

MICHAEL WARD)
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 Claimant-Petitioner)
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 v.)
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 HOLT CARGO SYSTEMS) DATE ISSUED: May 6, 2002
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 and)
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 UNITED STATES FIRE INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Louis A. Perez, Jr., and Aloysius J. Staud (Fine and Staud), Philadelphia, Pennsylvania, for claimant.

John E. Kawczynski (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-LHC-0046) of Administrative Law Judge Ralph A. Romano 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 longshoreman, suffered injuries to his head, back, shoulder, and inner ear

when he was struck by a pipe on the right side of his face causing a cerebral concussion during the course of his employment on July 1, 1998. He returned to work on February 14, 2000, and continues to perform his usual job duties. Claimant subsequently filed a claim under the Act seeking permanent total disability compensation or, alternatively, a permanent partial disability award based on a loss of wage-earning capacity.

In his decision, the administrative law judge denied the benefits sought by claimant. Specifically, the administrative law judge concluded that claimant had failed to establish either an inability to perform his usual employment duties or a present loss in wage-earning capacity. Claimant now appeals, arguing that the administrative law judge erred in denying his request for disability compensation. Employer responds, urging affirmance.

Claimant has the burden of establishing the nature and extent of any disability arising from his work-related injury. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56 (1985). In order to establish a *prima facie* case of total disability, claimant must demonstrate his inability to perform his usual work due to the injury. *See, e.g., Padilla v. San Pedro Boat Works*, 34 BRBS 49 (2000). The fact that a claimant works after an injury will not forestall a finding of total disability if the claimant works only with extraordinary effort and in spite of excruciating pain or is provided a position through employer's beneficence. *See CNA Ins. Co. v. Legrow*, 935 F.2d 430, 24 BRBS 202(CRT)(1st Cir. 1991); *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999). In instances where a claimant's pain and limitations do not rise to this level, such factors nonetheless are relevant in determining claimant's post-injury wage-earning capacity and may support an award of permanent partial disability benefits under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), based on a reduced earning capacity despite the fact that claimant's actual earnings may have increased. *See generally Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT)(9th Cir. 1991).

In the instant case, claimant does not argue that he is incapable of performing his usual job duties but, rather, asserts that he should not be performing those duties because of his residual symptomology, including vertigo. Additionally, claimant avers that he is able to work only with the assistance of his fellow employees. In making this argument, claimant relies upon the opinion of Dr. Zwillenberg, who opined that "[claimant] will never function again as a Longshoreman." CX 6. Claimant argues that Dr. Zwillenberg's opinion should be given definitive weight not only because he is an independent medical examiner but also because his conclusions are supported by those of Drs. Kean and Shapiro, who agreed that claimant had vertigo.¹

¹Contrary to claimant's position, the fact that Dr. Zwillenberg is an independent examiner is not dispositive of the issue as the Board has held that such reports are not binding on the fact-finder. *See Cotton v. Newport News Shipbuilding & Dry Dock, Co.*, 23 BRBS 380

In finding that claimant did not establish an inability to perform his usual work as a longshoreman, the administrative law judge did not discuss the medical evidence in detail, relying instead on the fact that claimant continues to perform his job duties successfully, as evidenced by his own testimony. The administrative law judge noted Dr. Zwillenberg's June 2000 medical opinion predicting that claimant would never work again as a longshoreman, Decision and Order at 4, n.1, but found he returned to this work and has worked continuously since February 14, 2000. The administrative law judge found that while claimant testified to a balance problem resulting from his injury, claimant had not established such symptoms interfered with the performance of his usual job duties with employer. The administrative law judge further determined that claimant's allusions to his "informal arrangement" of being assisted in the performance of his job duties by his co-workers, HT at 24-25, was lacking specificity; it thus is insufficient to prove that claimant would be unable to perform his job without assistance. In sum, claimant has not established error in the administrative law judge's analysis of the evidence, and we therefore decline to disturb his findings. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Accordingly, the administrative law judge's determination that claimant failed to establish an inability to return to longshore work is affirmed.

(1990).

The administrative law judge also found that claimant did not establish a loss in hours worked as a result of his injury and thus had no current loss in wage-earning capacity. Claimant does not challenge this finding, but contends that the administrative law judge erred in failing to grant him a nominal award.² The United States Supreme Court, in *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54(CRT) (1997), held that a nominal award may be entered on claimant's behalf where 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 evidence which, if credited, may support such an 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 entitlement to a nominal award pursuant to the Supreme Court's decision in *Rambo*.

Accordingly, the case is remanded for consideration of claimant's entitlement to a nominal award in accordance with this decision. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

²We reject employer's contention that the issue of claimant's entitlement to a nominal award should not be considered by the Board because it was not raised before the administrative law judge. A claim for total disability benefits includes any lesser degree of disability. *See Rambo v. Director, OWCP*, 81 F.3d 840, 843, 30 BRBS 27, 20(CRT)(9th Cir. 1996), *vacated in part on other grounds sub nom. Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997); *Young v. Todd Pacific Shipyards Corp.*, 17 BRBS 201 (1985).

PETER A. GABAUER, Jr.
Administrative Appeals Judge