BRB No. 93-1501

JOSEPH FITCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTHWEST MARINE, INCORPORATED	)	DATE ISSUED: _____
	)	
and	)	
	)	
HAMILTON BALLARD LIMITED/ LEGION INSURANCE	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Douglas A. Swanson (Swanson, Thomas & Coon), Portland, Oregon, for claimant.

Russell A. Metz (Metz & Associates, P.C.), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (92-LHC-2278) of Administrative Law Judge Thomas Schneider 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 if they 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 sustained injury to his neck on August 21, 1991, while working as a machinist for employer. He continued working with increasing pain in his neck, left shoulder, and arm until September 6, 1991, when he was laid-off by employer for reasons unrelated to his injury. On September 19, 1991, claimant was seen by Dr. Hummel, an associate of his treating physician, Dr. Miller, who diagnosed cervical disc syndrome, related this condition to the work injury, and suggested a course of conservative treatment. Claimant responded well to the conservative therapy; on October 4, 1991, Dr. Hummel indicated claimant was completely asymptomatic and released him

to return to full-duty employment.

Thereafter, claimant remained asymptomatic until February or March 1992. In late May 1992, however, when his pain became severe, claimant was referred to Dr. Miller, who, after diagnosing a cervical disc protrusion, performed a laminotomy and foraminotomy on July 20, 1992. Two months later, on September 17, 1992, Dr. Miller released claimant to return to work without restrictions. Employer did not pay any benefits voluntarily. Claimant sought temporary total disability benefits for the period immediately following his surgery, permanent total disability benefits from September 17, 1992 through October 30, 1992, and a *de minimis* award thereafter.

In his Decision and Order, the administrative law judge found that inasmuch as the August 21, 1991, work injury caused claimant's herniated cervical disc, employer is liable for medical costs associated with the July 20, 1992, surgery. The administrative law judge also awarded claimant temporary total disability benefits from June 1, 1992 to September 17, 1992, and a *de minimis* award of permanent partial disability compensation at the rate of $1 per week thereafter.[1] On appeal, employer challenges the administrative law judge's *de minimis* award, contending that it is not in accordance with law and should therefore be reversed. Claimant responds, urging affirmance

After the administrative law judge's Decision and Order in this case was issued, the United States Court of Appeals for the Ninth Circuit, which has jurisdiction over this case, 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). The court 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). Claimant must establish that there is a significant possibility of future economic harm as a result of his impairment. *Id*; *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 Shipyards Corp.*, 640 F.2d 769, 13 BRBS 237 (5th Cir. 1981).

In determining that a *de minimis* was appropriate in this case, the administrative law judge initially recognized that Dr. Miller, who provided the only relevant testimony, had last examined claimant on September 17, 1992, less than one month after claimant's surgery, and determined that in his view, this was too soon for Dr. Miller to make any predictions about whether claimant sustained any permanent disability. The administrative law judge further noted that although Dr. Miller stated that claimant had no objective impairment, he advised claimant to avoid heavy

[1]The administrative law judge further found that, since claimant is entitled only to a *de minimis* award for permanent partial disability, employer is not entitled to Section 8(f), 33 U.S.C. §908(f), relief, and he awarded claimant's counsel an attorney's fee of $8,739.15. These findings are not challenged on appeal.

vigorous activity. Dr. Miller also stated that he would classify claimant as having a category two or three impairment under the State of Washington categories of disability, which, Dr. Miller explained, is a mild impairment. Moreover, the administrative law judge noted that a surgically treated cervical disc lesion with no residual symptoms equates to a 7 percent whole person impairment under the American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d. ed. 1988). After considering the aforementioned, the administrative law judge found that a "minimal" award was warranted because "claimant suffers some physical impairment the future consequences of which are impossible to foretell." Decision and Order at 3. Inasmuch as the standard which the administrative law judge employed in this case does not comport with the Ninth Circuit's recent decision in *Rambo,* we vacate the administrative law judge's *de minimis* award, and remand for further consideration under the standard enunciated therein. *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985).

Accordingly, the administrative law judge's *de minimis* award is vacated, and the case is remanded for further consideration. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge