BRB No. 08-0804

R.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EG&G TECHNICAL SERVICE	)	DATE ISSUED: 03/13/2009
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Nina H. Thiele (Freedman & Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

John Schouest and Limor Ben-Maier (Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P.), Houston, Texas, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2008-LDA-00004) of Administrative Law Judge Daniel F. Solomon 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.,* as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (the Act). 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).

Following his military career, claimant took a mechanic job with employer, a contractor, in Iraq. During the course of his work on August 2, 2005, he injured his left shoulder. Cl. Ex. 21 at 3-4. He returned to the United States for treatment and surgery. His treating physician, Dr. Hodges, released him to return to work with restrictions in February 2006, and claimant returned to Iraq to work in a sedentary position. Cl. Exs. 11-12, 17, 20 at 11-12. When his contract ended in June 2006, employer would not allow him to renew it because of his shoulder pain/condition. He again returned to the United States for treatment, and on June 17, 2007, was released to return to work with permanent restrictions.[1] He accepted a domestic position as a vehicle inspector which was within his limitations. In October 2007, claimant began work in Afghanistan with another employer as a wheeled vehicle inspector. He has continued that employment, working seven days per week, 12 hours per day, and makes $114,410.80 per year. Cl. Exs. 20-21. He cannot perform overhead work and takes over-the-counter medicine for pain. Cl. Ex. 20 at 20-21.

Claimant filed a claim for benefits, and the parties stipulated to all issues except average weekly wage and claimant's entitlement to a nominal award. The administrative law judge found that claimant established an average weekly wage of $2,034.05, and he concluded that claimant has a permanent impairment which has the potential to cause a diminished earning capacity in the future. Accordingly, he awarded claimant a nominal award beginning June 17, 2007.[2] Decision and Order at 6-7. Employer appeals only the nominal award. Claimant responds, urging affirmance.

Employer argues that the administrative law judge erred in awarding nominal benefits. It asserts that any decrease in claimant's wages in the future will be caused by his decision not to work or to the lack of overseas work – it will not be due to his injury. A nominal award under Section 8(h), 33 U.S.C. §908(h), is appropriate when a worker's work-related injury has not diminished his current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004). The Supreme Court stated that, in such cases, a nominal award gives full effect to Section 8(h)'s admonition that the future effects of an injury must be considered when assessing an employee's post-injury wage-earning capacity. *Rambo II*, 521 U.S. at 131-132, 136-137, 31 BRBS at 57-58, 60-61(CRT).

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[1]Dr. Hodges permanently restricted claimant from lifting more than 15 pounds overhead with his left arm and prohibited claimant from working overhead with his left shoulder at greater than 90 percent flexion. Cl. Exs. 13, 17.

[2]According to claimant, the parties agreed to $1 per week. Cl. Brief at 4.

In *Rambo II*, the claimant injured his back and leg performing longshore work. Following his recuperation, he was released to return to work with permanent physical restrictions. He trained to become a crane operator, and he returned to work in that job making three times the amount he had made prior to his injury. The Supreme Court remanded the case to the administrative law judge for a determination of whether there was a significant possibility that Rambo's injury would cause a reduction in his wage-earning capacity in the future. If so, the Court stated that it would be proper to award nominal compensation, which would preserve Rambo's right to file a motion for modification under Section 22, 33 U.S.C. §922, in the future.

Similarly, in *Keenan*, a longshoreman injured his right shoulder and underwent two surgeries, but residual symptoms and permanent impairment persisted. Keenan was unable to perform heavy or repetitive overhead work, and he had to limit his lifting activities above chest level. He returned to work with restrictions and worked as a marine clerk, earning more than he made as a longshoreman. The United States Court of Appeals for the Ninth Circuit stated that Keenan's situation is precisely analogous to Rambo's, and it remanded the case for the administrative law judge to address whether Keenan satisfied the relevant factors in *Rambo II*. Specifically, the Ninth Circuit stated:

> The Court could not have made it clearer that present employment in which the worker is able to avoid using the impaired body part, far from removing the basis for a *de minimis* award, is exactly the circumstance for which nominal compensation is designed. * * * If there is a chance of future changed circumstances which, together with the continuing effects of Keenan's injury, create a "significant potential" of future depressed earning capacity, then Keenan is entitled to the possibility of a future modified award under *Rambo II*.

Keenan, 392 F.3d at 1047, 38 BRBS at 94(CRT).

The administrative law judge in this case found that there is a significant possibility or potential that claimant's injury will cause a diminished earning capacity in the future which justifies a nominal award. He credited the undisputed opinion of Dr. Hodges that claimant, after achieving maximum medical improvement, was permanently restricted from fully using his left arm. Cl. Ex. 13. The undisputed evidence also establishes that claimant cannot return to his usual work as a mechanic and that he is currently in a position earning more than his pre-injury average weekly wage. The administrative law judge also found that claimant is trained to work only as a mechanic or vehicle inspector and that claimant's overseas work contract is of limited duration. He rationally concluded, therefore, that claimant has a permanent impairment which could cause a future economic loss in that his injury would affect his ability to obtain new

employment should his current work situation end. Decision and Order at 6. As the administrative law judge's award of nominal benefits is rational, supported by substantial evidence, and in accordance with law, we affirm it. *Rambo II*, 521 U.S. at 138-141, 31 BRBS at 61-62(CRT); *Keenan*, 392 F.3d at 1047, 38 BRBS at 94(CRT); *Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (3d Cir. 2001).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge