BRB Nos. 10-0454
and 10-0454A

DANIEL S. RAYMOND	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLACKWATER SECURITY CONSULTING, L.L.C.	)	
	)	
and	)	
	)	
FIDELITY AND CASUALTY COMPANY OF NEW YORK/ CNA INTERNATIONAL	)	DATE ISSUED: 04/28/2011
	)	
Employer/Carrier-Respondents Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits of Gerald M. Etchingham, Administrative Law Judge, United States Department of Labor.

Joel S. Mills and Gary B. Pitts (Pitts & Mills), Houston, Texas, for claimant.

Michael W. Thomas and Shana L. Prechtl (Thomas, Quinn & Krieger, L.L.P.), San Francisco, California, for employer/carrier.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore),

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals the Decision and Order Awarding Benefits (2009-LDA-00293) of Administrative Law Judge Gerald M. Etchingham 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

In May or June 2006, claimant began working for employer in a security position for the United States Ambassador in Afghanistan. On May 30, 2007, claimant injured his back in the course of his work-related physical training. Claimant received treatment and then completed the remainder of his one-year contract, leaving Afghanistan in August 2007. He returned to the United States and, on January 7, 2008, he filed a claim for benefits under the Act.

The administrative law judge found that claimant's average weekly wage was $2,897.95, and he determined that claimant is unable to return to his usual work for employer and is entitled to temporary total disability benefits at a rate of $1,114.44 per week from August 29 to November 28, 2007. 33 U.S.C. §§906(b), 908(b). The administrative law judge also found that claimant is entitled to permanent total disability benefits from November 29, 2007, to January 6, 2008. The parties stipulated that claimant began post-injury alternate work on January 7, 2008. The administrative law judge found that claimant's actual post-injury wages reasonably represent his post-injury wage-earning capacity, that his 2008 wage-earning capacity was $798.83 per week, and that, as of January 1, 2009, his wage-earning capacity was $985.51 per week.[1] The administrative law judge determined that, beginning September 1, 2011, claimant is entitled only to a nominal award of $1 per week instead of permanent partial disability

[1]As two-thirds of the difference between the average weekly wage and the wage-earning capacities exceeded the statutory maximum rate in 33 U.S.C. §906(b), the administrative law judge awarded claimant permanent partial disability benefits at the statutory maximum rate of $1,114.44 per week from January 7, 2008, to August 31, 2011.

benefits based on his actual loss of wage-earning capacity. He summarily found persuasive employer's argument that claimant should not receive benefits indefinitely based on his higher overseas wages when claimant had been planning to return to Arizona by August 2011. Decision and Order at 2, 16, 22-26. The administrative law judge reasoned that claimant's work in Afghanistan would have been of limited duration, as he credited claimant's testimony that he would have renewed his one-year contracts sequentially and departed Afghanistan no later than August 2011. Decision and Order at 26 n.22. The administrative law judge also concluded that claimant's pre-injury stateside wages were very similar to his post-injury wages; thus, any loss of wage-earning capacity claimant sustained upon returning to employment in the United States was minimal. Decision and Order at 25-26; Amending Order at 1.[2]

Claimant appeals the administrative law judge's decision, arguing that the administrative law judge's two-tiered award, permanent partial disability benefits followed by a nominal award, does not comport with law. BRB No. 10-0454. The Director also appeals the administrative law judge's award,[3] arguing that the administrative law judge does not have the discretion to limit the time a claimant may receive an unscheduled permanent partial disability award and that it was improper to award claimant only nominal benefits in this case. BRB No. 10-0454A. Employer responds, urging affirmance of the administrative law judge's decision.

Based solely on his finding that claimant was going to leave his lucrative overseas job no later than August 2011, the administrative law judge summarily stated that the amount of claimant's disability award must change at that time.[4] Because claimant

[2]The administrative law judge subsequently denied the Director's motion for reconsideration, finding it to be untimely. Alternatively, the administrative law judge found that the Director did not have standing to file the motion. Order Denying M/Recon. at 2.

[3]The Director has standing to appeal the administrative law judge's decision. 33 U.S.C. §921(b)(3); *Ahl v. Maxon Marine, Inc.*, 29 BRBS 125 (1995) (order).

[4]The administrative law judge did not identify the legal principle on which this finding is based. The administrative law judge referenced employer's post-hearing brief, which in turn cited *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995) and *Murphy v. Pro-Football, Inc.*, 24 BRBS 187, *aff'd on recon.*, 25 BRBS 114 (1991), *rev'd mem. on other grounds*, No. 91-1601 (D.C. Cir. Dec. 18, 1992), wherein the administrative law judges awarded the claimants, former professional football players, benefits on a two-tiered system; the first, a higher award for the presumed duration of the football career cut short due to the work injury and the second, a lower award for the claimant's post-football career. In neither *Kubin* nor *Murphy* did any party appeal the changes to the

testified he was going to voluntarily return to the United States to work, which would reduce his earnings, and because he secured post-injury employment that was equivalent to what he had previously made in the United States before he went overseas, the administrative law judge compared the prior stateside earnings with claimant's post-injury stateside wage-earning capacity and found that any loss of wage-earning capacity between the two is nominal. Therefore, to maintain the availability of modification under Section 22 of the Act, the administrative law judge awarded compensation in the amount of $1 per week as of September 1, 2011. Claimant and the Director contend that the administrative law judge erred by reducing claimant's post-August 2011 benefits to a *de minimis* award. They assert that the Act provides the means for determining the amount and duration of a claimant's benefits and that the administrative law judge does not have the discretion to limit that period.

In a case involving a back injury, compensation for permanent partial disability is calculated under Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). That section provides that the compensation shall be 66 2/3 percent of the difference between the claimant's average weekly wage at the time of the injury and his post-injury wage-earning capacity in the same or other employment, "payable during the continuance of partial disability." 33 U.S.C. §908(c)(21), (h); *see Container Stevedoring Co. v. Director, OWCP*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). The administrative law judge found that claimant's average weekly wage at the time of his injury was $2,897.95 and his wage-earning capacity after January 1, 2009, was $985.51 per week. These findings have not been challenged. Based on the plain language of Section 8(c)(21) and the evidence adduced in this case, claimant is entitled to permanent partial disability benefits after January 1, 2009, in the amount of $1,274.96,[5] "payable during the continuance of partial disability," subject to the statutory maximum rate in Section 6(b). Unless and until a party files a motion for modification and establishes that claimant's entitlement to such disability benefits should be modified, 33 U.S.C. §922, the statute does not authorize the administrative law judge to award claimant a lesser amount of benefits. This result is consistent with *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997).

In *Harmon*, the claimant suffered a traumatic injury to his back in February 1992. He remained out of work and unable to perform his job because of his injury; he applied for longevity retirement in June 1993. His retirement became effective on July 1, 1993. The administrative law judge stated that he could not determine whether the claimant's

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compensation rates at the end of the projected football careers. Accordingly, the Board's commentary in these cases about the two-tiered awards is *dicta*.

[5]$2,897.95 - $985.51 = $1,912.44; $1,912.44 x .666667 = $1,274.96.

retirement was "voluntary" or "involuntary." Accordingly, the administrative law judge found that the claimant was not disabled after June 30, 1993, because the claimant did not carry his burden of establishing that his retirement was due to his work injury. The Board reversed the administrative law judge's denial of benefits after June 30, 1993, and awarded benefits pursuant to the administrative law judge's alternate findings. The Board held that in a traumatic injury case, the claimant need establish only that he had a work-related disability in order to be entitled to benefits. 33 U.S.C. §§908, 920(a). As the claimant in *Harmon* suffered a traumatic injury which totally disabled him prior to his retirement, the issue of the type of retirement he took was irrelevant. *Harmon*, 31 BRBS at 48-49. Hence, the Board held that it was improper for the administrative law judge to terminate the claimant's total disability benefits on the retirement date.[6] 33 U.S.C. §908(a) (permanent total disability benefits are to be "paid to the employee during the continuance of such total disability").

Similarly, in this case, the date claimant planned to leave his overseas work is not a factor in awarding benefits under the Act.[7] *See* 33 U.S.C. §908. In the first instance, the administrative law judge's two-tiered award is premised on the occurrence of a presumed future event that does not take the claimant's injured status into account. This type of calculation was rejected in *Keenan v. Director, OWCP*, 392 F.3d 1041, 38 BRBS 90(CRT) (9th Cir. 2004). Specifically, as the Director correctly argues, the Ninth Circuit, within whose jurisdiction this case arises,[8] rejected a claimant's assertion that he was entitled to an upward adjustment of his compensation based on a promotion he anticipated he would have received had he not been injured. The Ninth Circuit distinguished tort law where a "theoretical" wage may be relevant and held that the

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[6]Contrary to employer's argument, *Hoffman v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 148 (2001), is distinguishable from *Harmon*. In *Hoffman*, the claimant injured his knee at work. He returned to light-duty work for over two years and then accepted the employer's early retirement package. Subsequent to his retirement, his knee condition worsened, and he sought permanent total disability benefits. Because the claimant had retired for reasons unrelated to his injury, he had no loss of wage-earning capacity at the time his condition deteriorated and was precluded from obtaining total disability benefits. He was, however, entitled to benefits under the schedule for the degree of his physical impairment. *See* 33 U.S.C. §908(c)(2).

[7]In this case, claimant testified that he intended to renew his contract to work in Afghanistan until 2010 or 2011. Cl. Ex. 2 at 1-5; Tr. at 37-41. The administrative law judge found claimant to be credible on this point. Decision and Order at 12.

[8]This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit because the district director, who filed the compensation order, is in California. 42 U.S.C. §1653(b); *Hice v. Director, OWCP*, 156 F.3d 214, 32 BRBS 164(CRT) (D.C. Cir. 1998).

statutory formula under Section 8(c)(21) is straightforward: it contemplates wages at the time of the injury as the baseline for comparison with actual post-injury earning capacity. *Keenan*, 392 F.3d at 1045-1046, 38 BRBS at 93(CRT); *see also Sestich v. Long Beach Container Terminal*, 289 F.3d 1157, 36 BRBS 15(CRT) (9th Cir. 2002). Therefore, rather than relying on speculative future factors, the Act provides set formulas for awarding disability compensation. Consequently, we hold that the administrative law judge erred in changing claimant's compensation rate based on his testimony regarding his planned departure from Afghanistan. As there is no legal support in the Act or case law for the administrative law judge's finding that he may limit the duration of claimant's award of permanent partial disability benefits, and as the plain language in Section 8(c)(21) provides that compensation is "payable during the continuance of partial disability[,]" 33 U.S.C. §908(c)(21), we reverse the administrative law judge's finding that claimant is entitled to only a nominal award as of September 1, 2011. *Keenan*, 392 F.3d 1041, 38 BRBS 90(CRT); *Harmon*, 31 BRBS 45.

Moreover, a nominal award is not appropriate on the facts of this case. A nominal award is appropriate when a worker's work-related injury has not diminished his current wage-earning capacity but there is a significant potential that the injury will cause a reduced wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Keenan*, 392 F.3d 1041, 38 BRBS 90(CRT). The Supreme Court stated that a nominal award gives full effect to the admonition in Section 8(h), 33 U.S.C. §908(h), that the future effects of an injury must be considered when assessing an employee's post-injury wage-earning capacity, and it preserves the employee's right to file a motion for modification under Section 22 in the future. *Rambo II*, 521 U.S. at 131-132, 136-137, 31 BRBS at 57-58, 60-61(CRT); *see also Keenan*, 392 F.3d at 1047, 38 BRBS at 94(CRT).

In this case, having properly made an average weekly wage finding based on claimant's overseas employment at the time of injury, the administrative law judge awarded nominal benefits based on what he determined was essentially equivalent pre-overseas and post-injury stateside work. It is well-settled that there is only one average weekly wage per injury on which disability benefits will be based and post-injury events generally are not relevant to determining average weekly wage. 33 U.S.C. §910; *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981); *cf. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979); *S.K. [Khan] v. Service Employers Int'l, Inc.*, 41 BRBS 123 (2007) (consideration of post-injury factors may be appropriate under Section 10(c) where a claimant's previous earnings do not realistically reflect his wage-earning potential). The administrative law judge found claimant's average weekly wage at the time of injury to

be $2,897.95, and this finding has not been appealed. *See K.S. [Simons] v. Service Employees Int'l, Inc.*, 43 BRBS 18, *aff'd on recon. en banc*, 43 BRBS 136 (2009).

By comparing the wages claimant earned in the United States prior to his overseas work to his post-injury stateside earnings, the administrative law judge effectively applied a second average weekly wage in considering claimant's entitlement to benefits. This finding is not consistent with law. *Hawthorne*, 28 BRBS 73; *Merrill*, 25 BRBS 140; *James*, 13 BRBS 762. Moreover, a finding that pre- and post-injury stateside wages are "remarkably similar" does not meet the standard under *Rambo II* for awarding a nominal amount. *Rambo II*, 521 U.S. 121, 31 BRBS 54(CRT). *Rambo II* permits a nominal award only when there is no present diminution of wage-earning capacity but there is the potential for it, due to the claimant's injury, in the future. The proper comparison is between a claimant's average weekly wage at the time he was injured and his present wage-earning capacity. Here, the administrative law judge found that claimant has an actual loss in wage-earning capacity between his average weekly wage and his present wages. As the administrative law judge did not base his *de minimis* award on proper legal foundations, it cannot be affirmed. *See Stallings v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 193 (1999), *aff'd in pert. part*, 250 F.3d 868, 35 BRBS 51(CRT) (4th Cir. 2001) (where claimant had a present loss of wage-earning capacity, though small, it was not a *de minimis* award). Therefore, we vacate the administrative law judge's *de minimis* award. As no party disputes the administrative law judge's findings regarding claimant's average weekly wage at the time of injury, his post-injury wage-earning capacity in his employment as of January 7, 2008, and January 1, 2009, or the resulting compensation rate calculations, we modify the administrative law judge's decision to reflect employer's liability for permanent partial disability benefits, "payable during the continuance of partial disability," based on claimant's actual loss of wage-earning capacity subsequent to August 31, 2011, 33 U.S.C. §908(c)(21), (h), subject to Section 6(b).

Accordingly, the administrative law judge's nominal award beginning September 1, 2011, is vacated, and the decision is modified to reflect claimant's entitlement to continuing permanent partial disability benefits at the rate awarded by the administrative law judge for the period from January 1, 2009, through August 31, 2011. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge