BRB No. 96-1560

JESUS PUENTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GULF COPPER & MANUFACTURING CORPORATION	)	DATE ISSUED:
	)	
	)	
and	)	
	)	
WAUSAU INSURANCE	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ed W. Barton (Law Office of Ed W. Barton), Orange, Texas, for claimant.

Robert S. De Lange (Royston, Rayzor, Vickery & Williams, L.L.P.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (93-LHC-845) of Administrative Law Judge Edward Terhune Miller 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 welder, was injured on April 7, 1988, while working for employer, when an iron pipe weighing approximately 1,500-2,500 pounds slipped from its chain and landed on his left arm. Claimant went to the hospital and was subsequently treated by Dr. Bell, who put his arm in a cast. His arm continued to swell until the cast was removed.

Claimant's arm remained discolored, but no bones were found to have been broken. Claimant testified that as of the time of the hearing his left arm remained painful from his elbow to the shoulder area and around the armpit, and that he experiences intermittent cramping of his fingers which immobilizes them for several minutes at a time. After several unsuccessful attempts to return to welding work, claimant was able to work as a welder for Vessel Repair, where he had been working for two years as of the time of the hearing. Claimant sought either a *de minimis* award under Section 8(c)(21), 33 U.S.C. §908(c)(21), or permanent partial disability compensation under the schedule for loss of use of his hand or arm, 33 U.S.C. §908(c)(1), (3). The parties stipulated that claimant had no loss of wage-earning capacity at the time of the hearing.

Based on Dr. Ericsson's opinion, the administrative law judge found that as claimant's injury was to a nerve in his shoulder, rather than to his arm, claimant's disability was not covered by the schedule. This finding is not challenged on appeal. He further determined that, although claimant had no present loss in wage-earning capacity, he is entitled to a *2* percent nominal award. The administrative law judge based this finding on Dr. Ericsson's characterization of the injury and its likely evolution and on claimant's credible testimony that he is afflicted with significant, partially incapacitating pain which affects his ability to perform welding work, as well as his medical history. In addition, the administrative law judge found that the observations and impairment ratings of Drs. Bell (60 percent) and Ericsson (25 percent) support the conclusion that there is a substantial risk that claimant's pain and other symptoms could increase, or otherwise become disabling, so that he could not continue to work as a welder.

On appeal, employer challenges the administrative law judge's *de minimis* award of permanent partial disability benefits. Claimant responds, urging affirmance. Employer replies, reiterating its argument that the rationale supporting a *de minimis* award in *Hole v. Miami Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981), is not applicable to the facts in this case.

Employer specifically contends that the administrative law judge's *de minimis* award is not in accordance with law because all of the medical opinions, including that of Dr. Ericsson, upon which the administrative law judge primarily relied, indicate that claimant could return to work as a welder and no doctor expressed the view that in the future claimant would no longer be able to work as a welder or would have to curtail his activities as a welder. Employer further maintains that the facts in this case are distinguishable from those in *Hole* and that the administrative law judge's determination that there is a reasonable expectation in the future that claimant may not be able to work as a welder is not supported by substantial evidence.

Nominal awards have been found appropriate where claimant has not established a present loss in wage-earning capacity under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21), but has established that there is a *significant* possibility of future economic harm as a result of the injury. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT)(2d Cir. 1989); *Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT)(D.C. Cir. 1984); *Hole*, 640 F.2d at 769, 13 BRBS at 237. The United States Supreme Court recently upheld the propriety of such awards, holding that a worker is entitled to nominal compensation where there is a significant possibility that his wage-earning capacity will at some future point fall below pre-injury levels. *Metropolitan Stevedore Co. v. Rambo*, No. 96-272, 1997 U.S. LEXIS 3864 (U.S. June 19, 1997). Such an award gives effect to the language of Section 8(h) of the Act, 33 U.S.C. §908(h), which provides for consideration of the effect of disability as it may extend into the future in calculating claimant's wage-earning capacity.

We affirm the administrative law judge's finding that claimant is entitled to a *de minimis* award of permanent partial disability compensation because it is supported by substantial evidence and consistent with the standard adopted in *Rambo*. We reject employer's argument that the administrative law judge's *de minimis* award in this case should be overturned, as the facts in the present case are distinguishable from those in *Hole*, wherein the claimant, who had been a heavy laborer, had been promoted to a manager, and there was evidence that the managerial job might be abolished in the future. While claimant in the present case, unlike the claimant in *Hole,* returned to the same type of work he performed pre-injury, in both cases evidence was presented sufficient to establish a significant possibility of future economic harm as a result of the work injury. Employer correctly asserts that no medical opinion of record affirmatively states that claimant may not be able to perform welding in the future. Nonetheless, there is substantial evidence, credited by the administrative law judge, to support the conclusion that claimant has a significant potential for diminished earning capacity in the future.

The administrative law judge based his finding on claimant's complaints of ongoing pain,[1] the substantial problems he experienced when he attempted to return to welding initially,[2] and Dr. Ericsson's testimony that nerves heal very slowly and that factors such as weather, barometric pressure changes, fatigue, or sudden heavy lifting could exacerbate

[1] Claimant testified that his condition had not improved significantly in the two years prior to the hearing, on January 19,1994, although he is able to control the pain with medication. He further testified that his early attempts to return to work failed because of incapacitating pain and swelling in his left arm.

[2]The administrative law judge noted that after Dr. Bell cleared claimant to return to work in July 1991, he attempted to work for Coastal Marine but was discharged after 3 days for slow performance, and inferred that claimant could not keep pace and accordingly was discharged because of his impaired arm. Decision and Order at 18.

claimant's pain and reinjure the vulnerable nerve, Cl. Ex. 3 at 15-16, 29-30. In addition, he relied upon the findings of significant permanent physical impairment by Drs. Bell and Ericsson. He also noted that Dr. Bell's assessment of a persistent nerve injury was corroborated by the EMGs and other opinions of Drs. Profitt and Agustin, and by claimant's reaction to the functional tests performed by Dr. Bennett in 1989, at which time after turning, grasping pliers, and similar maneuvers, claimant required emergency room treatment. Decision and Order at 7, 17, 19. In addition, the administrative law judge considered the Initial Rehabilitation Evaluation dated December 12, 1993, EX 4, which took reasonable account of the prospect that claimant might be prevented by his impaired arm from continuing to work in his usual heavy welding employment and identified lighter welding jobs at similar or slightly reduced pay. The administrative law judge reasonably concluded that the medical evidence and past experience suggest an appreciable risk that claimant's painful impairment might preclude welding work altogether. Finally, the administrative law judge found that given claimant's education, intellectual capabilities, language limitations,[3] employment experience in the United States, and his particular skills it could reasonably be inferred that if claimant were precluded from welding, he could only obtain employment, if at all, at approximately minimum wage. Decision and Order at 19. Inasmuch as this evidence supports the administrative law judge's conclusion that claimant established a substantial likelihood of future economic harm resulting from his work injury, and employer has failed to establish any reversible error made by the administrative law judge in evaluating the record evidence and making credibility determinations, the award of benefits made by the administrative law judge is affirmed.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Claimant, who immigrated to the United States from Mexico and speaks mainly Spanish, required an interpreter at the hearing.