BRB No. 97-477

ROBERT MULHOLLAND	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
CRAWLEY AMERICAN TRANSPORT INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Eugene Mattioni and Francis X. Kelly (Mattioni, Mattioni & Mattioni), Westmont, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-LHC-330) of Administrative Law Judge Robert D. Kaplan rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Worker's 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).

On July 16, 1992, claimant injured his right shoulder while working for employer as a barge driver and trailer mechanic. Claimant thereafter came under the care of Dr. Phillip Marone, a board-certified orthopedic surgeon, who ultimately performed rotator cuff surgery on October 16, 1992. Following a period of post-surgical physical therapy, claimant was released to return to full duty work for employer on or about November 24, 1992. For the next 3 years, claimant continued to perform his pre-injury work duties without any loss of time except for a brief period in 1995, when he underwent scar revision surgery. The parties stipulated that since his return to work following the accident, claimant has been employed by employer at this usual job without any reduction in wage-earning capacity.

Claimant sought a *de minimis* award of permanent partial disability compensation under the Act, contending that although he had been working at this usual job without any loss of earnings, there was a substantial likelihood of future economic harm.

The administrative law judge denied claimant a *de minimis* award, concluding that because the United States Court of Appeals for the Third Circuit, in whose jurisdiction the present case arises, had not yet ruled on the propriety of such awards, he was bound by the Board's position that that such awards are inappropriate. The administrative law judge further determined, however, that even if such awards were allowable, a *de minimis* award was not warranted in this case because claimant failed to establish a reasonable likelihood of future economic harm. Claimant appeals the administrative law judge's denial of a *de minimis* award. Employer responds, urging affirmance.

We affirm the administrative law judge's finding that claimant is not entitled to a *de minimis* award on the facts of the present case. In the time since the administrative law judge issued his decision in the present case, the United States Supreme Court has upheld the propriety of *de minimis* awards, concluding that a worker is entitled to nominal compensation where he suffers from a physical impairment and 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*, ___ U.S. ___, 117 S. Ct. 1953 (1997). In light of the intervening decision of the Supreme Court, the administrative law judge's finding that *de minimis* awards are not authorized under the Act is contrary to applicable law.

Nonetheless, we conclude that any error the administrative law judge may have made in this regard is harmless on the facts presented because his alternative determination that even if *de minimis* awards are allowable, the record in the instant case fails to establish that claimant is likely to sustain a loss of wage-earning capacity in the future is rational and supported by the record.[1] Claimant argues that this finding is in error because he provided credible testimony that he experiences pain when he performs his full duty work, and Dr. Marone's opinion, that claimant has a 20 percent impairment of the right upper extremity with additional weakness in the right upper extremity which is not calculable under the AMA *Guides to the Evaluation of Permanent Impairment*, provides an objective basis to substantiate his complaints. We reject claimant's argument. In denying claimant a *de minimis* award, the administrative law judge considered claimant's testimony

[1]In making this determination, the administrative law judge did not, as claimant suggests, indicate that expert vocational or medical evidence was required. Rather, he considered all of the relevant evidence and found that the record contained no opinion of a physician, vocational expert, *or any other person* demonstrating that there is a reasonable expectation that a loss in wage-earning capacity will occur in the future or that claimant's shoulder condition will worsen and result in greater limitation or greater impairment than that which he has had since reaching maximum medical improvement and returning to work. *See* Decision and Order at 4.

as well as Dr. Marone's assessment of claimant's permanent impairment . He found that this evidence was not sufficient to establish a reasonable expectation that claimant will likely experience a loss in wage-earning capacity in the future, in light of countervailing record evidence to the contrary. In concluding that claimant failed to establish a reasonable expectation of future economic loss, the administrative law judge found that Dr. Marone released claimant to return to work without restriction on November 24, 1992, and that claimant worked for 3 years upon returning to work with no loss of time except for a 3-week period when he underwent and recuperated from revision of the right shoulder scar. In addition, he noted that in a report dated June 22, 1993, Dr. Marone stated that things probably would not get worse. EX-8. Because the evidence credited by the administrative law judge demonstrates that claimant's medical condition and prospects for continued employment are stable, it provides substantial evidence to support his finding that claimant failed to establish a significant possibility of future economic harm. *See Palmer v. Washington Metro. Area Transit Auth.*, 20 BRBS 39, 41-42 (1987). Accordingly, we affirm that determination and consequently his denial of a *de minimis* award in this case. *See Burkhardt v. Bethlehem Steel Corp*., 23 BRBS 272, 278 (1990).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge