HAROLD S. ODDEN	)	BRB Nos. 04-0722 and
	)	04-0722A
Claimant-Respondent	)	
Claimant-Cross-Petitioner	)	
v.	)	
	)	
LOUIS DREYFUS CORPORATION	)	DATE ISSUED: 06/13/2005
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest-Respondent	)	
	)	
	)	
HAROLD S. ODDEN	)	BRB No. 04-0904
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOUIS DREYFUS CORPORATION	)	
	)	
and	)	
	)	
CRAWFORD & COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	DECISION and ORDER

Appeals of the Decision and Order, Decision and Order on Motions for Reconsideration, and Attorney Fee Order of Jennifer Gee, Administrative Law Judge, United States Department of Labor and the Compensation Order-Approval of Attorney Fee of Karen P. Staats, District Director, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Karen O'Kasey (Hoffman, Hart & Wagner, LLP), Portland, Oregon, for employer/carrier.

Andrew J. Schultz (Howard Radzely, Solicitor of Labor; Donald S. Shire, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Motions for Reconsideration and claimant appeals the Attorney Fee Order (2002-LHC-1336) of Administrative Law Judge Jennifer Gee 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). Claimant also appeals the Compensation Order-Approval of Attorney Fee (Case No. 14-0126578) of District Director Karen P. Staats. We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *See Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant sustained work-related injuries to his neck and left arm and shoulder in an incident at work on October 1, 1997. Claimant underwent elbow surgery on June 16, 1999. In addition, claimant has a disc protrusion at C6-7 which causes pain into the shoulder area. Claimant continued to work for employer until April 4, 2002, when he was laid off. Claimant sought scheduled permanent partial disability benefits for his arm injury, a nominal award of benefits for the period prior to his layoff, and ongoing

permanent partial disability benefits due to his loss in wage-earning capacity after the layoff.

In her Decision and Order, the administrative law judge found that claimant reached maximum medical improvement on August 10, 1999. She awarded claimant permanent partial disability benefits under the schedule for a five percent arm impairment and a *de minimis* award for the period from August 10, 1999 through April 4, 2002.[1] The administrative law judge found that claimant's average weekly wage at the time of his injury was $1,162.25, and that his post-injury wage-earning capacity, after April 4, 2002, is $679.18. The administrative law judge denied employer's petition for relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C §908(f).[2] The administrative law judge denied employer's motion for reconsideration.

Subsequently, the administrative law judge entered an Attorney Fee Order in which she awarded claimant's counsel $13,178.85 in fees and costs. The administrative law judge awarded a fee for counsel's services at an hourly rate of $225. Moreover, the district director awarded counsel a fee of $3,627.26; she awarded counsel an hourly rate of $210.

On appeal, employer contends that the administrative law judge erred in awarding claimant benefits under the schedule for a five percent impairment to his left arm, in finding claimant entitled to a *de minimis* award for his unscheduled injuries, and in finding that claimant has an ongoing loss in wage-earning capacity. BRB No. 04-0722. In his appeals, claimant contends that the administrative law judge and

[1] This award excluded the period from October 16-22, 2001, when claimant was temporarily totally disabled.

[2] The Director, Office of Workers' Compensation Programs, has filed a brief seeking affirmance of the denial of Section 8(f) relief as employer did not raise on appeal any issue with regard to Section 8(f). For this reason, we affirm the denial of Section 8(f) relief.

district director abused their discretion in reducing the requested hourly rate from $250 to $225 and $210, respectively.[3] BRB Nos. 04-0722A, 04-0904.

We reject employer's contention that the administrative law judge erred in awarding claimant benefits for a five percent impairment to his arm. Before the administrative law judge, as well as on appeal, employer contended that Dr. Peterson failed to explain the reasoning behind his five percent impairment rating. In finding employer's contention unfounded, the administrative law judge stated that the Ninth Circuit held in *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir.), *cert. denied*, 528 U.S. 809 (1999), that a treating physician's opinion is entitled to substantial weight, and that this case arises in the Ninth Circuit. Moreover, contrary to employer's contention, the administrative law judge did not mechanically credit Dr. Peterson's opinion. She observed that Dr. Peterson had treated claimant for more than three years and had performed surgery on claimant's left elbow. The administrative law judge also rationally credited claimant's testimony regarding his continuing pain and inability to resume work in his normal capacity. Finally, the administrative law judge observed that there is no other evidence of record concerning an impairment or lack thereof to claimant's arm.

The administrative law judge is not bound by any particular standard or formula but may consider a variety of medical opinions and observations in addition to claimant's description of his symptoms and physical effects in assessing the degree of physical impairment to a scheduled member. The Act does not require that an impairment of the arm be based on a medical opinion using the criteria of the American Medical Association *Guides to the Evaluation of Permanent Impairment. See Pimpinella v. Universal Maritime Serv., Inc.*, 27 BRBS 154 (1993). As substantial evidence supports the administrative law judge's scheduled award, we affirm it. *See generally Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195 (2001).

Employer next contends that the administrative law judge erred in entering a nominal award for the period from August 10, 1999 through April 4, 2002. Nominal or *de minimis* awards are benefits to which an injured employee may be entitled if he has no current loss of wage-earning capacity as a result of his injury but has established the significant possibility that the injury will cause future economic harm. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). In her initial decision, the administrative law judge stated that claimant's post-injury work

[3] We deny claimant's motion to consolidate these appeals with claimant's appeal in BRB No. 05-0513, inasmuch as the briefing schedule in that appeal is not yet complete. The decision on employer's appeal in BRB No. 04-0722 must be issued by June 16, 2005. Pub. L. No. 108-447 (2004).

restrictions limited his ability to accept jobs, thereby creating the risk that his wage-earning capacity would decrease. The administrative law judge awarded claimant nominal benefits of one dollar per week because claimant, in fact, ultimately was laid off. Decision and Order at 9. In her rejection of employer's motion for reconsideration of this award, the administrative law judge again noted claimant's inability to work in his normal capacity post-injury. She stated that the risk of layoff became a reality on April 4, 2002, and therefore claimant is entitled to a nominal award. Decision on Recon. at 3.

We must remand this case for further consideration of claimant's entitlement to a nominal award. The administrative law judge did not make findings as to which physical restrictions limited claimant's ability to accept jobs. If the limitations were due solely to claimant's left elbow impairment, they cannot provide a basis for a *de minimis* award. *De minimis* awards are predicated on Section 8(h), 33 U.S.C. §908(h), *see Rambo*, 521 U.S. at 135, 31 BRBS at 60(CRT), which is wholly inapplicable to scheduled injuries that are permanent in nature. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980); *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd mem.*, 84 Fed. Appx. 333, 37 BRBS 120(CRT) (4th Cir. 2004); *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002). If the restrictions are due to claimant's neck and shoulder injuries, however, the administrative law judge may find that a *de minimis* award is appropriate. *See Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004). Furthermore, the administrative law judge should reconsider whether she awarded nomimal benefits due solely to the fact that, in hindsight, claimant ultimately was laid off. While the purpose of a nominal award is to preserve the employee's right to seek benefits should his injury in the future cause a loss in wages, *see Rambo II*, 521 U.S. at 133-137, 31 BRBS at 59-60(CRT); *Randall v. Comfort Control, Inc*., 725 F.2d 791, 16 BRBS 56(CRT) (D.C. Cir. 1984), in this case the preservation of that right was arguably unnecessary as the claim for actual loss in wages due to the injury was under consideration by the administrative law judge. *See Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part mem.*, Nos. 02-71207, 02-71578 , 2004 WL 1064126 (9th Cir. May 11, 2004). We therefore vacate the administrative law judge's nominal award and remand the case for reconsideration of this issue.

Employer further contends that the administrative law judge erred in finding that claimant suffered a loss in wage-earning capacity as of April 4, 2002. Employer contends that since, pursuant to *Matulic v. Director, OWCP*, 154 F.3d 1052, 32 BRBS 148(CRT) (9th Cir. 1998), Section 10(a) was applicable to determine claimant's average weekly wage, then the rationale of *Matulic* should apply to claimant's post-injury wage-earning capacity determination. Employer maintains that under such a calculation, claimant's post-injury wages are higher than his average weekly wage.

We reject this contention, as it does not comport with the specific requirements of the Act. Section 8(h) provides that claimant's post-injury wage-earning capacity is to be based on his actual post-injury earnings where, as here, they reasonably and fairly represent claimant's earning capacity. Section 8(c)(21) states that claimant's loss in wage-earning capacity is to be calculated as $66^{2/3}$ percent of the difference between claimant's average weekly wage and his post-injury wage-earning capacity. 33 U.S.C §908(c)(21). The fact that Section 10(a) permits claimant's average weekly wage to be calculated on a theoretical basis does not establish that post-injury wage-earning capacity must be calculated in this manner given the statute's reference to a claimant's "actual [post-injury] earnings." *See Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002); *Johnston v. Director, OWCP*, 280 F.3d 1272, 36 BRBS 7(CRT) (9th Cir. 2002); *Deweert v. Stevedoring Services of America*, 272 F.3d 1241, 36 BRBS 1(CRT) (9th Cir. 2002). Accordingly, as employer does not otherwise challenge the administrative law judge's finding, we affirm the finding that claimant's actual post-injury earnings, adjusted for inflation, are $679.18 per week, and the resulting award of ongoing permanent partial disability benefits. Decision and Order on Reconsideration at 7.

In his appeals, claimant challenges the attorney's fee awarded by the administrative law judge and the district director. Claimant argues that the administrative law judge and district director erred by reducing his requested hourly rate from $250 to $225 and $210 respectively.[4] The administrative law judge extensively discussed the parties' contentions concerning an appropriate hourly rate. *See* Attorney Fee Order at 3-4. She concluded that the requested rate of $250 was excessive in this case, given the lack of complexity of the case, and found that $225 per hour is commensurate with the nature of the case, claimant's counsel's experience, and the rates he has been awarded in other cases. Section 702.132, 20 C.F.R. §702.132, provides that the award of any attorney's fee shall be reasonably commensurate with the necessary work done, the complexity of the legal issues involved, and the amount of benefits awarded. *See generally Finnegan v. Director, OWCP*, 69 F.3d 1039, 29 BRBS 121(CRT) (9th Cir. 1995); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10th Cir. 1997); *see also Newport News Shipbuilding & Dry Dock Co. v. Brown*, 376 F.3d 245, 38 BRBS 37(CRT) (4th Cir. 2004). We affirm the hourly rate of $225 awarded as the administrative law judge adequately addressed the relevant factors and claimant has not shown that the administrative law judge abused her discretion in reducing the hourly rate based on the regulatory criteria. *See generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

[4] We decline counsel's invitation to take judicial notice of a newspaper article discussing the cost of living in Portland, Oregon. This argument is appropriately addressed to the administrative law judge and the district director.

However, we cannot affirm the district director's reduction of the requested hourly rate to $210. She too relied on the absence of complex issues to find that a rate of $250 is not warranted, a finding that is within her discretion. *Id.* In addition, she stated that "It is customary to award lower hourly rate for work performed before this office since no litigation occurs." Comp. Order at 3. This is an improper basis on which to reduce counsel's hourly rate. Claimant correctly contends that the value of his services is not worth less because of the type of work performed, and the Board has held that it is improper to distinguish between trial and non-trial work in setting an hourly rate. *Kauffman v. Brady-Hamilton Stevedore Co.*, 12 BRBS 544 (1980). Therefore, as the district director rationally rejected a rate of $250 and erred in awarding a rate of $210 based on the nature of the services provided, we modify the district director's fee award to reflect an hourly rate of $225.[5]

[5] This results in an award of fees and costs of $3,848.51.

Accordingly, we affirm the administrative law judge's award of benefits for a five percent impairment to the arm and the ongoing permanent partial disability award beginning April 5, 2002, based on a post-injury wage-earning capacity of $679.18. We vacate the *de minimis* award and remand the case for further consideration consistent with this decision.[6] The fee award of the administrative law judge is affirmed. The fee award of the district director is modified to reflect an hourly rate of $225.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6] In an Order dated April 13, 2005, the Board dismissed employer's appeals of the fee awards, BRB Nos. 04-0904A and 05-0152, for failure to file a petition for review and brief. Employer's appeals were taken to preserve its right to challenge the fee awards in the event that its appeal on the merits was successful. Notwithstanding the Board's dismissal of its appeals, employer retains the right to petition the administrative law judge for a lower fee award if claimant's degree of success changes on remand, as fee awards are not final until all appeals are exhausted. *See generally McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).