BRB No. 00-0297

NICHOLAS ANTONIO CROCETTI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: Nov. 29, 2000
	)	
and	)	
	)	
SCHAFFER INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Respondents	)	) DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and Decision and Order on Reconsideration (98-LHC-2919) of Administrative Law Judge Richard T. Stansell-Gamm 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 left knee on May 20, 1997, during the course of his employment

for employer as a lasher. Claimant was able to continue working until July 8, 1997, despite the knee injury. On September 2, 1997, claimant underwent arthroscopic surgery to reconstruct the posterior cruciate ligament. Employer voluntarily paid benefits under the Act for temporary total disability, 33 U.S.C. §908(b), from July 9, 1997, to June 2, 1998. On July 1, 1998, claimant retired from longshore employment. Claimant sought continuing permanent total disability benefits.

The administrative law judge first determined, pursuant to *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), that claimant had an average weekly wage of $789.50 at the time of his injury on May 20, 1997, and an average weekly wage of $1,035.26 on October 1, 1997, when the 1998 contract year between claimant's union and employer's trade association commenced and claimant's entitlement to vacation/holiday, container royalty and guaranteed annual income (GAI) payments for the 1997 contract year vested. Next, the administrative law judge noted the parties' stipulations that claimant is unable to return to his usual employment, that employer established the availability of suitable alternate employment, and that claimant has a residual wage-earning capacity of $363.50 per week. The administrative law judge rejected claimant's contention that he is entitled to benefits for permanent total disability, 33 U.S.C. §908(a), or, in the alternative for permanent partial disability based on the stipulated loss of wage-earning capacity of $363.50 per week, *see* 33 U.S.C. §908(c)(21). Rather, the administrative law judge awarded claimant compensation under the schedule for a 20 percent permanent partial impairment of the left leg, 33 U.S.C. §908(c)(2), finding that claimant's left knee condition reached maximum medical improvement on May 26, 1998, and that suitable alternate employment was available by the end of May 1998. On reconsideration, the administrative law judge denied claimant's contentions that he failed to consider claimant's pre-existing right knee impairment when determining the extent of disability and that he is entitled to an award for permanent partial disability based on a loss of wage-earning capacity.

On appeal, claimant challenges the administrative law judge's determination that his average weekly wage on October 1, 1997, was $1,035.26, and his finding that claimant is not entitled to an award of benefits under the Act for his loss of wage-earning capacity of $363.50 per week. Employer responds, urging affirmance.

Claimant contends that the administrative law judge erred in determining his average weekly wage commencing on October 1, 1997, by dividing by 104 weeks the sum total of his container royalty, vacation/holiday and GAI payments in the 1996 and 1997 contract years. Claimant contends that the payments he received in 1996 and 1997 from employer's trade association, totaling $25,559, should have been divided by 68, which is the actual number of weeks claimant worked during those contract years. Section 10 of the Act, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average

weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous, and he is a five or six day per week worker. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied. The object of Section 10(c) is to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26(CRT) (5th Cir. 1991).

In *Wright*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held that vacation/holiday and container royalty payments are "wages" within the meaning of Section 2(13) of the Act, 33 U.S.C. §902(13), and must be included in the calculation of average weekly wage if they are earned from actual work. *Wright*, 155 F.3d at 328, 33 BRBS at 28(CRT); *see also McMennamy v. Young & Co.* 21 BRBS 351 (1988) (GAI payments are "wages" under Section 2(13)). Concerning the actual calculation of average weekly wage, the circuit court observed that the timing of the vacation/holiday and container royalty payments, which in the instant case occurs after the close of the contract year on September 30, requires the determination of average weekly wage under Section 10(c). *Wright*, 155 F.3d at 327, 33 BRBS at 28(CRT). Moreover, to prevent a double recovery to claimant, the court held that average weekly wages must be calculated twice; *i.e.*, an average weekly wage derived from claimant's earnings from his labor at the time of injury and a second average weekly wage incorporating claimant's vacation/holiday and container royalty payments, which applies to compensation payments made from October 1 after the date of injury.[1] *Id.*, 155 F.3d at 329-330, 33 BRBS at 30(CRT).

In the present case, it is uncontested that the administrative law judge properly applied *Wright* and utilized Section 10(c) to calculate claimant's average weekly wage at the time of the injury and a second average weekly wage applicable on October 1, 1997. In calculating

[1]The court reasoned that a single, average weekly wage commencing from the date of injury which incorporated claimant's subsequent vacation/holiday and container royalty payments would unjustly award disability compensation for wages that could not have been earned or lost from the date of injury to the end of the contract year on September 30. *Wright*, 155 F.3d at 329-330, 33 BRBS at 30(CRT).

the former average weekly wage, the administrative law judge relied on claimant's actual wages in 1996 and 1997, which he divided by the actual number of weeks claimant worked during these years, 68, to derive an average weekly wage on the date of injury, May 20, 1997, of $789.50. This finding is not challenged on appeal. The administrative law judge next added claimant's vacation/holiday, container royalty and GAI payments in contract years 1996 and 1997, which he divided by 104 weeks to derive an additional average weekly wage of $245.76. The administrative law judge added this average weekly wage to the $789.50 figure, and found that claimant had an average weekly wage of $1,035.26, commencing on October 1, 1997. On appeal, claimant contends that the administrative law judge should have used the same divisor of 68 he utilized in determining claimant's average weekly wage on the date of injury, which is based on the actual number of weeks claimant worked in 1996 and 1997. Claimant contends that this method would yield a higher average weekly wage commencing on October 1, 1997. We reject claimant's contention of error and affirm the administrative law judge's average weekly wage calculation.

The parties agree that claimant's entitlement to vacation/holiday and container royalty payments was contingent on his actually working over 700 hours during the course of the contract year, while the GAI payment is dependent on claimant's reporting daily for work at the union hall. Claimant's Post-Hearing Brief at 11-12; Employer's Post-Hearing Brief at 9, 11-12. It is implicit in the administrative law judge's utilization of a divisor of 104 weeks to derive claimant's average weekly wage from his vacation/holiday, container royalty and GAI payments in 1996 and 1997 that the administrative law judge found these payments were earned over the course of the two contract years and were not specifically related to the actual number of weeks claimant worked each contract year. The administrative law judge's finding is rational as vacation/holiday and container royalty payments vest upon working 700 hours during the course of the contract year and there is no evidence of record that these payments are affected by claimant's working more than 700 hours during the contract year or by the number of weeks worked during the contract year. Moreover, the administrative law judge's utilization of a divisor corresponding to the actual number of weeks in the 1996 and 1997 contract years is congruent with the plain language of Section 10(d)(1), which states that the average weekly wages of an employee shall be one fifty-second part of his average annual earnings. *See generally James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 34 BRBS 35(CRT) (5th Cir. 2000); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). We therefore conclude that the administrative law judge rationally divided by 104 the sum total of vacation/holiday, container royalty and GAI payments in contract years 1996 and 1997. Accordingly, the administrative law judge's findings regarding claimant's average weekly wage commencing October 1, 1997, are affirmed. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997).

Claimant also challenges the administrative law judge's finding that his recovery for his permanent knee impairment is limited to an award under the schedule. *See* 33 U.S.C.

§908(c)(1)-(20). Claimant contends that he has a permanent total disability and is entitled to an unscheduled award under Section 8(c)(21), pursuant to the parties' stipulations that claimant is unable to return to his usual longshore employment and that, as a result of his work injury, claimant sustained a loss of wage-earning capacity of $363.50 per week.

Claimant's argument is meritless. Claimant does not appeal the administrative law judge's acceptance of the parties' stipulations that employer established the availability of suitable alternate employment and that claimant has a residual wage-earning capacity. The administrative law judge therefore properly determined that claimant is partially, not totally, disabled. *See generally* *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). In *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268, 14 BRBS 363 (1980), the Supreme Court held that an employee who sustains a permanent partial disability to a body part covered by the schedule provisions of Section 8(c)(1)-(20) of the Act, must be compensated under the schedule and may not receive compensation under Section 8(c)(21) for a loss of wage-earning capacity. *See generally* *Rowe v. Newport News Shipbuilding & Dry Dock Co.*, 193 F.3d 836, 33 BRBS 160(CRT) (4th Cir. 1999)*; Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 32 BRBS 15(CRT) (4th Cir. 1998); *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986). Accordingly, we hold that the administrative law judge properly applied *PEPCO* to the instant case and limited claimant's recovery for his permanent partial disability to an award under Section 8(c)(2).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge