BRB No. 91-0445

WILLIE L. BRANCH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES CORPORATION	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

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

Lee E. Wilder (Rutter & Montagna), Norfolk, Virginia, for claimant.

Robert A. Rapaport (Knight, Dudley, Dezern & Clarke), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (89-LHC-3465) of Administrative Law Judge Michael P. Lesniak 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 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 injured his back while working for employer on November 21, 1987. Employer voluntarily paid claimant temporary total disability compensation from November 22, 1987, onward. Claimant returned to work on May 2, 1990, with the restriction that he was not to lift more than 40-50 pounds. Claimant sought compensation under the Act based on a higher average weekly than that on which employer's voluntary payments had been made. Prior to the hearing, the parties stipulated that claimant's injury arose during the course and scope of his employment, and that the notice, claim, and controversion were timely. The parties further stipulated that claimant had received $5,071.51 in payments from the Vacation/Holiday Fund and the Container Royalty Fund[1] in 1987,

[1]Vacation/holiday pay benefits are administered through a trust fund. Vacation payments are paid in December of the contract year following the eligibility year and holiday benefits are paid in June

prior to his injury, and $5,045.67 in payments from these funds in 1988 and $8,031.82 in 1989 while he was disabled. At the formal hearing held on March 28, 1990, two issues were in dispute: whether payments claimant received from the Container Royalty and Vacation/Holiday Funds in the year prior to his injury should be included in the calculation of his average weekly wage[2] and whether monies paid to claimant from these funds during the time of his work-related disability are "wages" for which employer can take a direct credit against future compensation benefits owed.

In his decision, the administrative law judge found that the payments claimant received from the Container Royalty and Vacation/Holiday Funds were properly included in determining his average weekly wage. He further found that employer was entitled to a credit for the Vacation/Holiday and Container Royalty Fund payments claimant received while he was disabled. In so concluding, the administrative law judge rejected claimant's argument that these monies were similar to bonuses which are not wages under the Act. Although claimant also argued that these monies should not be subject to employer's credit because he did not have to work to receive these benefits, the administrative law judge found this argument "unpersuasive as well as confusing." The administrative law judge noted that if the vacation and holiday pay were treated as bonuses they would be considered fringe benefits, not wages. He further determined that even though claimant did not have to work to receive these benefits while he was injured, they nonetheless represented earnings paid by employer and not allowing employer a credit for these payments under such circumstances would make claimant "more than whole" at employer's expense. Decision and Order at 8. Thereafter, consistent with instructions given by the administrative law judge in his decision, the parties entered into stipulations regarding the actual amounts owed which the administrative law judge then incorporated into an Order dated December 11, 1990. Pursuant to this Order, the post-injury payments in question were treated as if they were indicative of a post-injury wage-earning capacity so as to reduce the average weekly wage and amount of temporary total disability compensation owed to claimant.

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of the contract year following the eligibility year. Tr. at 31.

The container royalty payment is made by shipping companies in lieu of work lost by longshoremen due to containerization. The royalty is paid yearly in December of the contract year following the eligibility year, and is divided by the number of people who earned 700 hours.

Under the collective bargaining agreement, an employee becomes eligible for payments from the Vacation/Holiday and Container Royalty Funds if he works or receives credit for 700 hours during each contract year. If an employee is out due to illness or disability, he will be credited 20 hours every week he is out due either to temporary total or temporary partial disability.

[2]At the hearing, the parties stipulated that claimant's average weekly wage is $470.99, if the vacation/holiday and container royalty fund payments are held to be included. Tr. at 4.

On appeal, claimant contends that the administrative law judge erred in allowing employer a credit for the vacation, holiday, and container royalty payments he received while he was disabled after his injury.[3] Claimant asserts that the Act only allows an employer to take a credit against future compensation payments owed if a claimant actually earns wages, which are defined by Section 2(13) of the Act, 33 U.S.C. §902(13), as compensation for services rendered. Claimant argues that as he did not perform any work to receive these payments, they are not "wages" but rather a negotiated benefit between union and management similar to a bonus, which may not properly be the subject of an employer's credit. Employer responds that the administrative law judge correctly determined that it was entitled to a credit for these payments. Employer asserts that once the administrative law judge found that these payments were wages to be included in the determination of claimant's average weekly wage, he properly determined that these payments had to be treated as wages for all purposes to avoid claimant's receiving a double recovery.[4]

We agree with claimant that the administrative law judge erred in allowing employer a credit for the vacation, holiday and container royalty payments he earned while he was temporarily totally disabled. Section 14(j) of the Act, 33 U.S.C. §914(j), governs employer's entitlement to a credit in this case. Under this provision employer is entitled only to a credit for its prior payments of compensation against any compensation subsequently found due. In *Andrews v. Jeffboat, Inc.,* 23 BRBS 169, 174 (1990), the Board held that the employer was entitled to a credit for holiday pay claimant earned while he was disabled against temporary total disability benefits owed where the union contract specifically provided that during the first eight holidays an employee is off work due to an on-the-job injury, the holiday pay was intended to be "in lieu of compensation." In so concluding, the Board reasoned that claimant incurred no wage loss on the days he received his holiday pay. *Andrews*, 23 BRBS at 174. The Board's decision in *Andrews*, however, clearly states that the holding rests on its facts -- specifically, the intention that holiday pay was to be in lieu of compensation. *Id.*

More recently the Board addressed the issue of a credit for holiday pay in *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994) (Brown and McGranery, JJ., concurring in pert. part and dissenting in part), *modifying in pert. part on recon. en banc* 25 BRBS 100 (1991). In its original decision, the Board held that the employer was entitled to a credit for its disability payments on the days the claimant received holiday pay, citing the decision in *Andrews. Sproull*, 25 BRBS at 107-108. On reconsideration, however, the Board held that the employer was not entitled

[3]The administrative law judge's finding that claimant's average weekly wage included the holiday/vacation and container royalty payments is not challenged on appeal.

[4]Employer argued below that if these payments were included in determining claimant's average weekly wage, they must also be viewed as indicative of claimant's post-injury wage-earning capacity similar to claimant's obtaining a job. Employer argued that under these facts, the award of compensation should be calculated by subtracting the earnings claimant received from these funds while he was disabled from the stipulated average weekly wage and then dividing this number by two-thirds. See Tr. at 14-15.

to a credit for holiday pay against the temporary disability compensation paid to the claimant, because the union contract in *Sproull*, unlike that in *Andrews*, did not specifically provide that the holiday pay "was intended in lieu of compensation." *Sproull*, 28 BRBS at 276.[5]

The present case is similar to *Sproull* in that the union contract does not specifically provide that the payments from the Vacation\Holiday Fund or Container Royalty Fund were intended to be in lieu of compensation. Under the HRSA-ILA agreement in the present case, an employee becomes eligible for payments from the Vacation/Holiday and Container Royalty Funds if he works or receives credit for 700 hours during each contract year. If an employee is absent from work due to illness or disability, he is credited 20 hours for every week he is out on temporary total or temporary partial disability. The employee's ability to earn these benefits regardless of whether he is disabled belies a finding that these payments were intended as advance payments of "compensation," which is defined under the Act as the "money allowance payable to an employee or his dependents under the Act." *See* 33 U.S.C. §902(12). As claimant asserts, the fact he receives these payments even while he is temporarily disabled stems from the union contract itself rather than any provision of the Longshore Act. Such privately negotiated payments may be likened to wages paid under an employer-sponsored salary continuance plan, which the Board has specifically recognized are not compensation and thus not subject to a credit under Section 14(j). *See Fleetwood v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12 (CRT)(4th Cir. 1985). *See generally* 4 A. Larson, *The Law of Workmen's Compensation* §97.53 (1994). Inasmuch as there is no evidence in this case that the holiday/vacation and container royalty payments made during claimant's disability were intended as compensation, as is required for a credit under Section 14(j), the administrative law judge's finding that employer is entitled to credit is reversed.

Moreover, we agree with claimant that in his December 11, 1990, Order, the administrative law judge erred in treating the holiday/vacation and container royalty payments claimant earned while he was temporarily totally disabled as indicative of a post-injury wage-earning capacity, resulting in a reduced "average weekly wage" for each of the three years of claimant's disability. Initially, this calculation of a new "average weekly wage" in 1988, 1989, and 1990, is totally improper. Claimant is entitled to temporary total disability payments of 66 2/3 percent of his pre-injury average weekly wage. 33 U.S.C. §908(b). There is no statutory basis for creating a reduced award by altering claimant's average weekly wage. Claimant's entitlement to temporary total disability compensation under the Act, moreover, is premised on his complete incapacity due to his injury to return to work and *earn* wages. *See* 33 U.S.C. §§902(10), 908(b). Although the payments at issue here may be properly included in the definition of "wages" in Section 2(13) of the Act, the post-injury receipt of such payments does not create a wage-earning capacity or establish that

[5]Additionally, in the decision on reconsideration in *Sproull*, the Board noted that since registered employees who were eligible for a paid holiday could work on the holiday and receive payment as prescribed in the collective bargaining agreement, then had the claimant not been injured, he could have received both his holiday pay and wages. *Id.* The Board therefore stated that the claimant arguably sustained a wage loss due to his injury on the holiday as he was entitled to a paid holiday whether or not he worked.

claimant is less than totally disabled where he is physically unable to work or earn such wages. Claimant is able to receive these payments during a period when he is physically incapable of working due to a provision in the union contract itself, and his receipt of these payments has no bearing on his entitlement to temporary total disability compensation under the Act.

Finally, we reject the conclusion that claimant will be made "more than whole" by his post-injury receipt of these payments. They are earned under the contract based on hours worked or credited during periods of disability. The parties to the contract agreed to the terms. It is irrelevant that claimant's average weekly wage included the payments; their inclusion in average weekly wage is based on pre-injury payments due to work performed by claimant prior to his injury. *See generally Sproull*, 28 BRBS at 276. There is no provision in the statute for offsetting post-injury payments on the facts presented and no danger of double recovery, as claimant is entitled to the payments regardless of his disability status and the post-injury payments are not included in any entitlement calculations.[6]

Accordingly, the administrative law judge's Decision and Order holding that employer is entitled to a credit for the holiday/vacation and container royalty payments claimant received pursuant to the union contract while he is disabled is reversed. His subsequent Order reducing claimant's temporary total disability compensation payments based on these benefits is also reversed. The decisions are modified to reflect that claimant is entitled to temporary total disability compensation during the period he was unable to work based on the 66 2/3 of applicable average weekly wage. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[6]Examination of the actual payments and benefits due demonstrates that claimant is not made more than whole if a credit is denied to employer on the facts presented in this case. Based on the stipulated average weekly wage of $470.99 in the year prior to his injury, claimant would have had annual earnings of $24,491.48. While he was disabled he would receive compensation payments based on 66 and 2/3 percent of his $470.99 average weekly wage or $314 per week, resulting in yearly compensation payments of $16,328. The parties stipulated that claimant received $5045.67 in holiday/vacation and container royalty payments in 1988 and $8,031.82 in 1989. As claimant will receive a total of $21,373.67 in 1988 ($16,328 in disability compensation plus $5,045.67 in supplemental payments) and $24,359.82 in 1989 ($16,328 in disability compensation plus $8,031.82 in supplemental payments), in no year does the combination of the compensation and extra payments exceed his average annual earnings prior to his injury.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge