

BRB No. 99-0454

JEFFREY DALE MASON)
)
 Claimant-Petitioner)
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 v.)
)
 WEST STATE, INCORPORATED) DATE ISSUED:
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 and)
)
 SAIF CORPORATION)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order on Remand of Vivian Schreter-Murray, Administrative Law Judge, United States Department of Labor.

Bruce A. Bottini (Bottini, Bottini & Oswald, P.C.), Portland, Oregon, for claimant.

Norman Cole (SAIF Corporation), Salem, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order On Remand (93-LHC-2324) of Administrative Law Judge Vivian Schreter-Murray 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 appeals the administrative law judge's denial of a nominal award on remand from the United States Court of Appeals for the Ninth Circuit. Claimant, a boilermaker, injured his left upper extremity at work in September 1990. Employer

voluntarily paid claimant various periods of temporary total and permanent partial disability benefits from October 1, 1990, to January 8, 1992. Claimant sought disability benefits for the time he was not working from January 8, 1992 to October 8, 1992, and for times he was working with a different employer, Anodizing, Incorporated, after October 8, 1992, as he alleged a loss in wage-earning capacity. In her initial Decision and Order, the administrative law judge awarded claimant continuing permanent partial disability benefits from October 1992.

In her Decision on Reconsideration, the administrative law judge awarded claimant permanent partial disability benefits of \$46.13 per week from February 3, 1992, through October 7, 1992. The administrative law judge further awarded claimant continuing permanent partial disability benefits from October 8, 1992, based on a weekly rate of \$6.53 (two-thirds of the difference between claimant's pre-injury average weekly wage of \$276.20 and his post-injury wage-earning capacity at Anodizing, Incorporated, of \$266.40 per week).¹ The administrative law judge stated that these benefits will terminate when claimant's earnings, in 1990 dollars, equal or exceed his average weekly wage at the time of his injury. Claimant appealed to the Board.

The administrative law judge's decisions were administratively affirmed by the Board on September 12, 1996, pursuant to Public Law No. 104-134, Omnibus Consolidated Rescissions and Appropriations Act of 1996, 110 Stat. 1321 (1996), and claimant subsequently appealed to the United States Court of Appeals for the Ninth Circuit. *Mason v. West State, Inc.*, No. 96-71013 (9th Cir. Aug. 25, 1997). The court affirmed the administrative law judge's calculation of claimant's average weekly wage of \$276.20 under Section 10(c) of the Act, 33 U.S.C. §910(c). Claimant also contended that the administrative law judge erred in determining that his permanent partial disability benefits would terminate once his post-injury wages equaled the amount of his average weekly wage. The court found that this contention had merit in light of the Supreme Court's decision in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (CRT)(1997), which was decided after the administrative law judge issued her decisions. The court vacated the administrative law judge's decision insofar as it terminated claimant's permanent partial disability benefits, and remanded the case for consideration of whether "there is a significant potential that [claimant's] injury will cause diminished capacity under future conditions," *i.e.*, to determine whether claimant is entitled to a nominal award. *Mason*, slip op. at 3, *quoting Rambo II*, 521 U.S. at 138, 31 BRBS at

¹The administrative law judge also awarded claimant temporary total disability benefits from October 18, 1993, through October 26, 1993, due to a temporary aggravation of his injury, which benefits were conceded by employer.

61 (CRT).

On remand, the administrative law judge denied claimant a nominal award, finding no significant potential that claimant's injury will cause diminished capacity under future conditions. The administrative law judge further noted that, generally, an ongoing disability award does not terminate unless the employer files a motion for modification. See 33 U.S.C. §922. The administrative law judge stated that the court of appeals apparently found no reason to compel a modification proceeding in this case, inasmuch as the national average weekly wage had risen 7.7 percent between October 1992, when the award was entered and June 21, 1994. She concluded that this rise "presumably" provided claimant with weekly earnings of \$318.82, which is the equivalent of \$287.46 in 1990 dollars, and she quoted the court's decision stating " ` When Mason's post-injury, wage-earning capacity equaled his pre-injury, average weekly wage, no longer was there a measurable difference in his wage-earning capacity.' " Decision and Order on Remand at 2, quoting *Mason*, slip op. at 3.

On appeal, claimant contends that the permanent partial disability award commencing in October 1992 should be given effect until such time as employer establishes, through modification proceedings, that claimant's wage-earning capacity exceeds his average weekly wage. Claimant further challenges the administrative law judge's denial of a nominal award on remand. Employer responds in support of the administrative law judge's decision on remand. Claimant replies, and attaches new medical evidence in support of his appeal.

We hold that claimant is entitled to the ongoing permanent partial disability benefits awarded by the administrative law judge in 1994 until such time as employer introduces evidence, in a Section 22 modification proceeding, that there has been a change in claimant's economic condition consistent with the dictate of the Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995). As claimant contends, the administrative law judge erred in *assuming* that claimant's wage-earning capacity increased merely because there was an increase in the national average weekly wage. The national average weekly wage is defined as "the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls," 33 U.S.C. §902(19), and is arrived at using data compiled by the Bureau of Labor Statistics. See *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 632 n.8, 15 BRBS 155, 158 n.8(CRT) (1983). Increases in the national average weekly wage therefore do not necessarily represent an increase in the actual wages of an individual claimant, and more importantly, cannot demonstrate that a claimant's *wage-earning*

capacity has increased above his wages at the time of injury once inflation has been factored out. It is this latter comparison that is crucial in assessing a claimant's entitlement to continuing benefits. See, e.g., *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988). Moreover, in the context of modification, the Supreme Court has cautioned that a finding of a change in claimant's economic condition is not warranted based on every variation in actual wages or transient change in the economy. *Rambo I*, 515 U.S. at 300-301, 30 BRBS at 5(CRT); see *Price v. Brady-Hamilton Stevedore Co.*, 31 BRBS 91 (1996). Rather, the factors identified in Section 8(h) of the Act, 33 U.S.C. §908(h), must be reviewed to determine whether claimant's wage-earning capacity has indeed increased above his average weekly wage.² *Id.*

Employer has not requested modification in this case; therefore, there is no evidentiary basis for the termination of benefits.³ The mere rise in the national

²Section 8(h) states:

The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. §908(h).

³Employer unilaterally may suspend payment of benefits, but risks liability for a penalty pursuant to Section 14(f), 33 U.S.C. §914(f), if it is determined that benefits were due during the period of suspension. *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Claimant's remedy is to apply to the district director for a supplementary compensation order declaring employer in default. 33 U.S.C. §918(a); 20 C.F.R. §702.372.

average weekly wage is insufficient to establish a change in claimant's economic condition within the meaning of *Rambo I*. Moreover, we note that neither the court of appeals nor the administrative law judge on remand specifically determined that claimant's permanent partial disability award was to terminate. Thus, in view of the lack of an evidentiary basis or a specific order terminating benefits, claimant is entitled to the continuing permanent partial disability benefits awarded by the administrative law judge. Claimant therefore does not require a nominal award at this time in order to maintain his right to seek modification should his condition deteriorate. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997).

In *Rambo II*, the Supreme Court held that a claimant is entitled to nominal compensation when his work-related injury has not diminished his present post-injury wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.⁴ *Id.*, 521 U.S. at 138, 31 BRBS at 61(CRT). Inasmuch as claimant is entitled to compensation for an actual loss in wage-earning capacity, he has no need for a nominal award at this time. See generally *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB No. 99-0330 (Dec. 20, 1999). Thus, we need not address claimant's contentions pertaining to the administrative law judge's denial of a nominal award. If, in accordance with *Rambo I*, employer requests modification and establishes a change in claimant's economic condition such that termination of claimant's permanent partial disability benefits for his loss in wage-earning capacity is warranted, claimant may at that time be entitled to a nominal award if he establishes the significant likelihood of a future decline in his post-injury wage-earning capacity.⁵ See *Rambo II*, 521 U.S. at 138-139, 31 BRBS at 61-62(CRT).

⁴The purpose of nominal awards is to account for the mandate of Section 8(h) that the future effects of an injury be considered in calculating an injured employee's post-injury wage-earning capacity. *Rambo II*, 521 U.S. at 121, 31 BRBS at 54(CRT). In order to protect the employee's right to seek modification in the event his physical or economic condition deteriorates, nominal awards are appropriate where a claimant has not established a present loss in wage-earning capacity under Section 8(c)(21), 33 U.S.C. §908(c)(21), but has established a significant potential of future economic harm as a result of the injury. *Id.*; see also *Stallings v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB No. 99-0330 (Dec. 20, 1999), slip op. at 4-5.

⁵The Board's review of an administrative law judge's decision is limited to consideration of evidence admitted into the record by the administrative law judge. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource Inc.*, 17 BRBS 32 (1985). Thus, the new evidence attached to claimant's reply brief cannot be

considered by the Board. Claimant may seek modification in this case in order to increase his permanent partial disability benefits award if his current wage-earning capacity is less than that established by the administrative law judge's 1994 decision.

Accordingly, the award entered by the administrative law judge in her decision dated September 22, 1994, is to remain in force until such time as the award is modified pursuant to Section 22 of the Act. The administrative law judge's Decision and Order on Remand is therefore modified to provide for continuing payments of \$6.53 per week consistent with the administrative law judge's award.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge