BRB No. 00-0609

| | | |
|---|---|---|
| KENNETH RAAPPANA | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| STEVEDORING SERVICES OF AMERICA | ) | DATE ISSUED: |
| | ) | |
| and | ) | |
| | ) | |
| HOMEPORT INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Gregory A. Bunnell and Meagan A. Flynn (Preston Bunnell & Stone, LLP), Portland, Oregon, for claimant.

William M. Tomlinson and Jay W. Beattie (Lindsay, Hart, Neil & Weigler, LLP), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1994-LHC-3339) of Administrative Law Judge Alexander Karst 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).

Claimant, a longshoremen, slipped and injured his shoulders during the course of his

employment for employer on February 2, 1993. Employer voluntarily paid claimant temporary total disability benefits from February 10, 1993, to March 8, 1994. 33 U.S.C. §908(b). Thereafter, claimant filed two claims under the Act. Claimant sought benefits for permanent total disability, 33 U.S.C. §908(a), due to the combination of his work-related shoulder injury and pre-existing impairments of both knees. Secondly, claimant sought medical benefits and additional compensation for temporary total disability due to carpel tunnel syndrome.

In his initial Decision and Order, the administrative law judge found employer liable for the treatment of claimant's carpel tunnel syndrome, and thereafter awarded claimant temporary total disability compensation from March 9, 1994, to July 11, 1994, when claimant's condition reached maximum medical improvement. The administrative law judge next denied the claim for permanent total disability benefits. Specifically, the administrative law judge found that claimant's shoulder injury caused a permanent impairment that prevents him from working in some, but not all, of the longshore occupations available to him at his home port. In this regard, the administrative law judge found that there are fourteen longshore occupations within claimant's shoulder-related work restrictions. The administrative law judge found that employer therefore had established the availability of suitable alternate employment. The administrative law judge next reviewed the employment records of the Pacific Maritime Association and determined, based upon those records, that claimant did not sustain a loss of wage-earning capacity due to his shoulder impairment. Accordingly, the administrative law judge concluded that claimant was not entitled to permanent partial disability benefits for his permanent shoulder disability. *See* 33 U.S.C. §908(c)(21). Claimant moved for reconsideration, which was summarily denied by the administrative law judge in an Order Denying Motion for Reconsideration.

Claimant appealed this decision to the Board, challenging the administrative law judge's findings that employer established the availability of suitable alternate employment and that claimant did not sustain a post-injury loss in wage-earning capacity. In its Decision and Order, the Board affirmed the administrative law judge's determinations that employer met its burden of establishing the availability of suitable alternate employment and that claimant sustained no loss in wage-earning capacity as a result of his February 2, 1993, work accident. *Raappana v. Stevedoring Services of America*, BRB No. 96-0820 (Mar. 26, 1997)(unpublished).

Claimant appealed the Board's decision to the United States Court of Appeals for the Ninth Circuit which, on July 14, 1998, vacated the Board's decision and remanded the instant case for a determination of whether claimant is entitled to a nominal award of compensation. *See Raappana v. Stevedoring Services of America*, No. 97-70649 (9th Cir., July 14, 1998)(unpub.). On remand, pursuant to the limited issue presented on remand from the Ninth Circuit, the parties agreed to forgo a second hearing and to present their positions to

the administrative law judge via their respective briefs. Thereafter, in his Decision and Order on Remand, the administrative law judge concluded that claimant failed to establish that there is a significant possibility that his post-injury wage-earning capacity will fall below his pre-injury earnings in the future. Accordingly, the administrative law judge denied claimant's request for a nominal award of disability benefits.

On appeal, claimant challenges the administrative law judge's denial of a nominal award. Employer responds, urging affirmance.

In support of his appeal, claimant avers that his work-related disability limits him from performing a range of jobs as a longshoreman. Thus, while conceding that he was not able to present specific evidence that economic conditions would fluctuate in the future resulting in his inability to perform the jobs credited by the administrative law judge as constituting the availability of suitable alternate employment, claimant asserts that the Board

> should hold that, when a claimant is permanently precluded from performing a whole class of jobs and maintaining his earning capacity depends upon a strong economy, as a matter of law there is a significant possibility that his earning capacity will fall below the level of [his] pre-injury wages at some point in the future.

*See* Claimant's brief at 3. Accordingly, claimant concludes that without a nominal award employees who sustain permanent injuries during times of economic prosperity will have no way to protect themselves against the inevitable end to an economic boom. For the reasons that follow, we reject claimant's suggestion, and we affirm the administrative law judge's decision on this issue.

The United States Supreme Court has held that a nominal award may be entered on claimant's behalf upon a showing that a worker's wage-earning capacity will at some future point fall below his pre-injury wages. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997*); see also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 n. 9, 18 BRBS 12 n. 9 (CRT)(4th Cir. 1985)*; Randall v. Comfort Control, Inc*., 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981); *Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3 (CRT)(9th Cir. 1986); *Buckland v. Department of the Army*, 32 BRBS 99 (1997). In this regard, the Court adopted the standard set forth by the United States Court of Appeals for the District of Columbia Circuit in *Randall*, 725 F.2d 791, 16 BRBS 56 (CRT), and the United States Court of Appeals for the Fifth Circuit in *Hole*, 640 F.2d 769, 13 BRBS 237, *i.e.*, that such a nominal award is appropriate where a claimant has not established a present loss in wage-earning capacity under current circumstances, but has established a significant possibility that a worker's wage-earning

capacity will at some future point fall below his pre-injury wages. *Rambo II*, 521 U.S. at 137-138, 31 BRBS at 61 (CRT). Regarding the establishment of a future loss in wage-earning capacity, the Court emphasized that the probability of a future decline in a claimant's wage-earning capacity is a matter of proof; it is not to be assumed *pro forma* as an administrative convenience in the run of cases. *Id.*, 521 U.S. at 139, 31 BRBS at 62 (CRT).

In the instant case, the administrative law judge found, based upon the medical evidence of record, that claimant's work-related shoulder condition is not degenerative, and that claimant did not offer evidence showing that the trend of increasing work shifts will reverse in the future. *See* Decision and Order at 6. These findings are not challenged by claimant on appeal. Next, the administrative law judge specifically considered and rejected claimant's argument that he is entitled to a nominal award because there is a chance that the employment opportunities presently available to him will fluctuate in the future with changes in the economy. In this regard, the administrative law judge concluded that claimant's position is contrary to the Supreme Court's decision in *Rambo II*, which specifically emphasized that the probability of a future decline in a claimant's wage-earning capacity is not to be assumed but, rather, is a matter of proof. *Id.* In his brief on appeal, claimant concedes that he was not able to present specific evidence that the availability of suitable alternate employment that claimant is capable of performing would fluctuate in the future. On these facts, the administrative law judge rationally concluded that claimant failed to meet his burden of showing that there is a significant possibility, as required by *Rambo II*, that his wage-earning capacity will fall below his pre-injury earnings in the future.[1] We therefore affirm that determination and the consequent denial of a nominal award in this case. *See Buckland*, 32 BRBS 99; *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 272 (1990).

[1]We disagree with claimant that, because economic trends fluctuate, there is a significant possibility that his post-injury wage-earning capacity will decline in the future. On an initial claim for nominal compensation under the Act, claimant has the burden of showing by a preponderance of the evidence that the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future. *See Rambo II*, 521 U.S. at 138, 31 BRBS at 61 (CRT). Reliance on economic trends yet to manifest themselves is clearly insufficient to satisfy claimant's burden in this regard.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge