

THOMAS A. STYLC)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CERES CORPORATION)	DATE ISSUED:
)	
Self-Insured)	
Employer-Petitioner)	DECISION and ORDER

Appeal of the Decision and Order and Order Upon Motions for Reconsideration of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Roger L. Smith, Glen Burnie, Maryland, for claimant.

Andrew M. Battista (Young & Battista, P.A.), Baltimore, Maryland, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Upon Motions for Reconsideration (90-LHC-1052) 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

While working for employer as a stripper and stuffer of bulk cargo, claimant suffered injuries to his neck, back and knee on November 13, 1986. Claimant returned to his usual work on May 18, 1987, but found that it hurt his back and neck. Due to his seniority, he became a groundman, which involves lighter work, although claimant testified that the work strains his leg and neck. Claimant, however, has continued working as a groundman. Claimant testified that since his injury, except for one or two attempts, he has not worked out of the union hall, but that he has not missed any significant periods of work, and he has always met his orders. Claimant also testified that if he had not had his injury, he would probably still be working on the ground. Claimant's hourly wage has increased from \$17 at the time of the injury to \$19 an hour at the time of the

hearing.¹

Dr. Reahl stated that claimant is permanently partially disabled in his cervical spine, left knee and lumbar spine due to the November 1986 injury, and that claimant should be restricted from climbing ladders, working in and out of holds, and bending and carrying heavy objects. Dr. Reahl deposed that claimant had some weaknesses, but they would not prevent claimant from working unless the work pushed him to the "extremes of endurance." Dr. Bellis also stated that claimant has a permanent disability to his neck resulting from the November 1986 injury, but that claimant could return to his usual work. Dr. Cohen opined that claimant has a 10 percent permanent partial disability to his neck, but that claimant's neck, knee and back problems are not work-related, and that claimant requires no restrictions.

The administrative law judge found that claimant has a permanent impairment to his neck as a result of the work injury, but suffers no loss in wage-earning capacity due to that impairment. The administrative law judge also found that claimant's back and knee impairments are not work-related. The administrative law judge found that despite claimant's claim that the injury to his neck prevents him from obtaining extra work and income, due to his seniority, claimant made no "real effort" to obtain extra jobs and that there is no evidence that his work pushed him to the "extremes of his endurance." The administrative law judge found that claimant worked more hours per year in the years immediately after the injury than in the three years immediately preceding the injury. The administrative law judge also found that most of the overtime work available to claimant involved the unloading of auto ships, and although Dr. Reahl expressed misgivings about claimant's being able to perform such work, his misgivings were focused mainly on claimant's non work-related knee problems. The administrative law judge concluded that "in the interests of justice" and to preserve claimant's right to seek modification under 33 U.S.C. §922, claimant is entitled to a one percent *de minimis* award commencing May 19, 1987. Claimant and employer moved for reconsideration, which the administrative law judge denied.

On appeal, employer contends that the administrative law judge erred in entering a *de minimis* award on the ground that the evidence does not establish a significant possibility of future economic harm. Specifically, employer asserts that claimant suffered no loss of wage-earning capacity in the five years since the November 1986 injury, that claimant has seniority status, that there is no evidence claimant might lose his job, and claimant testified he always met his orders and would have worked as a groundman even if he had not been injured. Employer also notes that the administrative law judge did not make any finding that claimant's restrictions might pose a problem to his future employment. Alternatively, employer contends that a *de minimis* award must be issued in a specific dollar amount, and not as a percentage of average weekly wage.

The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has stated that a *de minimis* award may be appropriate where there is sufficient evidence for the administrative law judge to conclude that there is a likelihood of future economic harm due to the work injury, but the degree of that harm cannot presently be ascertained. *Fleetwood v. Newport*

¹Employer paid claimant temporary total disability benefits from November 14, 1986 to May 18, 1987.

News Shipbuilding & Dry Dock Co., 776 F.2d 1124, 1234 n. 9, 18 BRBS 12, 32 n. 9 (CRT)(4th Cir. 1985); *see also Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273, 277 (1990). Criteria evaluated in making this determination include whether claimant's job is secure in light of his physical restrictions, whether claimant has suffered a loss in wage-earning capacity in the present or is likely to do so in the future, or whether his physical condition is likely to deteriorate. *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyards Corp.*, 640 F.2d 760, 13 BRBS 237 (5th Cir. 1981); *Burkhardt*, 23 BRBS at 278; *Adams v. Washington Metro. Area Transit Auth.*, 21 BRBS 226 (1988).

Employer is correct in asserting that the administrative law judge failed to make any findings that claimant is likely to suffer significant future economic harm as a result of his neck impairment. Rather, the administrative law judge found that claimant's neck impairment and work restrictions do not impair his wage-earning capacity, his ability to perform his job, or his ability to perform overtime work. The evidence does not show that claimant's job is in any way threatened, and in fact reveals that claimant worked more hours after his injury than before. The findings made by the administrative law judge cannot support a conclusion that claimant is likely to suffer significant future harm due to his neck impairment, and there is no other evidence of record to support such a conclusion. The *de minimis* award, therefore, must be reversed.² *Burkhardt*, 23 BRBS at 278; *Mavar v. Matson Terminals, Inc.*, 21 BRBS 336 (1988); *Adams*, 21 BRBS at 228.

²We therefore need not address employer's argument that a *de minimis* award must be for a specific dollar amount rather than as a percentage of average weekly wage.

Accordingly, the administrative law judge's Decision and Order and Order Upon Motions for Reconsideration are reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge