BRB No. 00-832

MICHAEL A. ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUSTOM SHIP INTERIORS	)	DATE ISSUED: May 15, 2001
	)	
and	)	
	)	
FREMONT COMPENSATION INSURANCE GROUP	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum, P.C.), Savannah, Georgia, for claimant.

Lawrance B. Craig, III and Frank J. Sioli, Jr. (Valle & Craig, P.A.), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-3047) of Administrative Law Judge Linda S. Chapman 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 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).

Claimant was injured on August 21, 1998, while working on a cruise ship

inside a cabin, when a steel bunk bed fell on him. Claimant had performed seasonal work for employer, Custom Ship Interiors (CSI), working about two-thirds of the year, for about nine years, remodeling cruise ship interiors. In addition to his salary, claimant received a $77.50 *per diem.* Tr. at 161. Employer's accountant, Ms. Thomas, testified that the *per diem* was an advance payment to cover expenses of employees when they were away from home and on the job, and that employees, like claimant, who worked six days per week, received a *per diem* for seven days. Ms. Thomas stated that the *per diem* was not taxable and did not appear on the employees' W-2 forms. Tr. at 161-162. At the time of the injury, claimant was working in Newport News, Virginia, on the Carnival Cruise ship, the *M/V Ecstasy*, and was provided with room and board by Carnival at no cost to him, in addition to the *per diem*. Tr. at 52-54. Claimant testified that when he had worked previously in Virginia Beach for two years, his hotel cost $400 per week, and meals $100 per week. Claimant testified that he used the *per diem* to cover room and board, but that sometimes the owners of the ships would pay for or provided room and board and he would still receive the *per diem.* Tr. at 101-102. Employer paid claimant temporary total disability benefits from August 22, 1998, through July 15, 1999, based on an average weekly wage of $665.68. Tr. at 7. Claimant did not return to work after his injury, but moved to Florida to live with his family, as they could assist with his care.

In her decision, the administrative law judge awarded claimant continuing temporary total disability benefits beginning August 21, 1998, based on an average weekly wage of $377.13, calculated under Section 10(c) of the Act, 33 U.S.C. §910(c). Relying on law from the United States Courts of Appeals for the Fifth and Ninth Circuits, she found that the *per diem* should not be included as "wages" for purposes of computing claimant's average weekly wage, because it is not a taxable advantage. Decision and Order at 20.

On appeal, claimant contends that the administrative law judge erred in excluding the *per diem* and the value of the room and board he received while working on the Carnival ship from her calculation of average weekly wage. Claimant contends that the decision of the United States Court of Appeals for the Fourth Circuit in *Universal Maritime Service Corp. v. Wright,* 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998), is controlling on this issue, rather than the case law from the Fifth and Ninth Circuits on which the administrative law judge relied. Employer responds, asserting that these items were properly excluded from the average weekly wage calculation.

Section 2(13) of the 1984 Act 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)(1994).[1] The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises,[2] has not specifically addressed the issue of whether room and board or a *per diem* constitutes wages under Section 2(13). In *Wright*, 155 F.3d 311, 33 BRBS 15(CRT), however, the Fourth Circuit had occasion to interpret Section 2(13) in a different context. In that case, the court held that holiday, vacation, and container royalty payments are not fringe benefits and are wages under Section 2(13) if they are earned through actual work. The court defined "wages" in Section 2(13) as "the 'money rate' of compensation that is to be provided (1) for the employee's services (2) by an employer (3) under the employment contract in force at the time of injury." *Wright*, 155 F.3d at 319, 33 BRBS at 20(CRT). The court elaborated that pursuant to Section 2(13), "wages" also include the reasonable value of "any advantage" which is received from employer and is included for purposes of tax withholding. *Id.*, 155 F.3d at 318, 33 BRBS at 20(CRT). With regard to other types of payments, however, the Fourth Circuit declared that Section 2(13)'s definition of wages is ambiguous, and the court examined its history for guidance. *Id.,* 155 F.3d at 318, 33 BRBS at 19(CRT). The court

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[1]Section 2(13) as amended in 1984 codifies the holding of the United States Supreme Court in *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT)(1983). In *Morrison-Knudsen*, the Court, in construing Section 2(13) prior to the 1984 Amendments, stated that where benefits received are not "money recompensed," 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.

[2]Employer asserts that claimant cannot rely on *Wright*, because he filed his claim in District 6 (Jacksonville) and litigated the case in Tampa, which is within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Under Section 21(c) of the Act, however, the law of the circuit in which the injury occurred is applicable. *See* 33 U.S.C. §921(c); *Dantes v. Western Foundation Corp.*, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980). As claimant's injury occurred in Newport News, Virginia, the law of the Fourth Circuit is controlling in this case.

concluded that the structure of the first sentence of Section 2(13) demonstrates that the "advantages" described in the latter part of the sentence illustrate one class of the compensation defined generally in the first part of the sentence: "The word 'including' in §2(13) indicates that the reasonable value of advantages that are received from employers and trigger tax withholding will necessarily be 'part of the larger [category] of' compensation for employees' services provided by employers under the prevailing employment contract." *Id.*, 155 F.3d at 319 n.10, 33 BRBS at 20-21 n.10(CRT). The *Wright* court elaborated: "the section expressly 'includ[es]' as *an illustration* of such compensation the reasonable value of any advantage that is received from the employer and triggers tax withholding." *Id.,* 155 F.3d at 325, 33 BRBS at 26(CRT)(emphasis added).

The *Wright* court also noted that the Board's interpretation of this section in *Quinones v. H. B. Zachery, Inc.*, 32 BRBS 6 (1998),[3] was consistent with its own, while that of the United States Court of Appeals for the Ninth Circuit in *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), and *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir.1998), was to the contrary. *Wright*, 155 F.3d at 319 n.10, 33 BRBS at 20-21 n.10. In *Quinones*, the Board held that both case law and general rules of statutory construction support the interpretation that, while an advantage subject to tax withholding is a "wage" pursuant to Section 2(13), the use of the term "including" does not mandate that a benefit not subject to tax withholding is not a wage *per se*. Rather, the Board explained, advantages subject to tax withholding are but one example of the benefits which may be included as wages. As the last sentence of Section 2(13) does not include room and board as fringe benefits which are excluded from the calculation of average weekly wage, the Board affirmed the administrative law judge's decision to include the value of the claimant's room and board in his average weekly wage calculation. *Quinones*, 32 BRBS at 10; *see* n.3, *supra*.

[3]The Board's decision was subsequently reversed by the Fifth Circuit. *H.B. Zachery Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000); *see* discussion, *infra*.

As discussed by the Fourth Circuit in *Wright,* the Ninth Circuit reached a different conclusion in interpreting this section. The Ninth Circuit read the term "including" contained in Section 2(13) as "or," thereby interpreting the phrase "including the reasonable value of any advantage" as a mandatory limitation on the inclusion of non-monetary compensation to that subject to tax withholding in the definition of wages. *Wausau,* 114 F.3d at 122, 31 BRBS at 42(CRT). In *Wausau,* the court reversed the Board's holding that the value of an employer-provided room and board was includable in an employee's average weekly wage, and ruled that the Act defers to the Internal Revenue Service's criteria for deciding whether non-monetary compensation is wages. After determining that the value of meals and lodging was not income pursuant to Section 119 of the Internal Revenue Code, the court held that the value of the claimant's meals and lodging should not have been included as wages under the Act. *Id*., 114 F.3d at 122, 31 BRBS at 42(CRT). Pursuant to *Wausau,* the Ninth Circuit held that while a *per diem* a claimant received from an employer to pay for room and board was an "advantage," it was not a "wage" under the Act because it was not subject to withholding under the Internal Revenue Code. *McNutt*, 140 F.3d 1247, 32 BRBS 71(CRT). The Fifth Circuit subsequently reached the same conclusion, reversing the Board's interpretation of Section 2(13). *See H.B. Zachery v. Quinones*, 206 F.3d 474, 34 BRBS 23(CRT) (5th Cir. 2000).[4]

Following its analysis of Section 2(13), the Fourth Circuit in *Wright* held that vacation, holiday, and container royalty pay are "wages" within the first clause of Section 2(13), when they are earned as compensation for actual services rendered, pursuant to the contract of employment. *Wright,* 155 F.3d at 325-326, 33 BRBS at 26-27(CRT). Similarly, in *Story v. Navy Exchange Service Center,* 30 BRBS 225 (1994), *aff'd on recon.,* 33 BRBS 111 (1999), the Board affirmed the administrative law judge's finding that the tips the claimant received were wages under the first clause of Section 2(13), as they were part of the money rate at which claimant was compensated by employer. In *Story,* the Board rejected the Ninth Circuit's approach in *Wausau,* and found "compelling" the reasoning of the Fourth Circuit in *Wright.* The Board reaffirmed the approach it took in *Quinones,* that the term

[4]In reversing the Board's decision, the Fifth Circuit held that "Section 2(13) is clear on its face. It provides that 'wages' equals monetary compensation plus taxable advantages." *Quinones*, 206 F.3d at 479, 34 BRBS at 27(CRT). While the analysis of Section 2(13), and specifically the phrase "including the reasonable value of any advantage," differs in *Quinones* and *Wright,* the results are not inconsistent. *Quinones* involved the reasonable value of room and board provided by employer, which thus fell squarely within the second clause of Section 2(13), whereas *Wright,* like the present case and *Story v. Navy Exchange Service Center,* 30 BRBS 225 (1994), *aff'd on recon.,* 33 BRBS 111 (1999), discussed *infra*, involves cash paid to claimant, and thus, monetary compensation under the first clause.

"including" which prefaces the second clause of the first sentence of Section 2(13), is exemplary and not exclusive.[5] *Story*, 33 BRBS at 116.

[5]The decisions in *Story* were issued prior to the Fifth Circuit's decision in *Quinones*.

In the instant case, the administrative law judge summarily found applicable the reasoning of the Ninth and Fifth Circuits. She did not discuss the Fourth Circuit's decision in *Wright*, and whether or not it would demand a different result. As in *Wright* and *Story*, the *per diem* at issue here is part of the money claimant receives from employer, and is thus includable in average weekly wage under the first clause of Section 2(13) regardless of whether it is subject to tax withholding.[6] It is apparent from claimant's computerized pay stubs that claimant received the *per diem* in his pay check from employer every week. EX 34. Moreover, it is apparent from these records, as well as the testimony of employee's accountant, Ms. Thomas, that the *per diem* was part of the agreement, *i.e.*, "contract," under which claimant was hired. *See* Tr. at 156 *et seq.* Thus, in view of *Wright* and *Story*, we reverse the administrative law judge's exclusion of the *per diem* from claimant's average weekly wage. The *per diem* payments claimant received in the year prior to his injury are readily calculable from claimant's pay stubs. In the 52 weeks prior to his injury, claimant received $16,275 as *per diem*. Dividing this sum by 52 equals $312.98. Adding this to the average weekly wage of $377.13 calculated by the administrative law judge equals $690.11. We therefore modify the administrative law judge's decision to reflect claimant's average weekly wage as $690.11.

We reject, however, claimant's assertion that the value of the free room and board which Carnival Cruise Lines provided him should be included in his average weekly wage, in addition to the *per diem* paid by his employer. Underlying the Act are policies of promoting full employee recovery, while at the same time avoiding double recoveries. *See generally Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). As the Act attempts "to provide a single complete recovery to the employee," *id.*, 782 F.2d at 518, 18 BRBS at 51(CRT), claimant cannot have both the *per diem* and the value of the room and board included in his average weekly wage calculation.

[6]In *Story*, the Board noted that tips are subject to tax withholding, although such was not required for them to be considered a wage. *Story*, 33 BRBS at 116 n.7.

Accordingly, the administrative law judge's exclusion of the *per diem* from claimant's average weekly wage is reversed. Claimant's average weekly wage is modified to $690.11. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge