ESTATE OF GEORGE TRICE	)	BRB Nos. 93-1154 and
	)	93-1154A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL	)	
TERMINALS, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	
	)	
ESTATE OF GEORGE TRICE	)	BRB No. 95-1970
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL	)	
TERMINALS, INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and Granting the Petition for Relief Under Section 8(f) and the Order Denying Claimant's Request for Modification of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Thomas J. Duff, John Barrett and Kelly O. Stokes (Vandeventer, Black, Meredith & Martin, L.L.P.), Norfolk, Virginia, for self-insured employer.

Karen B. Kracov and Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, the estate of George Trice, appeals and employer cross-appeals the Decision and Order Awarding Benefits and Granting the Petition For Relief Under Section 8(f) and claimant appeals the Order Denying Claimant's Request For Modification (91-LHC-1206) 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).

George Trice (decedent) injured his back while working for employer on September 2, 1987, when he fell backwards out of a van. Decedent, who last worked on October 24, 1987, was diagnosed as suffering from spinal stenosis and chronic radiculopathy, and was found to be permanently totally disabled on November 14, 1988, by Dr. Loxley. Decedent's death on January 16, 1992, due to acute cardiorespiratory arrest, was not work-related. Employer voluntarily paid decedent temporary total disability benefits from October 26, 1987, through May 17, 1990, and temporary partial disability benefits from May 18, 1990 through January 9, 1992. Claimant, decedent's estate, sought compensation under the Act based on a higher average weekly wage than that on which employer's voluntary payments had been made.

At the formal hearing held on October 30, 1992, the administrative law judge accepted the parties' stipulation that decedent reached maximum medical improvement on November 14, 1988 and was permanently totally disabled at that time. The parties further stipulated that decedent's average weekly wage, inclusive of container royalty and vacation and holiday payments, was

$915.29, yielding a compensation rate of $605.32 per week.[1] In his Decision and Order, the administrative law judge found that payments decedent received from the Container Royalty Fund were not wages and not properly included in determining decedent's average weekly wage since these payments were made by shippers and not employer. The administrative law judge further found that employer was entitled to a credit for the vacation and holiday payments decedent received while he was disabled. The administrative law judge also found that claimant was entitled to cost of living adjustments pursuant to Section 10(f) of the Act, 33 U.S.C. §910(f), as of November 14, 1988, the date of maximum medical improvement. Lastly, the administrative law judge found that employer was entitled to relief pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

Following an appeal to the Board, claimant filed a motion for modification before the administrative law judge. In an Order dated July 19, 1995, the Board granted claimant's request to remand the case for the administrative law judge to consider the motion for modification, subject to reinstatement on the Board's docket. Claimant's modification request was based on an affidavit of Mr. Lewis Cobb, the administrator of the Hampton Roads Shipping Association/International Longshoremen's Association (HRSA-ILA) Benefits Funds, wherein Mr. Cobb attempted to clarify his earlier testimony regarding contributions to the Funds. Claimant's modification request was also based on cases decided subsequent to the administrative law judge's initial decision, specifically *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, No. 95-1904 (4th Cir. Sept. 10, 1996), and *Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994)(Smith and Dolder, JJ., dissenting in part), *aff'g and modifying in part on recon. en banc*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds), *aff'd in part and rev'd in part*, 86 F.3d 895 (9th Cir. 1996). The administrative law judge denied claimant's motion, again finding that there was no evidence that employer contributed payments to the Container Royalty Fund.

Claimant thereafter appealed the administrative law judge's decision on modification and sought reinstatement of his earlier appeal. By Order dated September 27, 1995, the Board reinstated claimant's appeal of the administrative law judge's initial Decision and Order, and reactivated employer's cross-appeal which had been held in abeyance. BRB Nos. 93-1154/A. The Board also

[1]Pursuant to the collective bargaining agreement between Hampton Roads Shipping Association (HRSA) and the International Longshoremen's Association (ILA), vacation and 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 of the contract year following the eligibility year. 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 workers who earned 700 hours. Under the collective bargaining agreement, an employee becomes eligible for payments from the Vacation and 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. *See* Emp. Ex. F.

acknowledged claimant's appeal of the administrative law judge's Order Denying Modification, BRB No. 95-1970, and consolidated all appeals for purposes of decision.[2]

On appeal, claimant contends that the administrative law judge erred in finding that payments decedent received from the Container Royalty Fund were not included in his average weekly wage. Claimant further contends that the administrative law judge erred in allowing employer a credit for the vacation and holiday payments decedent received while he was disabled after his injury. Employer responds, urging affirmance of the administrative law judge's findings with regard to container royalty payments, and credits for vacation and holiday payments. BRB No. 93-1154. In its cross-appeal, employer contends that the administrative law judge erred in finding that claimant was entitled to Section 10(f) adjustments. BRB No. 93-1154A. The Director, Office of Workers' Compensation Programs (the Director) filed a response brief, arguing that container royalty payments are wages and must be considered in determining decedent's average weekly wage. The Director also contended that employer was entitled to a credit against compensation for vacation and holiday payments decedent earned while disabled.

In its appeal of the administrative law judge's denial of modification, claimant again contends that the administrative law judge erred in finding that container royalty payments are not to be included in calculating decedent's average weekly wage. BRB No. 95-1970. Specifically, claimant asserts that the administrative law judge failed to consider Mr. Cobb's February 17, 1995, statement that stevedoring employers, as direct employers of ILA labor, may make container royalty payments on behalf of shippers. Claimant also argues that employer never specifically made vacation or holiday payments to decedent, and therefore should not be entitled to a credit for those payments. Employer responds, asserting that the administrative law judge's denial of modification should be affirmed. The Director also responds, arguing that container royalty payments should be included in decedent's average weekly wage calculation. Moreover, reversing his earlier position, the Director now contends that pursuant to *Branch*, vacation and holiday payments made during decedent's disability, as well as container royalty payments, are not advance payments of compensation, and therefore, employer is not entitled to a credit for those payments.

We first address claimant's contention that the administrative law judge erred in finding that the container royalty payments decedent received were not properly included in the calculation of decedent's average weekly wage. BRB No. 93-1154. Specifically, claimant argues that since container royalty payments are made pursuant to the collective bargaining agreement between HRSA and the ILA, and are taxable income, they should be included in the calculation of decedent's average weekly wage. We agree. This issue was addressed by the Board in *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). In *Lopez*, the Board held that container royalty payments, when

[2]In a case dismissed and subsequently reinstated on the Board's docket, the Board has determined that the one year period provided by P.L. No. 104-134 commences on the date of reinstatement, which in this case is September 27, 1995. Moreover, where appeals are consolidated, the date on which the last appeal was filed or reinstated controls.

made pursuant to a contract, are included in an employee's average weekly wage, as they are readily calculable, made directly to the employee, and are part of an employee's taxable income.[3] *See also McMennamy v. Young & Company*, 21 BRBS 351 (1988). In the instant case, it is undisputed that the container royalty payments decedent received were made pursuant to the collective bargaining agreement between the ILA and the HRSA and that employer is bound by this agreement as a member of the HRSA. Accordingly, for the reasons stated in *Lopez* and *McMennamy*, the administrative law judge's finding that the container royalty payments decedent received are not to be included in the calculation of his average weekly wage is reversed. Inasmuch as the administrative law judge accepted the parties' stipulation that decedent's average weekly wage, inclusive of container royalty payments and vacation and holiday payments, is $915.29, with a compensation rate of $605.32, we hold that claimant is entitled to benefits at a compensation rate of $605.32.

Claimant next contends that the administrative law judge erred in allowing employer a credit for vacation and holiday payments decedent received while he was disabled after his injury. Section 14(j) of the Act, 33 U.S.C. §914(j), governs employer's entitlement to a credit in the instant case. Under this provision, an employer is entitled only to a credit for its prior payments of compensation against any compensation subsequently found due. The Board has held that where a union contract does not specifically provide that vacation and holiday payments are intended in lieu of compensation, an employer is not entitled to a credit for vacation and holiday payments. *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, No. 95-1902 (4th Cir. Sept. 10, 1996).[4] In a similar

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[3] Section 2(13) as amended in 1984 provides:

> The term "wages" means 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 an 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 [26 U.S.C.A. §3101 et seq.] (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).

[4]We note that the Fourth Circuit, in an opinion not designated for publication, *see* Local Rule 36(c), affirmed the Board's decision on the issue raised herein involving the same union contract, stating that "while payments received from the Funds are properly treated as `wages' when the employee is working, such payments are not `wages' when received post-injury." *Ceres Corp. v. Branch*, 1996 U.S. App. Lexis 24022, 15, No. 95-1902 (4th Cir. Sept. 10, 1996).

case, the United States Court of Appeals for the Ninth Circuit affirmed the Board and rejected an employer's argument that its liability for disability benefits should be offset by vacation and holiday pay received during periods of disability, finding it unsupported by the terms of the collective bargaining agreement. *Sproull v. Director, OWCP*, 86 F.3d 895, 899 (9th Cir. 1996), *aff'g in pert. part, Sproull v. Stevedoring Services of America*, 28 BRBS 271 (1994)(*en banc*)(opinion of Smith and Dolder, JJ., Brown and McGranery, JJ., concurring in pert. part), *aff'g and modifying on recon.*, 25 BRBS 100 (1991)(Brown, J., dissenting on other grounds).

As was the case in *Branch* and *Sproull*, the union contract in the instant case does not specifically provide that the payments from the Vacation and Holiday Fund or Container Royalty Fund were intended to be in lieu of compensation. Rather, pursuant to the HRSA-ILA agreement in the present case, an employee becomes eligible for payments from the Vacation and 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. As the Board stated in *Branch*, 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). The fact that decedent received these payments even while he was temporarily disabled stems from the union contract itself rather than any provision of the 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 vacation and holiday payments made during decedent's disability were intended as compensation, as is required by Section 14(j), the administrative law judge's finding that employer is entitled to credit for such payments is reversed. Based on this holding, and our prior holding that the container royalty payments decedent received are to be included in the calculation of his average weekly wage, claimant's appeal of the administrative law judge's denial of its request for modification is moot. BRB No. 95-1970. Accordingly, the administrative law judge's Order Denying Claimant's Request for Modification is vacated.

In its cross-appeal, employer contends that the administrative law judge erred in finding that decedent is entitled to cost of living adjustments under Section 10(f) of the Act, 33 U.S.C. §910(f), as of November 14, 1988. BRB No. 93-1154A. It is well-established that claimants are entitled to Section 10(f) adjustments to compensation only during periods of permanent total disability, not temporary total disability. *See Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 23 BRBS 36 (CRT)(5th Cir. 1990)(*en banc*). In the instant case, the administrative law judge accepted the parties' stipulation that decedent was permanently totally disabled as of November 14, 1988. Accordingly, pursuant to *Phillips*, we affirm the administrative law judge's finding that claimant is entitled to Section 10(f) adjustments for the period of decedent's permanent total disability, November 14, 1988, through January 16, 1992.

Accordingly, the Order Denying Claimant's Request for Modification of the administrative law judge is vacated. BRB No. 95-1970. The administrative law judge's finding that container royalty payments decedent received are not includable in his average weekly wage is reversed, and the administrative law judge's decision is modified to provide benefits based on the average weekly wage of $915.29, which results in a compensation rate of $605.32. The administrative law judge's finding that employer is entitled to a credit for vacation and holiday payments decedent received during his disability is also reversed. In all other respects, the Decision and Order Awarding Benefits and Granting the Petition for Relief Under Section 8(f) of the administrative law judge is affirmed. BRB Nos. 93-1154/A.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge