BRB No. 98-0509

PETER VOOLICH	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
TODD PACIFIC SHIPYARDS CORPORATION	)	
	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Further Benefits of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

James K. Woods (Woods & Stauffer), Dallesport, Washington, for claimant.

Russell A. Metz (Metz & Associates, P.S.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Further Benefits (95-LHC-3093) of Administrative Law Judge Paul A. Mapes 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 if they 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 sustained injuries to his left knee and cervical spine on August 10, 1992,

while working as a rigger for employer. As a result of his work-related injuries, claimant underwent a partial medial meniscectomy on September 8, 1992, and an anterior cervical discectomy on August 16, 1993. Claimant was referred by the Office of Workers' Compensation Programs for vocational rehabilitation and, pursuant to his vocational rehabilitation plan, completed a two-year associate degree program in business management on June 14, 1996. Claimant obtained employment as an administrative assistant with WPH Crane Services on July 7, 1997. Employer voluntarily paid claimant temporary total disability compensation from August 22, 1992 to June 14, 1996. 33 U.S.C. §908(b). Employer additionally made voluntary payments of permanent partial disability compensation to claimant from September 24, 1996 to June 16, 1997, 33 U.S.C. §908(c)(21), and a scheduled award for a 5 percent leg impairment, 33 U.S.C. §908(c)(2), (19). Claimant sought additional unscheduled permanent partial disability compensation commencing June 14, 1996, based on the difference between his pre-injury average weekly wage and the wages paid by his present employer, WPH Crane Services, which he contended fairly and reasonably represent his post-injury wage-earning capacity.

The sole issue presented for adjudication before the administrative law judge was the extent of any loss of wage-earning capacity sustained by claimant subsequent to claimant's completion of his vocational rehabilitation on June 14, 1996. In his Decision and Order, the administrative law judge determined that claimant failed to show by a preponderance of the evidence that he is incapable of performing his usual work as a rigger as a result of any disability arising out of his work-related injuries. Accordingly, the administrative law judge denied the claim for additional compensation.

On appeal, claimant contends that the administrative law judge erred in denying him permanent partial disability compensation; alternatively, claimant avers that the administrative law judge erred in failing to issue a *de minimis* award. Employer responds, contending that the administrative law judge properly denied the claim for ongoing compensation benefits and that claimant is not entitled to a *de minimis* award.

It is well-established that claimant bears the burden of establishing the nature and 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 & Const. Co.,* 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant bears the burden of establishing that he is unable to return to his usual work. *See Blake v. Bethlehem Steel Corp.,* 21 BRBS 49 (1988). If claimant establishes his *prima facie* case, the burden of proof shifts to employer to establish the availability of suitable alternate employment. *See Hairston v. Todd Shipyards Corp.,* 849 F.2d 1194, 21 BRBS 122 (CRT)(9th Cir. 1988). If it is shown that claimant can perform alternate employment, he is only partially disabled. *Dove v. Southwest Marine of San Francisco, Inc.,* 18 BRBS 139 (1986).

In concluding that claimant had not established a *prima facie* case of total disability,

the administrative law judge declined to rely upon the opinion of Dr. Perkins that claimant cannot perform the duties of his usual job as a rigger. The administrative law judge additionally determined that the evidence indicates that claimant misrepresented his physical limitations, and that the opinions of both Dr. Schlitt and Dr. McCollum are insufficient to establish that claimant cannot work as a rigger.

We reject claimant's contention that the administrative law judge erred in failing to give determinative weight to Dr. Perkins' opinion. It is well-established that an administrative law judge is not bound to accept the opinion of any particular medical examiner, but rather, is entitled to weigh the credibility of all witnesses and draw his own inferences from the evidence. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Anderson*, 22 BRBS at 22. In the instant case, the administrative law judge rationally found that Dr. Perkins' opinion was not determinative as to the extent of claimant's disability. Contrary to claimant's argument on appeal, it was reasonable for the administrative law judge, in evaluating the reliability of Dr. Perkins' opinion, to take into account the record evidence regarding both the deliberate misrepresentation by Dr. Perkins of his educational and professional qualifications and the sanctions imposed on Dr. Perkins by the State of Washington Medical Quality Assurance Commission for various instances of unprofessional conduct. *See* Emp. Ex. 12. Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, we affirm the administrative law judge's determination that claimant has failed to meet his burden of proving that he is incapable of performing his former occupational duties as a rigger. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Donovan*, 300 F.2d at 741.

Claimant contends, in the alternative, that the administrative law judge erred in failing to grant a *de minimis* award.[1] The United States Supreme Court, in *Metropolitan Stevedore Co. v. Rambo*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997), stated that a nominal award may be entered on claimant's behalf upon a showing that there is a significant possibility that a worker's wage-earning capacity will at some future point fall below his pre-injury wages.

[1]We reject employer's contention that the issue of claimant's entitlement to a *de minimis* award should not be considered by the Board because it was not raised before the administrative law judge. The United States Court of Appeals for the Ninth Circuit has indicated that a claim for a greater award implicitly includes a request for a lesser possible award. *See Rambo v. Director, OWCP,* 81 F.3d 840, 843, 30 BRBS 27, 30 (CRT) (9th Cir. 1996), *vacated in part on other grounds sub nom., Metropolitan Stevedore Co. v. Rambo,* 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997).

Accordingly, the Court 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 possibility of future economic harm as a result of the injury. In the instant case, although claimant submitted into evidence testimony which, if credited, may support a *de minimis* award, the administrative law judge did not discuss this issue in his decision; we therefore remand this case for the administrative law judge to address claimant's possible entitlement to a nominal award pursuant to the Supreme Court's decision in *Rambo.*

Accordingly, the administrative law judge's Decision and Order is affirmed, and the case is remanded for consideration of claimant's entitlement to a *de minimis* award in accordance with this decision.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge