BRB No. 99-0330

FREDERICK M. STALLINGS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Dec. 20, 1999
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Decision Granting Employer's Motion for Reconsideration - Granting Relief, In Part, and Decision Granting the Director's Motion for Reconsideration - Granting Relief of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein, & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Decision Granting Employer's Motion for Reconsideration - Granting Relief, In Part, and Decision Granting the Director's Motion for Reconsideration - Granting Relief (94-LHC-427) of Administrative Law Judge Richard K. Malamphy 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 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).

Claimant, hired as a welder for employer on November 13, 1974, sustained an injury resulting in metal fume fever on June 24, 1993, prompting the filing of a claim for benefits on August 30, 1993. The parties ultimately agreed that claimant was temporarily totally disabled due to his work-related condition from June 24, 1993, to September 28, 1993.[1] Claimant thereafter returned to work where he was exclusively limited to outdoor welding, based upon the permanent restrictions imposed by his physician, Dr. Maxey. Claimant continued to pursue his claim for permanent partial disability benefits for parts of days in which employer sent him home without work because it did not have any employment within his physical restrictions,[2] as well as a nominal award for potential future losses in wage-

[1]The parties' agreement was set out by the district director in a Compensation Order dated April 19, 1994. CX 6b.

[2]By affidavit dated May 3, 1996, claimant stated that employer "passed him out of work" because it could not offer him a job within his restrictions when the weather was bad for part of the following days: October, 4, 1995, November 1, 1995, November 7, 1995, January 12, 1996, January 24, 1996, and February 2, 1996. CX 5. Claimant later added, in the post-hearing brief submitted to the administrative law judge, November 18, 1994, and November 24, 1994, as dates for which he is entitled to an award of permanent partial disability benefits.

earning capacity after February 2, 1996.

In his Decision and Order Granting Benefits, the administrative law judge concluded that claimant is entitled to permanent partial disability benefits in a lump sum of $236.38 for lost wages from November 18, 1994, through February 2, 1996, and is thereafter entitled to permanent partial disability benefits at the compensation rate of $3.78 per week. 33 U.S.C. §908(c)(21). Additionally, the administrative law judge granted employer's request for Section 8(f) relief, 33 U.S.C. §908(f), and therefore ordered that upon the expiration of 104 weeks from February 3, 1996, the Special Fund shall assume liability for claimant's permanent partial disability benefits.

Employer and the Director, Office of Workers' Compensation Programs (the Director), subsequently filed motions for reconsideration. In his decision on motions for reconsideration, the administrative law judge rejected employer's argument that claimant did not have any loss of wage-earning capacity, but accepted the Director's argument that Section 8(f) relief is not appropriate where claimant's entitlement is to a *de minimis* award, and therefore vacated his prior grant of Section 8(f) relief on claimant's award of benefits, which the administrative law judge found was properly characterized as a *de minimis* award.[3]

On appeal, employer challenges the administrative law judge's award of benefits, and denial of Section 8(f) relief. Claimant and the Director respond, urging affirmance.

Employer first argues that the administrative law judge erred in awarding claimant permanent partial disability benefits since the evidence of record is insufficient to establish that claimant sustained a loss of wage-earning capacity as a result of his work-related injury. Employer contends that claimant's actual post-injury earnings substantially exceed his pre-injury average weekly wage, and thus, conclusively establish that he does not continue to suffer any economic disability related to his work injury. Second, employer argues that claimant is not entitled to any disability benefits because it continues to provide claimant with continuous, secure suitable alternate employment, and that although claimant is unable to work due to weather on rare occasions, he nevertheless is compensated for that time pursuant to the Collective Bargaining Agreement (CBA). Thus, employer argues that to find claimant entitled to disability benefits in addition to the compensation he already collects under the CBA would improperly reward claimant with a double recovery for his injury.

Pursuant to Section 8(c)(21), an award for permanent partial disability is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-

[3]Although moot, the administrative law judge agreed with employer that the Special Fund's liability commenced 104 weeks after March 23, 1994.

earning capacity. 33 U.S.C. §908(c)(21). Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry,* 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson,* 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). The fact that claimant received actual post-injury wages equal to or greater than his pre-injury earnings does not mandate a conclusion that claimant has no loss of wage-earning capacity. *See generally Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

In the instant case, it is undisputed that following his injury, claimant returned to work for employer as a welder at the same wage rate. The administrative law judge nevertheless determined that although claimant's post-injury yearly earnings may have increased, claimant established a loss of wage-earning capacity due to a work-related inability to perform some job opportunities since, as a result of his injury, claimant was limited to outside welding and therefore could no longer perform indoor welding jobs. As the administrative law judge observed, in contrast to other welders, claimant could not be re-assigned to work indoors during periods of inclement weather and thus was passed out of work and sent home. The administrative law judge therefore concluded if inside welders are working and outside welders are sent home due to weather conditions, claimant is entitled to compensation for loss of wages. Consequently, he found claimant entitled to a lump sum of $236.38 for lost wages from November 18, 1994, through February 2, 1996. Additionally, inasmuch as claimant sustained an actual loss of income on those specific days when he was passed out of work and sent home because of inclement weather, and as that economic loss is directly attributable to the restrictions imposed upon claimant as a result of his injury, claimant's loss in wage-earning capacity is, contrary to employer's position, work-related.

Moreover, contrary to employer's contention, claimant is not reaping the benefits of a double recovery. While employer is correct that pursuant to Article 32 of the CBA, claimant, on the days he was passed out of work, was to be paid $52 for four hours, that amount remains less than the $104 for eight hours of work which he would have otherwise received if he could perform indoor welding work. Claimant, therefore, sustained a loss of wage-earning capacity on the days in question when he was sent home early and, thus, the administrative law judge's award of permanent partial disability benefits for the specific dates in question is affirmed.

We now turn to employer's contention that the administrative law judge erroneously found that claimant is entitled to continuing permanent partial disability benefits in the form of a *de minimis* or nominal award, as claimant has not provided any evidence that his physical condition will deteriorate in the future such that he will be unable 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 that 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 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 398.1 (5th Cir. 1981); *Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3 (CRT)(9th Cir. 1986), *aff'g Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985). 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. In order to protect the employee's right to seek modification in the event 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), 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).

In the instant case, the administrative law judge, upon noting that it is documented that claimant lost wages of $354.90 over the course of the 62.5 weeks preceding the hearing, determined that claimant's loss of wage-earning capacity is ongoing, and therefore found that claimant is entitled to permanent partial disability at the compensation rate of $3.78 per week.[4] Thus, as determined by the administrative law judge, claimant's work-related injury has diminished his present wage-earning capacity, as demonstrated by his actual current wage loss, albeit intermittent, which occurs every time the weather prevents him from working outdoors. 33 U.S.C. §908(c)(21), (h). Despite the administrative law judge's representation of this award as a nominal award pursuant to *Rambo II,* his findings of fact belie this characterization. The administrative law judge found that claimant's loss of wage-earning capacity in a normal work week is clearly documented, and we have affirmed this finding as rational and supported by substantial evidence. The administrative law judge's award of continuing permanent partial disability benefits in this case is therefore not a *de minimis* or nominal award for a future loss of earning capacity as contemplated by the Supreme Court in *Rambo II,* but rather represents claimant's current and actual loss of wage-earning capacity, although such loss is small in amount.

Employer next challenges the administrative law judge's denial of Section 8(f) relief. In this regard, employer first maintains that the administrative law judge erred in failing to require the Director to be bound by his pre-hearing concession as to the Special Fund's liability in this case. Employer also argues that if claimant's award is not a "nominal award" for a future loss under *Rambo II,* the rationale for prohibiting Section 8(f) relief on such an

[4]The administrative law judge arrived at this figure by dividing the compensation rate of the actual lost wages, $236.38, by the length of the time period in question, 62.5 weeks.

award is not present in the instant case. The Director responds that Section 8(f) relief is not available on any award that is small in fact, regardless of whether it is based on the reasoning of *Rambo II*. The Director contends that the basis for the decisions in *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3 (CRT)(9th Cir. 1986), obtains as well to the facts of the current case.

To avail itself of Section 8(f) relief where an employee suffers from a permanent partial disability, an employer must affirmatively establish: 1) that claimant had a pre-existing permanent partial disability; 2) that the pre-existing disability was manifest to the employer prior to the work-related injury; and 3) that the ultimate permanent partial disability is not due solely to the work injury and is materially and substantially greater than the disability that would have resulted from the work-related injury alone. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Carmines]*, 138 F.3d 134, 32 BRBS 48 (CRT)(4th Cir. 1998); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum II]*, 131 F.3d 1079, 31 BRBS 164 (CRT)(4th Cir. 1997); *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. [Harcum I]*, 8 F.3d 175, 27 BRBS 116 (CRT)(4th Cir. 1993), *aff'd on other grounds*, 514 U.S. 122, 29 BRBS 87 (CRT)(1995).

In *Porras v. Todd Shipyards Corp.*, 17 BRBS 222 (1985), *aff'd sub nom. Todd Shipyards Corp. v. Director, OWCP*, 792 F.2d 1489, 19 BRBS 3 (CRT)(9th Cir. 1986), both the Board and the United States Court of Appeals for the Ninth Circuit held, based on the particular facts of that case,[5] that Section 8(f) relief was not appropriate when a nominal award is granted.[6] The Board and the court affirmed the administrative law judge's reasoning that since the claimant's disability was nominal, it could not be determined that the claimant's compensable disability is materially and substantially greater than that which would have resulted from his second injury alone. Both tribunals also recognized an underlying policy basis for their decisions, namely, that if employer can qualify for Section 8(f) based on a nominal award, it will pay minimal benefits and escape liability for any substantial disability which may appear later. The Board subsequently followed *Porras* in

[5]In *Porras*, the administrative law judge determined that claimant was entitled to a nominal award of $3.00 per week, which represented 1 percent of his post-injury earnings.

[6]Given these holdings, the administrative law judge did not err in finding that the Director was not bound by his earlier concession that employer is entitled to Section 8(f) relief. Stipulations are not binding if they evince an incorrect application of the law. *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990); *McDevitt v. George Hyman Constr. Co.*, 14 BRBS 677 (1982).

Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133 (1987), wherein it vacated the administrative law judge's award of Section 8(f) relief on the rationale that Section 8(f) relief is not permitted where claimant is determined to be entitled to a *de minimis* award. Specifically, the Board held that inasmuch as a *de minimis* award denotes a nominal disability, the requirement that the claimant's permanent partial disability be

"materially and substantially" greater than that due to the subsequent injury alone cannot be satisfied.[7] *Peele*, 20 BRBS at 137-138.

[7]In *Murphy v. Pro-Football, Inc.*, 24 BRBS 187 (1991), *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992), the Board further considered this underlying policy in conjunction with a line of cases holding that it is consistent with the Act to assess employer for only one 104-week period of liability, pursuant to Section 8(f), for all permanent disabilities arising out of the same injury. *See generally Newport News Shipbuilding & Dry Dock Co. v. Howard*, 904 F.2d 206, 23 BRBS 131(CRT) (4th Cir. 1990)(when

permanent partial disability is followed by permanent total disability and the two awards arise from completely separate injuries, employer is liable for two periods of 104 weeks.); *Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985)(where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both awards, employer is liable for only one period of 104 weeks). The Board observed that unlike *Porras*, *Murphy* involved a permanent partial disability award for an actual loss in wage-earning capacity for 2.4 years, followed by the *de minimis* award. *Murphy*, 24 BRBS at 191. The Board held that employer is liable for only one 104-week period of permanent partial disability benefits arising as a result of claimant's work-related injuries, which commences from the permanent partial disability award for an actual loss in wage-earning capacity, noting that if the awards in *Murphy* were reversed, the 104-week period of employer's liability would not begin to run until the *de minimis* award ended. *Id.* at n.3.

In the instant case, the administrative law judge's award of ongoing permanent partial disability benefits, measured at $3.78 per week, although not based on future effects as an award under *Rambo II*, is so small in fact that the concerns underlying *Porras* are equally applicable. Specifically, based on the degree of claimant's disability in the instant case, employer would be legally unable to establish that claimant's disability is not due solely to the work injury, and is, in fact, "materially and substantially greater" than that caused by the last injury alone. *Harcum I*, 8 F.3d at 175, 27 BRBS at 116 (CRT). Additionally, we note that the underlying policy of Section 8(f) would not be served in this case if employer were granted Section 8(f) relief, since it would enable employer to avoid liability for any substantial disability which may subsequently arise as a result of the instant work-related injury.[8] *Murphy*, 24 BRBS at 187; *Peele*, 20 BRBS at 137-138; *Porras*, 17 BRBS at 222. We therefore affirm the administrative law judge's determination that employer is barred from seeking Section 8(f) relief at the present time.

Accordingly, the administrative law judge's Decision and Order Granting Benefits and Decision Granting Employer's Motion for Reconsideration - Granting Relief, In Part, and Decision Granting the Director's Motion for Reconsideration - Granting Relief are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting

[8]As the Director notes in his brief, employer is not precluded from renewing its request for Section 8(f) relief should claimant's condition worsen in the future. 33 U.S.C. §922; *see generally Director, OWCP v. Edward Minte Co., Inc.*, 803 F.2d 731, 19 BRBS 27 (CRT)(D.C. Cir. 1986).

Administrative Appeals Judge