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Rambo, the Sequel: Does Federal Law Permit an Award of Nominal Disability Benefits to an Injured Longshoreman to Preserve the Right to Receive Future Benefits?

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Case at a Glance

John Rambo was injured while working as a longshoreman and was awarded partial permanent disability benefits under the Longshore and Harbor Workers' Compensation Act. Although Rambo remained permanently disabled, he obtained a better paying job as a crane operator. The Supreme Court is asked to decide whether a federal appeals court or a federal administrative agency is authorized in the first instance to order payment of nominal disability benefits to Rambo for the purpose of preserving his right to receive benefits should his disability adversely affect his future earnings.

Rambo, the Sequel: Does Federal Law Permit an Award of Nominal Disability Benefits to an Injured Longshoreman to Preserve the Right to Receive Future Benefits?

by Jay E. Grenig

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ISSUE

Does the Longshore and Harbor Workers' Compensation Act authorize a continuing award of nominal disability benefits to a covered employee who has suffered a partial permanent injury with a potential loss of long-term, wage-earning capacity but who has no present loss of earnings?

FACTS

In 1980 in the course of his employment with Metropolitan Stevedore Company ("Metropolitan"), John Rambo, a longshoreman, injured his back and leg. Rambo filed a claim for disability benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act") with the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (the "Director"). In 1983 an Administrative Law Judge ("ALJ"), acting on behalf of the Director, found that Rambo had sustained a partial permanent disability and awarded benefits at the rate of \$80.16 per week.

Rambo subsequently trained to become a crane operator and secured longshore work in this new capacity. He also worked in his spare time as a heavy lift-truck operator. Between 1985 and 1990, Rambo's average weekly wages as a crane operator ranged between \$1,307.81 and \$1,690.50, which was more than three times his preinjury earnings, though his physical condition remained unchanged.

In light of Rambo's increased wage-earning capacity, Metropolitan sought to terminate the disability award, claiming that under Section 22 of the LHWCA, 33 U.S.C. § 922 (1994), Rambo's new and considerably more remunerative employment was a "change in condition" that could support a downward modification or termination of benefits previously awarded. Section 22 also provides a one-year time period within which either the employer or the longshoreman can seek a change in benefits. The one-year period runs from the date of the last benefits payment or from the date a claim is rejected.

*METROPOLITAN STEVEDORE
COMPANY V. JOHN RAMBO AND
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR*
DOCKET NO. 96-272

ARGUMENT DATE:
MARCH 17, 1997
FROM: THE NINTH CIRCUIT

Rambo unsuccessfully resisted termination of his benefits award, arguing that his new job was not a change in condition within the meaning of Section 22. The ALJ hearing the matter agreed with Metropolitan and ruled that Rambo's new job was a change in condition for purposes of Section 22; accordingly, the ALJ terminated the award. The Department of Labor's Benefits Review Board (the "Review Board") affirmed the ALJ's decision, and Rambo appealed to the Ninth Circuit.

The Ninth Circuit reversed, holding that Section 22's change-in-condition requirement for modifying or terminating an award of disability benefits called for proof that the injured employee had undergone a change in physical condition. In the Ninth Circuit's view, an increase in a disabled longshoreman's post-injury earnings, standing alone, was insufficient to support a modification or termination of a prior benefits award. 28 F.3d 86 (9th Cir. 1995).

The Supreme Court took the case and reversed, holding "that a disability award may be modified under Section 22 where there is a change in the employee's wage-earning capacity, even without any change in the employee's physical condition." 115 S. Ct. 2144, 2150 (1995), 7 *ABA PREVIEW* 312 (April 7, 1995). The Court returned the case to the Ninth Circuit because Rambo had raised other arguments that the appeals court had not addressed.

Back in the Ninth Circuit, the court held that the Review Board should have reduced Rambo's award of disability benefits to a nominal amount in the interest of justice, rather than terminating the award in its entirety. 81 F.3d 840 (9th Cir. 1996). The Ninth Circuit determined that a nominal award would preserve Rambo's right to future benefits in

the event his disability caused a reduction of earnings at some later time.

The court explained that "because Rambo has suffered a permanent partial disability, there is a significant possibility that he will at some future time suffer economic harm as a result of his injury. The LHWCA mandates a forward look in award determinations. Thus, the appropriate award modification is a small award fashioned expressly for the purpose of preserving the right to receive compensation should disability in an economic sense ever visit him." 81 F.3d at 845.

The Ninth Circuit's second decision in this case is now before the Supreme Court which granted Metropolitan's petition for a writ of certiorari. 117 S. Ct. 504 (1996).

CASE ANALYSIS

The LHWCA is a comprehensive scheme to provide compensation "in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States . . ." 33 U.S.C. § 903(a). As noted, a disability award under the Act is designed to compensate a covered employee for reductions in wage-earning capacity resulting from a covered injury, as reductions in the claimant's wage-earning capacity may occur throughout his or her lifetime.

Metropolitan, however, argues that the LHWCA does not guarantee a complete remedy for all work-related disabilities under any and all contingencies, but is a compromise of competing interests. According to Metropolitan, the compromise reflected in the Act represents Congress' balancing of interests and also represents Congress' decision to remove the balancing process from the courts.

Metropolitan takes the position that the nominal award ordered by the Ninth Circuit was a mere device or fiction adopted for the transparent purpose of evading Section 22's one-year time limit for modifying LHWCA benefit awards when there is a change of condition. By awarding nominal benefits payable on an on-going basis, the Ninth Circuit provided Rambo with carte blanche to secure benefits should his future earnings decline regardless of any temporal connection between that decline and his employment with Metropolitan.

Rambo counters that an award of nominal benefits is the only mechanism available to incorporate in a benefits award the possible future adverse effects of a disability. According to Rambo, a nominal award is an appropriate mechanism for anticipating a future loss of earnings attributable to an earlier compensable disability.

The Director supports the substance of Rambo's argument. According to the Director, the LHWCA authorizes a continuing nominal award of disability benefits whenever a claimant has sustained no present loss of earnings but has established the likelihood of such a loss in the future as a result of an earlier, covered injury.

The Director relies on Section 8(h) of the LHWCA which provides that the Director may determine a covered employee's actual earnings for purposes of an award "having due regard . . . to the effect of disability as it may naturally extend into the future." 33 U.S.C. § 908(h). The Director maintains that a claimant who has demonstrated that a covered injury will more likely than not result in a loss of earnings in the future has shown a loss of long-term, wage-earning capacity that establishes a disability within the

(Continued on Page 370)

meaning of the Act. If the claimant is not experiencing a current loss of earnings, the Director says that the entry of a continuing nominal award is the appropriate course of action because it accounts for the fact that the claimant's future ability to compete in the open labor market may have been impaired. The fact that a primary purpose of a nominal award is to prevent triggering Section 22's one-year limitation period does not mean that such an award is inappropriate.

The Director, however, takes a different position on the proper procedure for ordering a continuing nominal award. In the Director's view, the Ninth Circuit exceeded its authority by ordering a nominal award without first permitting the ALJ and the Review Board to consider the matter. The Director argues that the Ninth Circuit should have sent the case back to those administrative forums for further proceedings to determine the likely effect of Rambo's injury on his long-term, wage-earning capacity.

SIGNIFICANCE

This case involves the interpretation of a provision of the LHWCA and the authority of courts to effectuate the purposes of the Act. On this point, the Supreme Court has held that courts are not free, under the guise of statutory interpretation, to amend provisions of the LHWCA. Speaking directly to the one-year limitation period of Section 22, the Court observed that "we are aware that the LHWCA is a humanitarian act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all." *Pillsbury v. United Eng. Co.*, 342 U.S. 197, 200 (1952).

For injuries such as those Rambo sustained, loss of wage-earning capacity is an element of the claimant's case. A claimant is not considered disabled unless he or she proves incapacity to earn wages because of injury. 33 U.S.C. § 902(10). A nominal award of benefits, in effect, extends a claimant's right to modification indefinitely notwithstanding the language of Section 22.

When Congress first enacted Section 22 as part of the original LHWCA in 1927, it permitted modification only during the term of an award. In 1934, Congress rejected a recommendation that there be an unlimited time period for modification and, instead, established a one-year period. In 1938 and 1983, Congress rejected proposals to change the one-year limit.

The District of Columbia, Second, and Fifth Circuits have ruled that a nominal award may be used to preserve a possible future award under Section 22 when there is a significant physical impairment without a present loss of earnings. *Randall v. Comfort Control, Inc.*, 725 F.2d 791 (D.C. Cir. 1984); *LaFaille v. Benefits Review Bd.*, 884 F.2d 54 (2d Cir. 1989); *Hole v. Miami Shipyards Corp.*, 640 F.2d 769 (5th Cir. 1981). On the other hand, the Fourth Circuit declined to approve such an award because of insufficient evidence of a future downturn in earnings. Nonetheless, the Fourth Circuit appeared to accept the principle that a nominal award may be appropriate in some cases to facilitate subsequent modification necessitated by a later reduction in wage-earning capacity. *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985).

The Review Board, however, has not been shy about expressing its dissatisfaction with court-ordered nominal awards of disability benefits, viewing them as judicial infringements on the province of Congress because, in the absence of legislative consideration, they extend indefinitely the time period provided for modifying or terminating awards under Section 22. Citing the legislative history of Section 22, the Director agrees that Congress intended that the Act would allow consideration of the effects of an injury causing permanent partial disability on an employee's future ability to earn. The Director only objects to who makes this determination in the first instance — the courts or the administrative agency charged with implementing the Act. Not surprisingly, the Director insists that the administrative agency should make the initial determination as to the appropriateness of a nominal benefits award. The Supreme Court's decision in this case could resolve this issue.

On a more immediate level, a decision for Metropolitan will limit the responsibility of maritime employers for injuries to employees who return to regular and continuous work at wages in excess of preinjury average weekly wages. A decision for Rambo will make it easier for disabled employees to seek modification of their benefits when circumstances change, but such a decision will increase the exposure to liability of maritime employers.

**ATTORNEYS OF THE
PARTIES**

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AMICUS BRIEFS

**In support of Metropolitan
Stevedore Company**

Joint brief of the National
Association of Waterfront
Employers, Master Contracting
Stevedore Association of the Pacific
Coast, Inc., Shipbuilders Council of
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