BRB No. 94-3939

REESE HAYNES, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RYAN-WALSH, INCORPORATED	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of George P. Morin, Administrative Law Judge, United States Department of Labor.

E. Paul Gibson (Riesen Law Offices), N. Charleston, South Carolina, for claimant.

Richard P. Salloum (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (93-LHC-3335) of Administrative Law Judge George P. Morin 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).[1] 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 sought benefits under the Act for injuries which he sustained on February 20, 1992, while in the course of his employment as a longshoreman with employer. At the formal hearing, the parties stipulated, *inter alia*, that claimant's average weekly wage for compensation purposes is

[1]By Order dated December 6, 1994, the Board denied claimant's request for oral argument, and stated that it would address claimant's Motion for Exclusion of New Evidence in the Board's Decision and Order. We deny claimant's motion to exclude from consideration the opinion of the United States District Court in *Brown v. Millette*, No. 85-0992 (NG)(S.D. Miss. Oct. 7, 1988) and an administrative law judge's decision in *Trice v. Virginia International Terminals*, 91-LHC-1206 (Feb. 17, 1993). The decisions which claimant seeks to exclude were attached to employer's response brief to support the legal arguments made in employer's brief and do not constitute "new evidence" pursuant to 20 C.F.R. §802.301(b).

$723.24 if his container royalty and holiday/vacation pay are included, and $519.40 if those amounts are excluded, with corresponding compensation rates of $482.16 and $346.21, respectively. This stipulation was subsequently accepted by the administrative law judge.

In his Decision and Order, the administrative law judge awarded benefits to claimant for a 26 percent permanent partial disability of claimant's right foot and ankle pursuant to Section 8(c)(4) of the Act, 33 U.S.C. §908(c)(4). Next, the administrative law judge determined that container royalty payments received by claimant do not fall within the definition of wages contained in Section 2(13) of the Act, as amended in 1984, 33 U.S.C. §902(13) (1988), and thus are not includible in calculating claimant's average weekly wage under Section 10 of the Act, 33 U.S.C. §910. The administrative law judge concluded, however, that claimant's holiday/vacation pay was to be included in his average weekly wage computation, and thereafter found claimant's average weekly wage to be $594.94, with a corresponding compensation rate of $396.65.

On appeal, claimant challenges the administrative law judge's decision to exclude container royalty payments made to claimant in calculating claimant's average weekly wage, contending that this case is controlled by the Board's decision in *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Employer responds, urging affirmance of the administrative law judge's Decision and Order.

We agree with claimant that the disposition of the issue raised on appeal in this case is controlled by *Lopez*, 23 BRBS at 295. In *Lopez*, the Board held that container royalty payments fall within the statutory definition of wages[2] since they are a part of claimant's income, they are reported on claimant's income tax returns,[3] the value of such payments is readily calculable, and the payments are made directly to the employee on the basis of seniority and career hours worked. *See Blakney v. Delaware Operating Co.*, 25 BRBS 273 (1992).

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[2]Section 2(13) of the Act, as amended in 1984, defines "wages" as:

> the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

33 U.S.C. §902(13) (1988).

[3]Claimant's W-2 Wage and Tax Statements, which show receipt by claimant of "wages, tips, other compensation" received from "Trustees, Container Royalties Supp. Fund," indicate that federal, state, Social Security, and Medicare taxes were withheld from claimant's container royalty payments. Cl. Exs. 15, 16, 17.

Employer, in response to claimant's appeal, contends that because claimant's container royalty payments were received from the Container Royalty Supplementary Fund, and not from employer, they constitute a fringe benefit, rather than a wage.[4] We disagree. Implicit in the Board's decision in both *Lopez* and *Parks v. John T. Clark & Son of Maryland, Inc.*, 9 BRBS 462, 465-66 (1978), *rev'd on other grounds sub nom. John T. Clark & Son of Maryland, Inc. v. Benefits Review Board*, 621 F.2d 93, 12 BRBS 229 (4th Cir. 1980), is the recognition that, to fall within the statutory definition of wages, container royalty payments need not be received *directly* from the stevedoring company that employs the claimant but, rather, may be received via a container royalty fund.[5] *Accord McMennamy v. Young & Co.*, 21 BRBS 351, 353-54 (1988) (Guaranteed Annual Income payments paid to the claimant from a trust funded by employer contributions pursuant to a collective bargaining agreement constitute wages under amended Section 2(13) of the Act). Because the container royalty payments in the instant case were made to claimant pursuant to a collective bargaining agreement and were allocated based on claimant's seniority and annual hours worked, the mere fact that claimant's payments were received via the Container Royalty Supplementary Fund, as opposed to directly from employer, does not divest them of their characterization as wages. *See Blakney*, 25 BRBS at 273; *Lopez*, 23 BRBS at 295; *McMennamy*, 21 BRBS at 351.

Moreover, employer's contention that container royalty payments must be considered a fringe benefit rather than a wage because they are governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq.*, is without merit. The issue of whether container royalty payments are governed by ERISA is not dispositive of the issue of whether such payments fall within the definition of "wages" under the Act, a different statutory scheme.

We therefore reverse the administrative law judge's determination that the container royalty payments received by claimant do not constitute wages pursuant to Section 2(13) and are not includible in the calculation of claimant's average weekly wage. *See Lopez*, 23 BRBS at 295; *McMenammy*; 21 BRBS at 351. The administrative law judge's decision is modified, consistent with

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[4]In construing Section 2(13) prior to the 1984 Amendments, the United States Supreme Court stated that where benefits received are not "money recompensated," or "gratuities received from others," the narrow question is whether the benefits are a "similar advantage" to board, rent, housing, or lodging in that the benefits have a present value that can be readily converted into a cash equivalent on the basis of their market value. *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155 (CRT)(1983). Section 2(13), as amended in 1984 to specifically exclude certain fringe benefits from the definition of wages, codifies the *Morrison-Knudsen* holding that employer contributions to union trust funds for health and welfare, pensions and training, which do not have a readily calculable present value and are not paid directly to the employees, are not included within the definition of "wages." *See Blakney*, 25 BRBS at 275; *McMenammy v. Young & Co.*, 21 BRBS 351, 353-54 (1988). In the present case, we are not addressing employer contributions to a fund, but rather payments made to claimant which are included in his income tax withholding.

[5]The Board noted in *Lopez*, 23 BRBS at 300, that container royalty payments historically represent compensation paid by shipping companies in lieu of work lost by longshoremen due to containerization. We note that, in the case at bar, the Container Royalty Supplementary Fund is funded by the South Carolina Stevedores Association and its direct employer members, of which employer is one. Emp. Ex. 42 at 3-5, 21.

the parties' accepted stipulation regarding claimant's average weekly wage inclusive of container royalty payments, to reflect claimant's entitlement to compensation based upon an average weekly wage of $723.24, and a corresponding compensation rate of $482.16.

Accordingly, the administrative law judge's decision to exclude claimant's container royalty payments from his average weekly wage calculation is reversed and the decision is modified to reflect claimant's entitlement to compensation based upon the stipulated average weekly wage of $723.24.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge