BRB No. 98-1282

CHARLES J. BRYANT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: June 24, 1999
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Jeffrey S. Mutnick (Pozzi Wilson Atchinson, LLP), Portland, Oregon, for claimant.

Delbert J. Brenneman (Hoffman, Hart & Wagner, LLP), Portland, Oregon, for employer/carrier.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (92-LHC-1568) 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 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).

This case is before the Board for the second time. On May 28, 1986, claimant, a walking boss, sustained injuries to his neck and back when he hit his hard-hat against a low passageway. Although claimant complained of pain and discomfort and reported the accident on the day it occurred, he did not lose any time from work until January 15, 1988, when claimant underwent surgery. Employer voluntarily paid temporary total disability benefits from January 15, 1988 through April 13, 1988. Thereafter, claimant returned to his usual job as a walking boss and sustained no further lost time as a result of his injury. Claimant filed a claim for benefits alleging that even though his post-injury earnings were higher than his pre-injury earnings he was entitled to a permanent partial disability award pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), for his loss of wage-earning capacity because pain caused him to decline available jobs.

The administrative law judge denied the claim, finding that claimant did not establish a loss of wage-earning capacity. Claimant appealed to the Board, asserting that the administrative law judge erred in denying him permanent partial disability benefits. The Board affirmed the administrative law judge's decision. *Bryant v. Stevedoring Services of America*, BRB No. 93-1161 (June 27, 1996)(unpub).[1]

[1]The Board modified the compensation rate for the period claimant received temporary total disability benefits following his surgery.

Subsequently, claimant appealed the denial of permanent partial disability benefits to the United States Court of Appeals for the Ninth Circuit. The court summarily affirmed the administrative law judge's decision denying claimant an award for a present loss in wage-earning capacity, but remanded the case for the administrative law judge to consider whether claimant is entitled to a nominal award based on the intervening change in the law set forth in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121 997, 31 BRBS 54 (CRT) (1997) (*Rambo II)*. *Byrant v. Stevedoring Services of America*, No. 96-70658 (9th Cir. Jan. 28, 1998)(unpub).[2] On remand, the administrative law judge denied claimant a nominal award, finding that claimant failed to produce sufficient evidence to establish the "probability," or even the "significant possibility, that his future earnings will decline below his pre-injury wages due to the work injury.

On appeal, claimant contends that the administrative law judge erred in denying him a nominal award. Employer responds, urging affirmance.

The Supreme Court has held that nominal awards are appropriate where the claimant has not established a present loss in wage-earning capacity under Section 8(c)(21) under current circumstances, but has established that there is a significant potential that the injury will cause diminished capacity under future conditions. *Rambo II*, 521 U.S. at 138, 31 BRBS at 61(CRT); *see also Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981). In so holding, the Court noted that circumstances may arise causing potential tension between the Section 8(h) mandate to account for the future effects of disability in determining wage-earning capacity and the inability to seek modification pursuant to Section 22 more than one year after compensation ends or a denial of a claim is entered. *See* 33 U.S.C. §§908(h), 922; *see also LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989).

[2]The court rejected employer's argument that inasmuch as claimant did not specifically raise the nominal permanent partial disability award issue below, claimant is barred from raising the argument on appeal. The court held that the nominal award was sufficiently raised below inasmuch as a claim for disability benefits includes any lesser degree of disability.

Claimant's contention that the administrative law judge erred in denying him a nominal award is without merit. The administrative law judge found that, while claimant's neck injury causes him some discomfort, claimant has not established that it is likely that his future wages will fall below his pre-injury earnings. Decision and Order on Remand at 3. Specifically, the administrative law judge found that claimant returned to his regular work as a walking boss after his 1988 surgery; that there is no evidence that claimant's treating physician imposed any physical restrictions on him; that he earned more money after his injury than prior to his injury; and that there is no evidence that he is in danger of losing his job.[3] *See Burkhardt v. Bethlehem Steel Corp.,* 23 BRBS 273 (1990). Next, the administrative law judge found that the comparison of claimant's work schedule to that of two co-workers is likewise irrelevant to claimant's seeking a nominal award and ignores the Ninth Circuit's affirmance of the administrative law judge's denial of an award for a present loss in wage-earning capacity.[4] The administrative law judge therefore concluded that there is insufficient evidence to prove the significant possibility that claimant's earnings in the future will decline below his pre-injury wages.

We reject claimant's contention that his undisputed need to decline certain jobs due to his proven 16 percent impairment to his cervical spine is sufficient proof that he is likely to suffer a loss of wage-earning capacity in the future. The administrative law judge specifically took these factors into consideration, but rationally found, given claimant's earnings since the surgery and the absence of evidence that claimant's continued employment is unstable, that claimant has not

---

[3]The parties stipulated at the hearing that claimant reached maximum medical impairment on March 2, 1990, and it is undisputed that claimant has a 16 percent work-related impairment to his cervical spine. The record reflects, however, that claimant has worked more hours and earned more money after his 1986 injury, except for 1988, when claimant was off work from January 15, 1988 to April 13, 1988, due to his surgery. For example, the administrative law judge noted that in 1985 claimant worked 2,880.50 hours and earned $81,861.39. In 1986, the year of claimant's injury, claimant worked 2,991 hours and earned $88,695.67. In 1987, claimant worked 3,096 hours and earned $102,238.49. In 1989, claimant worked 3,376 hours and earned $117,376.61. In 1990, claimant worked 3,129.50 hours, and in 1991, claimant worked 3,025 hours. (The administrative law judge noted that he could not find cumulative wage totals in the evidence for these years). In 1992, the year of the hearing, the administrative law judge found that claimant worked 1,568.25 hours as of June 26, 1992.

[4]In his initial decision, the administrative law judge rejected claimant's attempt to establish a present loss in wage-earning capacity based on the comparison between his post-injury earnings with that of two co-workers, finding that the co-workers' circumstances varied from those of claimant and thus were not truly comparable.

established the "significant possibility" of future economic harm. Moreover, claimant has not raised any error in the administrative law judge's treatment of the co-workers' earnings. We therefore affirm the administrative law judge's denial of a nominal award on remand as it is supported by substantial evidence, rational and in accordance with law.[5] *See Buckland v. Dep't of the Army/NAF/CPO*, 32 BRBS 99 (1997); *Burkhardt*, 23 BRBS at 273; *Adams v. Washington Metropolitan Area Transit Authority,* 21 BRBS 226 (1986).

Accordingly, the administrative law judge's denial of benefits on remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5]Thus, we need not address claimant's contention that a nominal award is not synonymous with a *de minimis* award.