

U.S. Department of Labor

Benefits Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



BRB No. 20-0169

STAFFORD C. CALVERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIGOR MARINE, LLC	)	
	)	DATE ISSUED: 09/23/2020
and	)	
	)	
SIGNAL MUTUAL INDEMNITY	)	
ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits and the Order Granting Partial Reconsideration and Amending Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for Claimant.

Robert E. Babcock (Babcock Holloway Caldwell & Stires, PC), Lake Oswego, Oregon, for Employer/Carrier.

Before: BUZZARD, ROLFE and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Richard M. Clark’s Decision and Order Awarding Compensation and Benefits and Order Granting Partial Reconsideration and Amending Order (2016-LHC-01859) rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act). We must affirm the administrative law judge’s findings of fact and conclusions of law if they

are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant, a boilermaker/structural welder, experienced neck pain at work on November 14, 2014, and sought medical care for his complaints on that date, on November 17, 2014, and on January 5, 2015. Claimant experienced right shoulder pain on January 30, 2015, and, due to his pain, was allegedly unable to work on January 31, 2015. On February 1, 2015, he went to the emergency room where an MRI revealed, inter alia, a herniated disc in his neck. Claimant worked for Employer on February 2 and 3, 2015. He underwent a medical examination on February 4, 2015, at which time surgery was recommended. Claimant worked 4.5 hours of light duty on February 6, 2015, and one hour on February 9, 2015, but asserted light-duty work was not made available to him on February 7 and 8, 2015. On February 18, 2015, Claimant underwent surgery on his neck.<sup>1</sup> He was released for full duty on November 13, 2015, CX 32, and returned to work for Employer on November 19, 2015. Claimant filed a claim under the Act, seeking benefits for various periods of disability.

The parties stipulated Claimant reached maximum medical improvement on November 13, 2015, and his post-injury wage-earning capacity is \$1,566.29. The administrative law judge calculated his average weekly wage as \$1,814.73. *See* Decision and Order at 8 – 10. The administrative law judge awarded Claimant temporary total disability benefits from November 14 through 17, 2014, and from February 9 through August 22, 2015, temporary partial disability benefits from August 23 through September 26, 2015, temporary total disability benefits from September 27 through November 12, 2015, and permanent total disability from November 13 through November 18, 2015. *Id.* at 12 – 14. After determining Claimant’s injury did not prevent him from performing his usual employment duties as of November 19, 2015, and that any loss of wage-earning capacity caused by a reduction in work hours after that date was due to fluctuations in Employer’s business cycle, the administrative law judge concluded Claimant is not entitled to any additional benefits as of November 19, 2015, the date he returned to work for Employer. *Id.* at 14 – 17.

Claimant timely sought reconsideration of the administrative law judge’s decision. In his Order on reconsideration, the administrative law judge corrected a calculation error

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<sup>1</sup> Claimant underwent a disc removal and an artificial disc replacement at C4-5. CXs 14, 15.

for the benefits awarded from August 23 to September 26, 2015, but denied Claimant's request that additional periods of compensation be awarded.

On appeal, Claimant challenges the administrative law judge's denial of temporary total disability benefits prior to February 10, 2015, and permanent partial disability benefits subsequent to November 18, 2015. Employer responds in support of the administrative law judge's decision, and Claimant has filed a reply brief.<sup>2</sup>

Claimant challenges the administrative law judge's denial of temporary total disability benefits for six days he asserts he could not work:<sup>3</sup> January 31, 2015, because of pain; February 1, 2015, due to his emergency room visit where he underwent an MRI; February 4, 2015, due to his medical appointment with Dr. Baggenstos; February 6, 2015, when Employer sent him home after four and one-half hours of work; and February 7 and 8, 2015, when light-duty work was not made available. *See* Cl. Br. at 6 – 9.

The administrative law judge initially gave Claimant's testimony significant weight, specifically finding he was a credible witness whose hearing testimony was consistent with his deposition testimony. *See* Decision and Order at 8. In addressing Claimant's claim for temporary total disability benefits on the aforementioned dates, the administrative law judge found

there is insufficient evidence to award Claimant disability compensation for January 31 . . . and February 1, 4, 6, 7, and 8, 2015. Claimant testified that he was off work these days because of his injury. TR at 57. However, there is no indication in the record that he could not work because of his injury. Claimant went to the emergency room on January 5, 2015, saw Dr. Smith on February 1, 2015. . . and saw Dr. Baggenstos on February 4, 2015. . . .Dr. Baggenstos released Claimant to light-duty work. . . .There is no doctor's recommendation that he not work on these days, and Claimant's testimony that he was off work because of his injury is cursory and lacking in detail. He also worked January 27, 28, and 30, and February 2, 3, 5, and 6, indicating

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<sup>2</sup> We deny Employer's Motion to Dismiss Claimant's Appeal, filed on April 24, 2020. On April 22, 2020, the Benefits Review Board granted Claimant's motion for an extension of time in which to file his brief. Claimant's May 18, 2020 Petition for Review and brief were timely filed in relation to the Board's April 22 Order.

<sup>3</sup> With respect to Claimant's contention that he is entitled to seven hours of temporary total disability benefits on February 9, 2015, we note the administrative law judge awarded these benefits. *See* Decision and Order at 12 - 13, 17; *see also* Order at 4; Cl. Br. at 6, 9.

that he was generally capable of performing his job. . . . Overall, I find that Claimant has not established that his injury prevented him from working on January 31, February 1, 4, 6, 7, and 8, 2105, and his request for disability compensation for these days is denied.

*Id.* at 12.

The administrative law judge's reference to Claimant's ability to perform his usual employment duties on January 27, 28 and 30, 2015, is misplaced, as Claimant did not experience pain requiring him to seek emergency room medical care until January 31, 2015. With regard to January 31, 2015, a claimant's credible complaints of pain may be sufficient to establish his inability to perform his usual employment duties. *See generally Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). With regard to February 1, 4 and 6, 2015, the administrative law judge acknowledged Claimant sought emergency room care and underwent an MRI on February 1, 2015, sought a second opinion on February 4, 2015, which resulted in light-duty restrictions, and thereafter had modified duties placed on him on February 6, 2015. *See* CXs 8 – 12. Time lost from work due to medical treatment for a work-related injury may be compensable under Section 8 of the Act. *See Kerch v. Air America, Inc.*, 8 BRBS 490 (1978), *aff'd in part sub nom. Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 10 BRBS 505 (1st Cir.1979). With regard to February 7 and 8, 2015, Claimant testified Employer did not provide him with light-duty work. Tr. at 57 – 58. A claimant may be entitled to disability benefits where his employer cannot provide him work within his physical restrictions. *See Edwards v. Director, OWCP*, 999 F.2d 1374, 27 BRBS 81(CRT) (9th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994).

We must remand this case for additional findings. The administrative law found Claimant's testimony regarding his ability to work on the six days at issue was "cursory and lacking in detail," Decision and Order at 12, but he did not consider the testimony in the context of the medical records documenting Claimant's post-January 30, 2015, complaints of pain, the diagnosis of a cervical condition requiring surgery, and the medical restrictions placed on him. Moreover, while Claimant appears to have worked for one hour on February 9, 2015, the administrative law judge did not specifically address Claimant's assertion that light-duty work was not made available to him on February 7 and 8, 2015. We therefore vacate the administrative law judge's denial of compensation benefits for these specific dates, and remand the case for him to address Claimant's testimony in conjunction with the supporting medical evidence regarding Claimant's ability to work on the dates in question. *See Ballesteros v. Willamette W. Corp.*, 20 BRBS 184 (1988); *see also Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985); *Frazier v. Nashville Bridge Co.*, 13 BRBS 436 (1981).

Claimant next challenges the administrative law judge's denial of ongoing permanent partial disability compensation commencing November 19, 2015. Alternatively, Claimant contends the administrative law judge erred in not considering his entitlement to a nominal award, an issue raised in his motion for reconsideration.

It is well-established that a claimant bears the burden of establishing the extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). Section 2(10) of the Act, 33 U.S.C. §902(10), defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or other employment."

The administrative law judge concluded, as of November 19, 2015, Claimant's injury does not prevent him from performing his usual employment duties as a boilermaker/structural welder, and Claimant's reduced post-injury hours, which resulted in a decline in his earning capacity post-injury, are the result of business cycle fluctuations and not his injury.

With regard to Claimant's ability to perform his usual employment duties, the administrative law judge declined to credit Claimant's testimony that he works more slowly and has co-workers help him perform certain work, finding it undisputed Claimant returned to work with no restrictions placed on him by his physician. The administrative law judge also found Claimant's work production did not suffer, Claimant did not offer any co-workers' testimony to support his assertion that he required help in the performance of work, and Claimant's supervisor testified no one reported to him that Claimant was having difficulties performing his work. Decision and Order at 14 – 15.

With regard to the decrease in hours worked, the administrative law judge was not persuaded Claimant worked less on weekends, lost pipe-welding jobs, or was the first to be laid off. Rather, the administrative law judge considered Employer's documentary evidence indicating employment for welders fluctuated due to work availability, Employer's supervisor's testimony that Claimant, while an above-average worker, was offered employment based upon both his employment rating and the amount of work available, and that Claimant was unsure of the amount of time he performed pipe welding work for Employer prior to his injury. Decision and Order at 14 – 16.

The administrative law judge's conclusion that Claimant is fully capable performing his pre-injury work with Employer is supported by Claimant's testimony acknowledging he was released to return to work by his physician and has not turned down any days of employment offered to him post-injury, including work that involved travel, Tr. at 60, 62, 55; that he is capable of performing the jobs assigned to him, *id.* at 106, 109; and that he

did not inform Employer of difficulties in performing his duties. *Id.* at 85. Claimant presented no evidence establishing his work injury resulted in a decline in the number of hours offered him post-injury. Rather, he contends simply that his alleged continuing neck symptoms must have played a role in the decline of hours made available to him.<sup>4</sup>

Claimant, however, conceded he did not know how often he had welded pipe for Employer pre-injury, Tr. at 87, and did not know the reason for any layoff changes that occurred after he returned to work for Employer. *Id.* at 66. In contrast, Employer’s supervisor testified Claimant had the same rating as before his injury, he was unaware of any difficulties with Claimant’s performance, and the amount of work available to welders is dependent on the amount and type of work Employer has at a given time. *Id.* at 118 – 120.

The Board is not empowered to reweigh the evidence and must accept the rational inferences and findings of fact of the administrative law judge that are supported by the record. *See, e.g., Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988). In determining Claimant is fully capable of performing his pre-injury work with Employer, the administrative law judge rationally relied on Claimant’s release to full-duty work, Claimant’s testimony that he is capable of performing the work assigned to him, and the lack of evidence to support Claimant’s assertion that he requires assistance. Claimant failed to meet his burden of establishing his reduced earning capacity was “because of” his injury. Decision and Order at 14 – 17. Accordingly, we affirm the administrative law judge’s finding that Claimant did not establish a loss of wage-earning capacity due to his injury as of November 19, 2015.

We cannot affirm, however, the administrative law judge’s decision not to address Claimant’s claim for a nominal award. In his Order addressing Claimant’s motion for reconsideration, the administrative law judge found that “Claimant raised the specter of nominal compensation for the first time on reconsideration.” Order at 3. The administrative law judge stated, “I take no position on the nominal compensation issue, but find that Claimant did not timely raise it in this proceeding. Accordingly, the request for a *de minimis* or nominal award is denied.” *Id.*

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<sup>4</sup> The parties agree there has been a decline in the number of hours worked by welders for Employer following Claimant’s return to work on November 19, 2015. Any error committed by the administrative law judge in calculating the percentage of this decline, *see* Decision and Order at 17, does not affect Claimant’s burden of establishing a relationship between his injury and his alleged incapacity to work.

The United States Supreme Court has held that 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 the injury will cause diminished capacity under future conditions. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); see *Keenan v. Director for Benefits Review Board*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004).<sup>5</sup> The purpose of such awards is to account for Section 8(h)'s mandate that the future effects of an injury be considered in calculating an injured employee's post-injury wage-earning capacity. See 33 U.S.C. §908(h).<sup>6</sup> In order to protect the employee's right to seek modification in the event that his physical or economic condition deteriorates, nominal awards are appropriate where a claimant has not established a present loss in wage-earning capacity under Section 8(c)(21), 33 U.S.C. §908(c)(21), but has established a significant potential of future economic harm as a result of the injury. *Rambo II*, 521 U.S. at 121, 31 BRBS at 54(CRT) ("There must, in other words, be a cognizable category of disability that is potentially substantial, but presently nominal in character."); see *Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997).

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<sup>5</sup> In *Keenan*, the court reversed the Board's affirmance of the denial of a nominal award and held, under *Rambo II*, that if there is a chance of future changed circumstances which, together with the continuing effects of the claimant's injury, create a significant potential of diminished earning capacity, a nominal award would be justified. See *Keenan*, 392 F.3d at 1046-1047, 38 BRBS at 94-95(CRT).

<sup>6</sup> Section 8(h) provides that

The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however*, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h).

The United States Court of Appeal for the Ninth Circuit, within whose jurisdiction this case arises, has held that a claim for a greater award implicitly includes a claim for a lesser degree of disability, such as a nominal award. *Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 30(CRT) (9th Cir. 1996), *aff'd and remanded sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997). Claimant sought total disability benefits, 33 U.S.C. §908(a), (b), and partial disability benefits, 33 U.S.C. §908(c)(21), (e), (h). These claims include the lesser claim for a nominal award. *Rambo*, 81 F.3d at 843, 30 BRBS at 30(CRT). Therefore, as the administrative law judge erred in declining to address Claimant's claim, we vacate his denial of a nominal award, and remand the case for him to address Claimant's claim for a nominal award. *Keenan*, 392 F.3d at 1046-1047, 38 BRBS at 94-95(CRT); *L.W. [Washington] v. Northrop Grumman Ship Sys.*, 43 BRBS 27 (2009).

Accordingly, we affirm the administrative law judge's finding that Claimant does not have a loss in wage-earning capacity due to his injury as of November 19, 2015. We vacate the denial of temporary total disability benefits for January 31, February 1, 4, 6 - 8, 2015, and the denial of a nominal award, and remand the case for further consideration consistent with this decision.

SO ORDERED.

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge