BRB Nos. 01-0892
and 01-0892A

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| GLENN G. HILL | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| Cross-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: August 13, 2002 |
| | ) | |
| | ) | |
| Self-Insured | ) | |
| Employer-Petitioner | ) | |
| Cross-Respondent | ) | DECISION and ORDER |

Appeals of the Decision and Order and Errata of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order and Errata (2000-LHC-2261) of Administrative Law Judge Richard E. Huddleston 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, a crane operator, injured his back at work on December 15, 1986, while

working as a fitter. Claimant returned to work post-injury at employer's facility in a light duty capacity until January 12, 2000, when he was passed out of work due to lack of work within his restrictions. Employer voluntarily paid periods of total and partial disability benefits from 1986-1991, and claimant was awarded these benefits in a compensation order by the district director filed on August 18, 1992, based on the parties' stipulations. On August 21, 1992, claimant filed a petition for modification pursuant to Section 22 of the Act, 33 U.S.C. §922, requesting partial disability benefits for lost overtime from 1992 and continuing. In 1992, claimant worked no overtime although he had worked overtime in each preceding post-injury year.

No action was taken (by the Department of Labor) on claimant's 1992 petition for modification, and on February 25, 2000, claimant requested total disability benefits from the date of his pass out on January 12, 2000. Claimant's claim for total disability benefits was amended to include a claim for partial disability benefits. Claimant additionally requested a nominal award with regard to his claim for lost overtime from 1992-1999.

The administrative law judge found that claimant's 1992 petition for modification was timely, but denied claimant's claim for partial disability benefits due to lost overtime. The administrative law judge further found that claimant's February 25, 2000, claim for additional benefits was timely because claimant's 1992 petition for modification was open and pending on that date, and the 2000 filing merely asserted additional grounds of entitlement. Based on employer's stipulation that claimant is permanently partially disabled with a loss in wage-earning capacity of $283.10, the administrative law judge awarded claimant partial disability benefits from January 12, 2000, and continuing at a rate consistent with the above stipulation. 33 U.S.C. §908(c)(21), (h).

On appeal, employer challenges the administrative law judge's award of partial disability benefits from January 12, 2000, contending that the claim for these benefits was not timely pursuant to Section 22. Claimant appeals the administrative law judge's denial of partial disability benefits for lost overtime from 1992-1999. Both employer and claimant filed response briefs.

We first address claimant's appeal. Claimant contends that the administrative law judge erred in denying his claim for partial disability benefits for lost overtime from 1992-1999. Claimant asserts that he did not work any overtime in 1992, 1993, 1996, and 1999, and had little overtime in 1997, for which he is entitled to be compensated. Moreover, claimant further asserts that he is entitled to a nominal award in 1994, 1995, and 1998, years in which he was able to work overtime. Claimant attributes his loss of overtime post-injury to his inability to operate more than one crane whereas other crane operators can earn overtime on any one of 17 cranes available to them.

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. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1992); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56(CRT)(D.C. Cir. 1984). If they do not, the administrative law judge must then determine the dollar amount which represents claimant's earning capacity in his injured state. In making these determinations, relevant considerations include the employee's physical condition, age, education, industrial history, and availability of employment which he can perform post-injury. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985), *aff'g* 16 BRBS 282 (1984); *Randall*, 725 F.2d 791, 16 BRBS 56(CRT); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649, 660 (1979). A loss of overtime is relevant to a determination of post-injury wage-earning capacity. *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). A claimant is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity, but there is a significant potential of future economic harm due to the injury. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)(1997).

We reject claimant's contention that the administrative law judge erred in denying benefits for lost overtime. The administrative law judge found that claimant did not establish how much overtime he lost due to his ability to work only one particular crane post-injury because he did not submit the overtime records of other crane operators who could work any one of 17 cranes. Thus, the administrative law judge stated he was unable to compare the amount of overtime available to claimant to the amount available to other crane operators. *See Sears v. Newport News Shipbuilding & Dry Dock Co.*, 19 BRBS 235 (1987); Decision and Order at 4; Cl. Exs. 1, 2; Tr. at 27-49. Moreover, claimant conceded at the hearing that the availability of overtime was fairly cyclical, and that he may have declined post-injury overtime for personal reasons not due to the work injury. Tr. at 42, 44-46. As the administrative law judge rationally determined that claimant did not establish the basis for an award based on a loss of overtime, we affirm this finding.[1]

[1]Any error in the administrative law judge's failure to consider claimant's claim for a nominal award for the years 1994, 1995, and 1998, is harmless as claimant was awarded partial disability benefits for his subsequent loss in wage-earning capacity. Thus, the purpose of a nominal award, that of keeping the Section 22 statute of limitations open until claimant sustains an actual loss of wage-earning capacity, is satisified in this case. *See Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT); *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002).

In its appeal, employer contends that the administrative law judge erred in awarding claimant partial disability benefits commencing January 12, 2000, since claimant's claim for these benefits, in 2000, was not made within one year of the district director's award in 1992.[2] Employer additionally contends that the 2000 request for additional disability benefits cannot be considered an amendment of the 1992 petition for modification because it does not "relate back," as required of an amended pleading under Federal Rule of Civil Procedure (FRCP) 15(c).[3] The administrative law judge found that, because claimant's initial petition

[2]Section 22 of the Act states that a modification request must be made "at any time prior to one year after the date of the last payment of compensation . . . or at any time prior to one year after the rejection of a claim. . . ." 33 U.S.C. §922. It appears that employer made its last payment of compensation on December 31, 1991. Cl. Ex. 4. Therefore, claimant's August 1992 petition for modification was timely as to employer's last payment, and we need not decide if the parties correctly assume that the date of the district director's compensation order awarding benefits previously paid is the relevant date for commencement of the one-year statute of limitations.

[3]FRCP 15(c) states, in relevant part:

Relation Back of Amendments. An amendment of a pleading relates back to

for modification had not been acted upon, claimant could add additional grounds for recovery so long as those grounds relate to the underlying compensation order sought to be modified. Decision and Order at 5.

We affirm the administrative law judge's finding that claimant's claim for disability benefits, commencing in January 2000, was timely made pursuant to Section 22. On the facts of this case, employer has not established error in the administrative law judge's finding that claimant could amend his pending petition for modification to include a claim for benefits commencing in 2000. *See* 33 U.S.C. §923(a); *U.S. Industries/Federal Sheet Metal v. Director, OWCP*, 455 U.S. 608, 613 n. 7, 14 BRBS 631, 633 n. 7 (1982)*; Intercounty Constr. Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975); *Pool Co. v. Cooper*, 274 F.3d 173, 184, 35 BRBS 109, 117(CRT)(5th Cir. 2001); *Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001); *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100, 104-105 (1990), *aff'd on recon.*, 26 BRBS 32 (1992), *aff'd mem. sub nom. Argonaut Ins. Co. v. Mikell*, 14 F.3d 58 (11th Cir. 1994); *Madrid v. Coast Marine Constr. Co.*, 22 BRBS 148 (1989); 29 C.F.R. §§18.1, 18.5(e); 7 Arthur Larson and Lex K. Larson, *Larson's Workers' Compensation Law*, §124.04[3](2001). Consequently, we affirm the administrative law judge's award of partial disability benefits commencing January 12, 2000, and continuing, at the rate stipulated by the parties.

Accordingly, the administrative law judge's Decision and Order and Errata are

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the date of the original pleading when

* * *

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, . . . .

Fed. R. Civ. P. 15(c)(2).

affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge