

BRB Nos. 97-346
and 97-346S

BERNARD N. WRIGHT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
UNIVERSAL MARITIME SERVICE CORPORATION)	DATE ISSUED:_____
)	
and)	
)	
SIGNAL MUTUAL COMPANY)	
)	
Employer/Carrier-Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joel F. Gardiner, Administrative Law Judge, and the Supplemental Decision and Order Awarding Attorney Fee of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Malcolm M. Crossland, Jr. (Steinberg Law Firm), Mt. Pleasant, South Carolina, for claimant.

Lawrence P. Postol (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (96-LHC-82) of Administrative Law Judge Joel F. Gardiner, and the Supplemental Decision and Order Awarding Attorney Fee (96-LHC-82) of David W. Di Nardi, 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 administrative law judges'

¹Because Judge Gardiner was no longer available to the Office of Administrative Law Judges at the time claimant's counsel filed for an attorney's fee, Judge Di Nardi reviewed the petition and awarded a fee. Supp. Decision and Order at 3.

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).

The parties stipulated to the facts of this claim. Claimant injured the middle finger of his right hand on April 17, 1995. Employer voluntarily paid temporary total disability benefits from the date of injury through December 31, 1995, based on an average weekly wage of \$591.34, which excludes claimant’s vacation, holiday and container royalty payments. Claimant filed a claim for additional temporary total disability benefits. The administrative law judge determined that claimant’s vacation, holiday and container royalty payments should have been included in his average weekly wage; however, those payments, which were made during claimant’s period of disability, should not be considered in determining post-injury wage-earning capacity. Decision and Order at 17-19. In a supplemental decision, Judge Di Nardi awarded claimant’s counsel an attorney’s fee of \$4,233.63.

Employer appeals both awards. Upon consideration of the Decision and Order, the arguments on appeal, and the record as a whole, we conclude that the administrative law judges’ determinations and awards are in accordance with applicable law. The vacation, holiday and container royalty payments claimant earned prior to his injury were properly included in calculating his average weekly wage. *Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT) (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1333 (1997); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990). Additionally, the administrative law judge properly determined that the vacation, holiday and container royalty payments claimant received during the period of his temporary total disability do not constitute wages within the meaning of Section 2(13), 33 U.S.C. §902(13), and have no impact on his post-injury wage-earning capacity. As a result, the administrative law judge correctly found that claimant is entitled to additional temporary total disability benefits pursuant to Section 8(b) of the Act. 33 U.S.C. §908(b). *Eagle Marine Services v. Director, OWCP [Wolfskill]*, 115 F.3d 735 (9th Cir. 1997); *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff’d mem.*, 96 F.3d

1438 (table), 30 BRBS 74 (CRT) (4th Cir. 1996).² Because claimant established his entitlement to additional benefits, his attorney is entitled to a fee, payable by employer, the amount of which has not been challenged on appeal. 33 U.S.C. §928(b).

Accordingly, the administrative law judges' decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

²This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Pursuant to that court's Local Rule 36(c), the citation of an unpublished decision "is disfavored. . . ." Nevertheless, Local Rule 36(c) provides that an unpublished decision with precedential value may be cited in relation to a material issue in a case if there is no published opinion that would serve as well (if all other parties are served with a copy of the decision). The Fourth Circuit's unpublished decision in *Branch* was admitted as Cl. Ex. 8; therefore, a copy of the decision is available to both parties. In its decision in *Branch*, the Fourth Circuit stated:

We therefore hold that the claimant's receipt of payments from the [Container Royalty and Vacation/Holiday] Funds while disabled are not "wages" within the meaning of Section 2(13) of the Act, 33 U.S.C. §902(13). As such, the claimant's "disability" was "total in character," and he is entitled to compensation benefits pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b).

30 BRBS at 78 (CRT).