BRB Nos. 91-434
and 91-474

LEROY G. BOLTON, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEFFBOAT DIVISION OF AMERICAN MARINE SERVICE COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Alton D. Priddy (Hardy, Logan, Priddy & Cotton), New Albany, Indiana, for claimant.

W. David Kiser (Ackerson, Nutt, Blandford, Yann and Kiser, P.S.C.), Louisville, Kentucky, for self-insured employer.

Marianne Demetral Smith (Judith E. Kramer, Acting Solicitor of Labor, Carol DeDeo, Associate Solicitor, Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: STAGE, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer and the Director, Office of Workers' Compensation Programs (the Director), appeal the Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration (87-LHC-2439) of Administrative Law Judge Rudolf L. Jansen 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).[1] The Board 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 sustained an injury to his back on November 30, 1983, while working as a tack welder for employer. Claimant was diagnosed as having a herniated disc and surgery was performed on January 10, 1984. Claimant was released to return to work with employer on March 20, 1985, with physical restrictions; claimant immediately experienced physical difficulties and, after two days, was transferred to the position of first class painter. Claimant remained in that position until he was laid off on May 21, 1985. Claimant thereafter found employment with various employers as a painter. Employer voluntarily paid claimant temporary total disability benefits from December 1, 1983, to March 19, 1985. 33 U.S.C. §908(b). Claimant subsequently filed a claim for benefits under the Act.

In his Decision and Order Awarding Benefits, the administrative law judge found that the claim was not barred by claimant's failure to object to the recommendation of the district director,[2] that claimant was entitled to permanent partial disability compensation based upon his loss of wage-earning capacity from May 22, 1985, until April 15, 1988, and that employer was entitled to relief pursuant to Section 8(f), 33 U.S.C. §908(f), of the Act. Thus, the administrative law judge ordered employer to pay claimant permanent partial disability compensation for a period of 104 weeks, after which time the Special Fund would commence payment of compensation to claimant. In his subsequent Decision on Motion for Reconsideration, the administrative law judge stated that claimant was to be compensated for 66 and 2/3 percent of the difference between his pre-injury earnings based on $9.35 per hour for a forty hour week and his actual earnings post-injury for the period from May 21, 1985, until the date he began earning the same or a greater hourly rate in his current position with H.C. Ackerman and Son (hereinafter Ackerman), April 15, 1988. Further, the administrative law judge found that although claimant, subsequent to April 15, 1988, is not entitled to additional compensation for his injury, his economic condition remains precarious since he receives preferential treatment from his post-injury employer; the administrative law judge thus awarded claimant compensation at the rate of $50 per week subsequent to April 15, 1988.

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[1] We hereby consolidate for purposes of decision employer's appeal, BRB No. 91-0434, and the Director's appeal, BRB No. 91-0474, of the administrative law judges's Decision and Order Awarding Benefits and Decision on Motion for Reconsideration. 20 C.F.R. §802.104.

[2] Pursuant to Section 702.105 of the regulations, 20 C.F.R.§702.105, the term "district director" has replaced the term "deputy commissioner" used in the statute.

On appeal, employer challenges both the administrative law judge's finding that the instant claim was not barred by claimant's failure to object to the district director's recommendation and the administrative law judge's permanent partial and *de minimis* disability award to claimant. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director also appeals, arguing that, although the administrative law judge properly found that the claim was not barred, the administrative law judge's calculation of claimant's wage-earning capacity from May 22, 1985, to April 15, 1988, is not in accordance with law; that although a *de minimis* award may be appropriate in these circumstances, the amount actually awarded by the administrative law judge is more than nominal and requires modification; and that Section 8(f) relief is not available in *de minimis* award cases.

The first issue presented by these appeals is whether the administrative law judge erred in failing to find the instant claim barred. On July 7, 1986, the district director issued a Memorandum of Informal Conference; thereafter, on September 1, 1987, claimant filed an LS-18 pre-hearing statement. Employer contends that a district director's "order" either rejecting the claim or making an award must be filed under Section 19(e), 33 U.S.C. §919(e), and that, pursuant to Section 21(a), 33 U.S.C. §921(a), that "order" becomes final unless it is appealed within thirty days after filing; thus, employer alleges, claimant's untimely filing of an LS-18 pre-hearing statement bars the instant claim. We disagree.

Contrary to employer's assertion, a district director's memorandum of informal conference is not a compensation order and, therefore, does not commence the thirty-day appeal period contained in Section 21(a) of the Act. Although the district director may enter a formal compensation order, with the consent of the parties, which would be governed by the requirements of Sections 19 and 21, the parties herein did not give such consent and such an order was not entered. *See Roulst v. Marco Construction Co.*, 15 BRBS 443 (1983); 20 C.F.R. §702.315; *see also* 20 C.F.R. §702.350. Rather, the district director, subsequent to the informal conference, prepared a memorandum of that conference. Although Section 702.316 of the regulations, 20 C.F.R. §702.316, requires that the parties respond to such a memorandum within fourteen days, no sanctions are set forth should the parties fail to do so. Further, Section 702.316 provides options for the district director to follow which include ordering further conferences or referring the case to the Office of Administrative Law Judges for a formal hearing. Thus, a claim which has been timely filed remains open during this period. *See Intercounty Construction Corp. v. Walter*, 422 U.S. 1, 2 BRBS 3 (1975). Accordingly, as no order was issued by the district director, we affirm the administrative law judge's conclusion that this claim is not barred.[3]

[3] Contrary to employer's assertion, *Fortier v. Bath Iron Works Corp.*, 15 BRBS 261 (1982), does not mandate a different result, as that case is clearly distinguishable from the case at bar. Specifically, unlike the instant case in which no order was issued by the district director, the Board in *Fortier* noted that an attorney's fee awarded by a district director pursuant to Section 28 of the Act is a compensation order, thus commencing the thirty-day appeal period mandated by the Act.

Next, both the Director and employer appeal the administrative law judge findings regarding claimant's post-injury loss of wage-earning capacity and the award of a $50 per week benefit subsequent to April 15, 1988.[4] Under Section 8(c)(21), 33 U.S.C. §908(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-earning capacity. Section 8(h) of the Act 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. Only if such earnings do not represent claimant's wage-earning capacity does the administrative law judge calculate a dollar amount which reasonably represents claimant's wage-earning capacity. 33 U.S.C. §908(h). In calculating claimant's post-injury wage-earning capacity, the administrative law judge, in order to neutralize the effects of inflation, must adjust the post-injury wage levels to the levels paid pre-injury so that they may be compared with claimant's pre-injury average weekly wage. *See Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988); *Bethard v. Sun Shipbuilding and Dry Cock Co.*, 12 BRBS 691 (1980).

In the instant case, the administrative law judge found that claimant receives preferential treatment in his post-injury employment, that claimant works in pain, and that claimant's present employment position is "precarious at best." *See* Decision and Order at 7-8; Decision on Reconsideration at 2. After setting forth claimant's various post-injury jobs, and the hourly rates paid claimant while he was employed in these positions, the administrative law judge awarded claimant permanent partial disability compensation, commencing May 22, 1985, based upon the difference between these actual post-injury earnings and claimant's pre-injury average weekly wage; the administrative law judge terminated these benefits on April 15, 1988, at which time he determined that claimant was being compensated post-injury at an hourly rate greater than his pre-injury hourly rate.

Initially, we note that although the administrative law judge acknowledged that claimant's post-injury employment is precarious and depends on the preferential treatment of his current employer, he nonetheless utilized claimant's actual post-injury wages to determine claimant's post-injury wage-earning capacity. While actual earnings should be used if they fairly and reasonably represent claimant's wage-earning capacity, the administrative law judge's finding in this case indicate that claimant's actual earnings may not fairly and reasonably represent his post-injury wage-earning capacity. Moreover, in using claimant's actual earnings, the administrative law judge did not adjust them to wage levels at the time of injury as is required. *See, e.g., Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). Finally, the administrative law judge's calculation of claimant's post-injury loss of wage-earning capacity does not follow the statutory scheme established in Section 8(c)(21) of the Act, in that the administrative law judge, in determining claimant's post-injury wage-earning capacity, did not arrive at a dollar amount to be compared with claimant's pre-injury average weekly wage.

[4]The administrative law judge's findings that claimant is incapable of resuming his usual employment duties with employer as a tack welder, and that claimant has been employed by various employer's since his lay-off, are unchallenged on appeal.

We, therefore, vacate the administrative law judge's post-injury wage-earning capacity finding and remand this case for the administrative law judge to consider explicitly whether claimant's post-injury wages reasonably and fairly represent his wage-earning capacity. If, on remand, the administrative law judge determines that claimant's post-injury wages reasonably and fairly represent his post-injury wage-earning capacity, the administrative law judge must adjust those wages to the wage levels paid at the time of claimant's injury; if they do not, the administrative law judge must calculate a dollar amount which reasonably represents claimant's wage-earning capacity at the time of his injury. *See* 33 U.S.C. §908(h). In either event, the administrative law judge must arrive at a figure for claimant's loss of post-injury wage-earning capacity pursuant to the statutory scheme established in Section 8(c)(21) of the Act. *See Cook*, 21 BRBS at 4.

Additionally, in his Decision on Motion for Reconsideration, the administrative law judge determined that, as of April 16, 1988, claimant earned hourly wages in excess of his pre-injury hourly rate. *See* Decision on Reconsideration at 2. After further finding that there was a realistic future threat to claimant's earnings and health, the administrative law judge awarded claimant additional compensation in the amount of $50 per week for all periods subsequent to April 15, 1988. *Id.* The administrative law judge's basis for this award indicates he found no present loss in wage-earning capacity and fashioned the award to compensate possible economic loss in the future. Section 8(h), however, provides that a loss in wage-earning capacity is to be based on consideration of factors including the "effect of disability as it may naturally extend into the future." 33 U.S.C. §908(h). *See Jennings v. Sea-Land Service*, 23 BRBS 312 (1990), *vacating on recon*. 23 BRBS 12 (1989). In cases where claimant has no calculable loss of wage-earning capacity, the courts have approved *de minimis* awards; however, such awards are only appropriate if claimant establishes a "significant" possibility of future economic harm due to his work-related injury. *See Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole v. Miami Shipyards Corp.*, 640 F.2d 760, 13 BRBS 237 (5th Cir. 1981).

In the instant case, we vacate the administrative law judge's continuing award of $50 per week subsequent to April 15, 1988, as the amount of the award is unsupported by substantial evidence. *See Jennings*, 23 BRBS at 315. In vacating that award, moreover, we agree with the Director that an award of $50 per week is too large to be *de minimis*. If, on remand, the administrative law judge finds that this case is factually one where a *de minimis* award is appropriate, *see Randall*, 725 F.2d at 234, 16 BRBS at 56 (CRT); *Hole*, 640 F.2d at 769, 13 BRBS at 237, then a nominal award should be fashioned in order to provide claimant a means for modification should his work-related condition result in a future economic loss. *See Spinner v. Safeway Stores, Inc.*, 18 BRBS 155 (1986), *aff'd mem. sub nom. Safeway Stores, Inc. v. Director, OWCP*, 811 F.2d 676 (D.C. Cir. 1987). We note, however, that the administrative law judge on remand must calculate claimant's post-April 15, 1988, permanent partial disability award pursuant to Sections 8(c)(21) and (h) of the Act, *see Cook*, 21 BRBS at 4; thus, although claimant's actual post-April 15, 1988 wages may be greater than those earned by claimant pre-injury, claimant may have a loss in his post-injury wage-earning capacity and a *de minimis* award may not be necessary. *See Jennings*, 23 BRBS at 314.

Lastly, the Director contends that if the administrative law judge's post-April 15, 1988 award is a *de minimis* award, then employer is not entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).[5] The Board has held that where there are consecutive periods of permanent partial disability arising from the same injury, and the second period consists of a *de minimis* award, employer is liable for only one 104 week period of permanent partial disability benefits arising out of his work-related injury. *See 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). Thus, 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 Davenport v. Apex Decorating Co., Inc.*, 18 BRBS 194 (1984). We therefore affirm the administrative law judge's determination that the Special Fund is liable for all payments of permanent partial disability compensation awarded to claimant after the first 104 weeks of such payments have been paid by employer.

[5] Section 8(f) relief is available in a case of permanent partial disability if the following three requirements are met: (1) the claimant had a pre-existing permanent partial disability which (2) in combination with the subsequent work-related injury contributes to a materially and substantially greater degree of permanent disability, and (3) the pre-existing disability was manifest to the employer. *See C & P Telephone Co. v. Director, OWCP*, 564 F.2d 503, 6 BRBS 399 (D.C. Cir. 1977). In this case, the Director does not contest the administrative law judge's determination that employer established entitlement to Section 8(f) relief for the permanent partial disability award which terminated as of April 15, 1988.

Accordingly, the administrative law judge's determination as to claimant's post-injury loss of wage-earning capacity is vacated, and the case is remanded for reconsideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits and the Decision on Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge