BRB Nos. 93-1234
and 93-1234A

KEVIN KEENAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:_____
EAGLE MARINE SERVICES	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and the Supplemental Order Awarding Attorney Fees of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

James M. McAdams (Pierry & Moorhead), Wilmington, California, for claimant.

Daniel F. Valenzuela (Samuelsen, Gonzalez, Valenzuela & Sorkow), San Pedro, California, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Award of Benefits and the Supplemental Order Awarding Attorney Fees (92-LHC-235) of Administrative Law Judge Ellin M. O'Shea 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). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with the law. *Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant unloaded a container on January 21, 1988, and hurt his shoulder. Tr. at 34. Dr. Morrison diagnosed anterior shoulder dislocation, Cl. Ex. 19, and employer paid claimant temporary total disability benefits from February 17, 1988, through March 25, 1989, and February 28 through June 9, 1990. Claimant's shoulder condition reached maximum medical improvement on November

28, 1990. Thereafter, claimant filed a claim for continuing disability benefits.

The administrative law judge stated that although she was persuaded by claimant's argument, she is bound by legal precedent which holds that shoulder injuries are considered unscheduled injuries, compensable under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). Decision and Order at 13. She also determined that claimant has not suffered a loss in work hours, but because of injury residuals, she believes claimant will experience job selection limitations. *Id.* at 15-16. Despite these potential limitations, the administrative law judge found that claimant's post-injury earnings fairly and reasonably represent his wage-earning capacity; however, because of his unusually long healing period and the need for prophylactic restrictions, she awarded a *de minimis* award of $1 per week and medical benefits. *Id.* at 16-17. The administrative law judge also awarded claimant's counsel an attorney's fee of $5,700, plus $791 in expenses. Supp. Decision and Order. Claimant appeals and employer cross-appeals the decision on the merits. Each responds to the other accordingly. Additionally, employer appeals the fee award, and claimant responds, urging affirmance.

Claimant contends his shoulder injury should be considered a scheduled injury because, under the American Medical Association *Guides to the Evaluation of Permanent Impairment*, the shoulder is considered part of the arm. As employer asserts, it is well-established that under the Act shoulder injuries are considered unscheduled injuries and are compensated under Section 8(c)(21). *Burkhardt v. Bethlehem Steel Corp.*, 23 BRBS 273 (1990); *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990); *Grimes v. Exxon Co., U.S.A.*, 14 BRBS 573 (1981). Therefore, we reject claimant's contention.

Employer contends the *de minimis* award of $1 per week is not in accordance with law and should be reversed. Claimant responds, arguing that because of union rules there will be a decreased availability of truck-driving jobs which he is capable of performing, and because he cannot perform heavy work, in the future he will suffer economic harm. In the absence of a present loss of wage-earning capacity, a claimant may receive a *de minimis* award if he demonstrates the existence of a physical impairment and a reasonable expectation of a future economic loss due to the impairment. *Palmer v. Washington Metropolitan Area Transit Authority*, 20 BRBS 39 (1987). The United States Court of Appeals for the Ninth Circuit, which has jurisdiction over this case, has approved *de minimis* awards. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27 (CRT) (9th Cir. 1996) (Decision on Remand from *Metropolitan Stevedore Co. v. Rambo*, ___ U.S. ___, 115 S.Ct. 2144, 30 BRBS 1 (CRT) (1995)). It stated that, in a situation where there is a significant physical impairment but no present loss of earnings, a nominal award is the appropriate mechanism for incorporating "the possible future effects of a disability in an award determination." *Rambo*, 81 F.3d at 844, 30 BRBS at 31 (CRT); *see also LaFaille v. Benefits Review Board*, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 16 BRBS 56 (CRT) (D.C. Cir. 1984); *Hole v. Miami Shipyard Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).

In this case, the administrative law judge credited the doctors who stated claimant can return to work but should avoid stress on his shoulder, *i.e.*, they recommended prophylactic limitations such as avoiding overhead work. She also credited claimant's testimony regarding his increased pain

with increased work; however, she did not determine whether claimant has a significant physical impairment which generates a reasonable expectation for future economic harm. The administrative law judge explained only:

there is also an unknown element which only the future will reveal, and doubt prevents an unreserved finding that future economic harm is not a significant possibility.

Decision and Order at 16. In light of the Ninth Circuit's recent decision in *Rambo,* we vacate the administrative law judge's *de minimis* award, and we remand the case for further consideration under the standard enunciated therein.[1] *See also Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985)

Employer also contends the administrative law judge erred in awarding an attorney's fee in this case. Specifically, it argues that it is not liable for a fee under Section 28(b), 33 U.S.C. §928(b), because the amount awarded by the administrative law judge is less than the amount it tendered to claimant. Alternatively, employer asserts that if it is liable for a fee, the amount should be decreased pursuant to the Supreme Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), because the amount awarded by the administrative law judge is minimal. Claimant responds, arguing that the *de minimis* award keeps the case open, allowing him to seek modification at a later date; therefore, his long-term compensation exceeds the lump sum settlement offers.

Under Section 28(b), claimant's counsel is entitled to a fee when employer voluntarily pays or tenders benefits, a controversy arises over additional compensation due, and, thereafter, claimant succeeds in obtaining greater compensation than that paid or tendered by the employer. 33 U.S.C. §928(b); *see Ahmed v. Washington Metropolitan Area Transit Authority*, 27 BRBS 24 (1993); *Fairley v. Ingalls Shipbuilding, Inc.*, 25 BRBS 61 (1991) (Decision after Remand). In this case, employer tendered two settlement offers to claimant. On November 20, 1991, it offered claimant $8,500 to cover disability benefits or $10,000 to cover disability and future medical benefits, and on July, 1, 1992, it offered claimant $15,000 to cover disability benefits, future medical benefits, and an attorney's fee. Claimant rejected both offers, proceeded with the claim, and obtained awards of $1 per week and medical benefits.

In light of our decision to vacate the *de minimis* award, we shall vacate the fee award also and remand the case for the administrative law judge to reconsider the fee petition and employer's objections in light of her decision on remand. However, we note that the administrative law judge erred in holding that Section 28(b) is inapplicable because of a "monetary intangible interest." Employer tendered two settlement offers to claimant which must be considered and compared to any amount the administrative law judge may award on remand. *See Armor v. Maryland Shipbuilding & Dry Dock Co.*, 19 BRBS 119 (1986). Additionally, if the administrative law judge determines that counsel is entitled to an attorney's fee, she must, if claimant has attained only limited success, consider the fee in light of the Supreme Court's decision in *Hensley*. *See generally Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995).

[1]The administrative law judge's award of medical benefits has not been challenged on appeal and is affirmed.

Accordingly, the administrative law judge's *de minimis* and attorney's fee awards are vacated, and the case is remanded for further consideration. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge