

BRB No. 04-0665

GLEN A. DUCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND	)	DATE ISSUED: <u>APR 26, 2005</u>
DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr.,  
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein  
Camden, LLP), Norfolk, Virginia, for claimant.

Benjamin E. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport  
News, Virginia, for self-insured employer.

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

**PER CURIAM:**

Claimant appeals the Decision and Order (2003-LHC-1579) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 sustained a work-related back injury on September 2, 2000. The administrative law judge entered an order in July 2002 awarding claimant temporary total disability compensation from December 6, 2000 to May 13, 2001, inclusive, and temporary partial disability compensation at a weekly rate of \$57.48 from May 14 to 27, 2001, inclusive, based on the stipulations of the parties. Subsequently, claimant filed a

petition for modification under Section 22 of the Act, 33 U.S.C. §922, seeking a *de minimis* award. In his Decision and Order, the administrative law judge found that any future wage loss was speculative and that there is no evidence of the likelihood that claimant's back injury will further disable him. Consequently, the administrative law judge denied claimant's Section 22 modification request for a *de minimis* award.

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

Section 22 of the Act permits the modification of a final award if the party seeking to alter the award can establish either a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922; *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93 (2003), *aff'd*, 84 Fed. Appx. 333, 37 BRBS 120(CRT) (4<sup>th</sup> Cir. 2004). Nominal or *de minimis* awards are benefits to which an injured employee may be entitled if he has no current loss of wage-earning capacity as a result of his injury but has established a significant possibility that the injury will cause future economic harm. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Jones v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 105 (2002). In *Rambo II*, the Supreme Court expressly emphasized that the probability of a future decline is a matter of proof; a decline is not to be assumed *pro forma* as an administrative convenience. *Rambo II*, 521 U.S. at 139, 31 BRBS at 62(CRT); *see generally Barbera v. Director, OWCP*, 245 F.3d 282, 35 BRBS 27(CRT) (2<sup>d</sup> Cir. 2001).

Claimant contends that the administrative law judge erred in denying him a *de minimis* award because he has permanent work restrictions and there is no guarantee that he will not be laid off in the future.<sup>1</sup> We reject claimant's contention and affirm the administrative law judge's denial of benefits as it is rational, supported by substantial evidence, and in accordance with law.

Substantial evidence supports the administrative law judge's finding that claimant did not establish that his injury will likely cause a future loss of wage-earning capacity. At the time of the formal hearing in February 2004, claimant had been employed by employer as an electrician for almost 31 years. The administrative law judge relied on the testimony of claimant's general foreman, Rhonda King, who stated claimant performs the same work he performed before his injury, with the exception that he now cannot

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<sup>1</sup> Claimant cites the testimony of his general foreman, Rhonda King, that employees on restrictions may be passed out of the shipyard for lack of work regardless of their seniority rights under the union contract. Tr. at 30-31.

climb vertical ladders. Tr. at 24. She testified that claimant's pay grade is the highest rate that can be attained within the temporary electrician job classification. *Id.* at 27-28. Ms. King also testified that claimant is a key employee because of his skill and abilities. *Id.* Regarding the likelihood of continued employment, Ms. King testified that claimant's department has been hiring new employees for roughly two years, including as recently as January 2004, and that she is unaware of any plans to lay off employees. *Id.* at 28, 31-32. Claimant also testified that his work is similar to what he was doing before he was injured, and that there always has been work available to him. *Id.* at 17, 20.

The administrative law judge also found that there is no evidence of the likelihood that claimant's back condition will deteriorate. The administrative law judge noted claimant's testimony that he had last missed work due to his injury in February, 2003, when he took one day off to see Dr. Jamili. Tr. at 20. Moreover, claimant admitted that it had been a long time since he had taken his pain medication. *Id.* at 17. The administrative law judge further found that Dr. Jamali has not stated that a worsening of claimant's condition is likely or that he is likely to miss any work in the future because of his back injury. The record reflects that on December 5, 2000, Dr. Jamali performed a spinal fusion of claimant's back, inserting six metal screws. CX 8 at 7. Dr. Jamali's chart note of November 15, 2001, describes claimant's progress post-surgery as "quite satisfactory," and he states that claimant has reached maximum medical improvement. *Id.* at 12. At that time, Dr. Jamali imposed a permanent restriction against climbing ladders and stated that claimant has a fifteen percent permanent impairment of the back. *Id.* The doctor's February 27, 2003 chart note again states "satisfactory progress," and that the x-ray shows "satisfactory position of the hardware and fusion is complete." *Id.* at 2. Dr. Jamali placed no further restrictions on claimant's work duties and recommended that claimant return to his office in one year. *Id.*

The administrative law judge's finding that claimant has not established the significant likelihood of either a diminution in his wage-earning capacity due to his injury or an increase in his physical impairment is rational and supported by substantial evidence, and claimant has raised no error in the administrative law judge's decision.

Consequently, we affirm the denial of claimant's claim for a *de minimis* award.<sup>2</sup> See generally *Buckland v. Department of the Army/NAF*, 32 BRBS 99 (1997).

Accordingly, we affirm the administrative law judge's Decision and Order.

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

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<sup>2</sup> We also reject claimant's contention that the administrative law judge committed reversible error in his reliance on the Fourth Circuit's holding in *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12(CRT) (4<sup>th</sup> Cir. 1985), which pre-dates the decision of the United States Supreme Court in *Rambo II*. As we have affirmed the administrative law judge's ultimate conclusion denying claimant a *de minimis* award under *Rambo II* based on the evidence in this case, any error he may have made with respect to the holding in *Fleetwood* is harmless.