claims because adjusting compensation benefits is more in keeping with tailoring the benefits through the actual wage loss of injured workers.

Modification requests have a time limit of one-year from date last date compensation was paid or a year from the denial of the claim. If benefits are being paid at the time a modification is sought and the award is changed, the benefits will be adjusted as of the date the modification is requested. As broad as modification proceedings can be, they are not a means of re-trying a case on any major issue such as fact of injury, course and scope of employment or compensation rate. The modification process is intended to adjust only the amount of benefits.

The impact of a modification can be dramatic. An employee who suffers an injury that falls within the list of scheduled awards but cannot find work may be awarded permanent total disability. Should the job market improve or the claimant's condition change so that work is available, even part-time work, his award can be reduced to a scheduled disability, and benefits terminated entirely.

Modification exists to adapt compensation payments to existing disability, and its availability lessens the impact of permanent total disability awards. In reality, those potentially expensive claims can be regulated through claims monitoring, and § 22 exists to provide an avenue to adjust benefits when the economy improves or claimant's education/training or work show an increase in wage-earning capacity. 3CU's expert longshore claim examiners track these total disability rewards and seek adjustment when the circumstances of the claim present such an opportunity.

