

BRB No. 98-1007

DAWN DESBRISAY)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HALL-BUCK MARINE,)	DATE ISSUED: <u>April 19, 1999</u>
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Robert K. Udziela (Pozzi Wilson Atchinson, L.L.P.), Portland, Oregon, for claimant.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (94-LHC-2641) of Administrative Law Judge Henry B. Lasky 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 which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant began work as a longshoreman in January 1986, and attained "A" status in August 1989. In 1991, she was earning over \$50,000 per year and committed herself to buying a house. She injured her back on March 12, 1993, while opening a lid on a rail car, although she continued to work until she sought treatment

from Dr. Post on March 29, 1993. Dr. Post diagnosed that claimant was suffering from a thoracolumbar sprain, which was later confirmed by Dr. Stewart. Employer voluntarily paid temporary total disability benefits from March 29, 1993 to September 7, 1993. Claimant returned to work on November 9, 1993, but continued to have significant lower thoracic and lower back pain. She sought permanent partial disability benefits under the Act.

In his original Decision and Order, the administrative law judge found that claimant's current earnings are not representative of her wage-earning capacity because she has to pick and choose the jobs she is able to perform, she is performing post-injury work that is unsuitable for her physical condition, she is working with pain and discomfort which increases with the level of her physical labor, and she receives the sympathetic help of fellow employees. Thus, he found that claimant works at unsuitable jobs because of her financial obligations, and noted that claimant will ultimately have to stop doing such physical labor in the future. Accordingly, the administrative law judge concluded that claimant is entitled to permanent partial disability benefits although she is earning the same or more money following her injury. In order to determine the extent of claimant's loss, the administrative law judge found that as claimant must report to the hiring hall seven days a week, rather than the previous five, in order to maintain the same wages, her loss in wage-earning capacity is equal to 28.5 percent, based on earnings for two-sevenths of a week, of her average weekly wage of \$1010.01. The administrative law judge denied employer's motion for reconsideration.

The case was administratively affirmed by the Board pursuant to Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), and was subsequently appealed to the United States Court of Appeals for the Ninth Circuit. The court vacated the administrative law judge's finding regarding claimant's loss in wage-earning capacity, holding that the administrative law judge's "determination that [claimant] suffered a two-sevenths reduction in her earnings capacity is neither 'reasonable' as required by statute nor supported by substantial evidence." *Hall-Buck Marine, Inc. v. DesBrisay*, No. 96-70967 (9th Cir. Jan. 14, 1998), slip op. at 9. The case was remanded for further consideration. *Id.*

In his Decision and Order on Remand, the administrative law judge noted that the court agreed that there was substantial evidence in the record to support claimant's claim that she experiences significant pain when working which is relevant to the determination of claimant's loss of wage-earning capacity notwithstanding her actual wages. However, he concluded that he was mandated by the court to issue a nominal award, which he did in the amount of \$1 per week. Decision and Order on Remand at 2.

On appeal, claimant contends that the administrative law judge erred in finding that the Court of Appeals mandated a nominal award, and thus erred in not considering the other factors that show that claimant has a current loss in wage-earning capacity. Employer responds, contending that the administrative law judge properly interpreted the court's opinion in awarding a nominal award of \$1 per week.

The post-injury wage-earning capacity of a partially disabled employee for whom compensation is determined pursuant to Section 8(c)(21) is equal to her actual earnings if they fairly and reasonably represent her wage-earning capacity. 33 U.S.C. §908(h). If they do not, the administrative law judge may fix a reasonable wage-earning capacity based on factors or circumstances such as the degree of physical impairment, claimant's age, education, industrial history, and availability of employment which she can do post-injury. See *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 651 (1979). The Ninth Circuit has held that, under Section 8(h), higher post-injury earnings do not preclude compensation for the claimant if the claimant has, nevertheless, suffered a loss of wage-earning capacity. *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213 (CRT) (9th Cir. 1991); see also *Long v. Director, OWCP*, 767 F.2d 1578, 17 BRBS 149 (CRT) (9th Cir. 1985); *Todd Shipyards Corp. v. Allan*, 666 F.2d 399, 14 BRBS 427 (9th Cir.), cert. denied, 459 U.S. 1034 (1982); *Portland Stevedoring Co. v. Johnson*, 442 F.2d 411 (9th Cir. 1971).

The administrative law judge in the instant case found that claimant's actual wages do not accurately reflect her earning capacity as she is working against medical advice with significant pain, motivated by her financial obligations and continues working only by her "extraordinary effort and sheer determination."¹ The Ninth Circuit affirmed the administrative law judge's finding that claimant's actual wages do not accurately reflect her earning capacity as it is supported by substantial evidence. Slip op. at 6. Thus, the inquiry turned to determining the reasonable dollar amount of claimant's wage-earning capacity.

The Ninth Circuit rejected the administrative law judge's method of calculating claimant's actual loss as the administrative law judge misunderstood claimant's testimony regarding job availability. The administrative law judge based his loss in earning capacity finding on the fact that claimant had to present herself at the hiring hall two extra days per week in order to make the same wages. Thus, he

¹Employer concedes that there are approximately nine types of longshore work claimant can no longer do, which she successfully performed before the injury. See *Delay v. Jones Washington Stevedoring Co.*, 31 BRBS 197 (1998).

subtracted two-sevenths of her actual post-injury wages to reflect the same number of days she previously worked to earn the same amount of wages. However, the court stated that claimant had always presented herself seven days, but had the luxury of choosing to refuse a job assignment before the injury. Thus, the court held that the administrative law judge's method for quantifying claimant's loss did not accurately reflect a loss in earning capacity.

In analyzing claimant's residual wage-earning capacity, the Ninth Circuit stated that while claimant requires additional assistance from fellow employees to adequately perform her duties, she will probably be unable to sustain her longshore work, and thus she will have to seek a less remunerative type of employment in the future, these factors do not provide a legitimate basis for finding a current reduction in wage-earning capacity. Slip op. at 8-9. However, the court agreed that there is substantial evidence in the record to support claimant's allegation that she experiences significant pain while performing longshore work. The court stated that "It is **unclear**, however, that [claimant's] pain supports the **significant** reduction in earnings capacity found by the ALJ." Slip op. at 9 (emphasis added). Moreover, the court stated that claimant's "inability to control the timing of her work does indicate some loss in wage-earning capacity." Slip op. at 7. In reaching this determination the court recognizes that the effect of claimant's significant pain on her ability to work is a factor to be considered by the administrative law judge on remand in determining a fair representation of claimant's current post-injury wage-earning capacity.² The court does reference the United States Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT) (1997),³ to state that the administrative law judge should not try to incorporate potential future losses into the current capacity determination, and that given the potential for future losses the administrative law judge should make a nominal

²This interpretation gives meaning to the court's earlier statement that claimant's actual earnings "do not accurately reflect her ability to earn as injured" Slip op. at 6.

³The Supreme Court held in *Rambo II* that when an injury does not lead to a present reduction in earnings but there is a significant possibility of future wage loss due to the injury, the proper approach is to make a nominal award that preserves the opportunity for future upward adjustments pursuant to Section 22. *Rambo*, 521 U.S. at 135, 31 BRBS at 61(CRT).

award. Slip op. at 8. However, we are not persuaded that this reference mandates that the administrative law judge make only a nominal award for potential future losses without consideration of claimant's current loss in earning capacity. Thus, we agree with claimant's contention that the decision read in its entirety does not mandate a nominal award of \$1, and we remand the case to the administrative law judge for further consideration.

The court noted that claimant's pain and the effect of it on the performance of her job is relevant to the determination of her current post-injury wage-earning capacity, to some degree, although it does not support the 28.5 percent loss found by administrative law judge. In addition, the court recognized that claimant can no longer control the timing of her work, due to the number of longshore jobs she can no longer perform, and that this fact also indicates a current loss in wage-earning capacity. Thus, on remand the administrative law judge should reconsider claimant's permanent partial disability, determining the extent of her current loss in wage-earning capacity based on the effects of her pain and inability to perform some jobs.⁴

Accordingly, the administrative law judge's Decision and Order on Remand awarding claimant permanent partial disability benefits in the amount of \$1 per week is vacated, and the case is remanded for a determination of a dollar figure which fairly represents claimant's post-injury wage-earning capacity.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

⁴We reject employer's contention that *Rambo II* mandates a nominal award whenever the claimant does not have a present reduction in actual earnings. The *Rambo* court clearly understood the distinction between loss in actual wages and loss in wage-earning capacity, stating specifically that a present disability may be calculated and an award made even though the worker is fortunate enough to receive full pre-injury wages. *See Rambo II*, 521 U.S. at 127-128, 31 BRBS at 56-57 (CRT). The *Rambo* court did not restrict calculating current earning capacity, but held that a claimant with no present loss in earning capacity is nonetheless entitled to a nominal award upon a showing of the significant possibility of a future loss in earning capacity due to the injury. The fact that a current loss may be difficult to quantify does not mandate a nominal award.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge