BRB No. 11-0868

MICHAEL D. DALTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARITIME SERVICES CORPORATION	)	DATE ISSUED: 08/30/2012
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Compensation and Benefits and Order Granting Reconsideration and Modifying July 22 Decision and Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Awarding Compensation and Benefits and Order Granting Reconsideration and Modifying July 22 Decision and Order (2011-LHC-00053) of Administrative Law Judge Richard M. Clark 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 injured his neck and head while working for employer as a laborer on a remodeling job at Todd Shipyards in Seattle, Washington, on March 17, 2001. As a result, claimant had a triple level fusion at C3-4, C4-5 and C5-6 on January 14, 2002. Claimant filed a claim seeking benefits under the Act. Employer voluntarily paid disability and medical benefits from the date of injury. The parties stipulated claimant is entitled to temporary total disability benefits until the date his injuries reach maximum medical improvement and to permanent total disability benefits thereafter, and that his average weekly wage should be calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). Issues, however, arose as to the date of maximum medical improvement and the calculation of claimant's average weekly wage, and the case was referred to the Office of Administrative Law Judges for a formal hearing.

In his decision, the administrative law judge found that claimant reached maximum medical improvement on March 4, 2004, rather than on February 21, 2003, as advocated by claimant, because, between February 2003 and March 4, 2004, Dr. Sova referred claimant to several physicians in order to determine whether future treatment, including surgery, might improve or resolve claimant's condition. Applying Section 10(c), the administrative law judge calculated claimant's average weekly wage at $527.73 by averaging claimant's earnings from the last two years he worked prior to the date of his injury, as he found that these wages were the most representative of claimant's earning capacity. Accordingly, the administrative law judge awarded claimant temporary total disability benefits from March 17, 2001, through March 4, 2004, and permanent total disability benefits thereafter. On reconsideration, the administrative law judge recalculated claimant's average weekly wage as $523.57, and altered the award to reflect claimant's entitlement to temporary partial, rather than temporary total, disability benefits for the period from June 6, 2001, through May 5, 2002, due to claimant's intermittent return to work during that period.

On appeal, claimant challenges the administrative law judge's maximum medical improvement and average weekly wage findings. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant asserts that he reached maximum medical improvement on February 21, 2003, noting that all of the specialists agreed that no further treatment would be beneficial and that he had received no treatment after that date. Claimant argues that he had healed "to the fullest extent possible," espoused by the United States Court of Appeals for the Ninth Circuit in *Stevens v. Director, OWCP*, 909 F.2d 1256, 23 BRBS 89(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991), and *Hawaii Stevedores, Inc. v. Ogawa*, 608 F.3d 642, 44 BRBS 47(CRT) (9th Cir. 2010), such that the administrative law judge was obligated to find that claimant reached maximum medical improvement as

of February 21, 2003, as that date represents the last time he received any treatment for his injuries.

A disability is considered permanent as of the date a claimant's condition reaches maximum medical improvement or if it has continued for a lengthy period and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. *Gulf Best Electric, Inc. v. Methe*, 396 F.3d 601, 38 BRBS 99(CRT) (5th Cir. 2004); *Louisiana Ins. Guar. Ass'n v. Abbott*, 40 F.3d 122, 29 BRBS 22(CRT) (5th Cir. 1994); *Diosdado v. Newpark Shipbuilding & Repair, Inc.*, 31 BRBS 70 (1997).

On February 21, 2003, claimant's treating physician, Dr. Sova, remarked that claimant's symptoms had likely "plateaued." Nonetheless, Dr. Sova referred claimant to a neurologist, Dr. Nutt, who, after examining claimant on May 12, 2003, suggested an MRI of the cervical spine and an evaluation by a neurosurgeon. An MRI was performed on July 2, 2003, and claimant was examined by a neurosurgeon, Dr. Chestnut, on October 8, 2003. Having analyzed the MRI results, which revealed no interval changes in the cervical spine, Dr. Chestnut stated that no further surgery was required. After reviewing Dr. Chestnut's report, Dr. Sova wrote a letter to carrier's claims adjuster on November 14, 2003, explaining that claimant had probably reached maximum medical improvement. Dr. Sova, however, informed the claims adjuster that he referred claimant to Dr. Erb for a closing exam, which is a final examination of a claimant, scheduled when the physician does not anticipate additional treatments or visits. Dr. Sova also sought a closing medical consultation and physical capacities evaluation with Dr. Lowenstein, a physician with Progressive Rehabilitation Associates. Thereafter, Dr. Lowenstein opined that claimant reached maximum medical improvement on March 4, 2004, and Dr. Erb opined that claimant reached maximum medical improvement on March 23, 2004. In a letter dated March 4, 2011, and at his April 1, 2011, deposition, Dr. Sova opined that, in retrospect, claimant had reached maximum medical improvement on February 21, 2003, because subsequent evaluations indicated nothing more could have been done to improve claimant's condition.

The administrative law judge found that claimant underwent extensive diagnostic testing after February 21, 2003,[1] aimed at determining whether he needed, or would

[1]The record establishes that claimant was also receiving treatment throughout this time period in the form of medication and pain management.

obtain a benefit from, additional surgery or other possible treatment. Despite his retrospective opinion that claimant reached maximum medical improvement in February 2003, Dr. Sova conceded that "at that point [2003] there was no certainty" as to whether claimant's condition had become medically stationary. EX 36 at 18. In contrast, Dr. Lowenstein in his report dated March 4, 2004, and Dr. Erb, in her "Closing Medical Evaluation" dated March 23, 2004, opined that claimant was, as of those dates, medically stationary with regard to the work injuries he sustained on March 17, 2001. CX 52-53. The administrative law judge relied on these later reports because he found that they indicate the earliest date claimant concluded treatment for his work injuries, March 4, 2004. Decision and Order at 8.

We affirm the administrative law judge's finding. Substantial evidence in the form of the opinions of Drs. Lowenstein and Erb supports the administrative law judge's determination that claimant reached maximum medical improvement on March 4, 2004. Although claimant's condition "plateaued" in February 2003, Dr. Sova recommended that claimant seek the opinions of additional specialists for the purposes of improving his condition. Dr. Sova was not certain, in February 2003, that claimant's condition was indeed permanent, and it was not until the referrals were concluded that it was certain that further treatment would not improve claimant's condition. Thus, the administrative law judge rationally found that claimant's condition was not permanent until the referrals were completed. *Ogawa*, 608 F.3d 642, 44 BRBS at 52(CRT); *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1551, 24 BRBS 223(CRT) (9th Cir. 1991); *Beumer v. Navy Personnel Command/MWR*, 39 BRBS 98 (2005).

Claimant next contends that the administrative law judge erred in calculating claimant's average weekly wage based entirely on his last two years of work with employer as the record establishes that those two years were not a fair approximation of claimant's annual earning capacity at the time of his injury. Claimant also contends that the administrative law judge erred by not including claimant's bonuses in the calculation of his average weekly wage.

Under Section 10(c), the administrative law judge has broad discretion to arrive at a fair approximation of a claimant's annual earning capacity at the time of his injury. *Rhine v. Stevedoring Services of America*, 596 F.3d 1161, 44 BRBS 9(CRT) (9th Cir. 2010); *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009); *Patterson v. Omniplex World Services*, 36 BRBS 149 (2003); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). The administrative law judge calculated claimant's average weekly wage by using claimant's earnings in the 24 months preceding his March 17, 2001, injury, as he found that this time frame "is most representative of the nature of claimant's sporadic work and pay." Decision and Order at 10. Noting that during this time, claimant averaged 1,264.75 hours of regular time and 490.63 hours of

overtime per year, the administrative law judge multiplied those hours by claimant's corresponding hourly rates of $13.50 for regular time and $20.25 for overtime, to find that claimant earned $27,009.39 per year. He then added one-half of $432.44, which claimant received in "differential payments," and divided claimant's total earnings of $27,225.61 per year by 52 to arrive at an average weekly wage of $523.37. Order on Recon. at 2. In reaching this figure, the administrative law judge rejected the average weekly wage calculations proposed by claimant and employer,[2] including claimant's position that the bonuses he received from employer should be included in the calculation of his average weekly wage. Decision and Order at 10.

The administrative law judge's decision to average claimant's earnings in the two years prior to his March 17, 2001, injury is within his discretion and is supported by substantial evidence. *See generally Empire United Stevedores v. Gatlin*, 936 F.3d 819, 25 BRBS 26(CRT) (5th Cir. 1991). Contrary to claimant's assertion, the administrative law judge's rejection of claimant's earnings for 1998, based on the downward trend in claimant's earnings in the three years preceding his injury,[3] as well as claimant's admission that his employment was sporadic,[4] is supported by substantial evidence. Additionally, as the administrative law judge rationally found that claimant's earnings in the two years immediately preceding his March 17, 2001, injury realistically reflect his wage-earning potential as of that date, it was unnecessary to account for employer's post-injury gross receipts in the calculation of claimant's average weekly wage. 33 U.S.C. §910; *Palacios v. Campbell Industries*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980); *see also Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS

[2]Employer argued that claimant's average weekly wage should be calculated based solely on claimant's earnings in the 52 weeks immediately preceding his injury. The administrative law judge rejected employer's position because that one-year period proved to be one of employer's worst economic years due to the recession resulting in substantially fewer work hours for claimant than usual; thereby making those particular earnings, on their own, an inaccurate representation of claimant's annual earning capacity.

[3]Between March 1998 and March 1999, claimant earned $41,505.67; between March 1999 and March 2000 he earned $33,551.89; and between March 2000 and March 2001, claimant earned $19,052.10.

[4]The administrative law judge found, based on claimant's testimony, that while claimant accepted every project that he was offered, he was unemployed for periods of time when business was slow. HT at 44.

103 (1995); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991). Accordingly, we affirm the administrative law judge's use of claimant's earnings in the two years immediately preceding his March 17, 2001, injury to calculate claimant's average weekly wage as it is rational, supported by substantial evidence and in accordance with law. 33 U.S.C. §910(c); *Rhine*, 596 F.3d 1161, 44 BRBS 9(CRT).

The administrative law judge's decision, however, is in error with regard to his assessment of the bonuses paid to claimant in this case. The record establishes that claimant received end-of-the year bonuses on December 30, 1998, in the net amount of $1,293.18, and on December 27, 1999, in the net amount of $2,406.52. EX 37 at 281, 287-288; HT at 61. As claimant contends, in calculating claimant's average weekly wage, the administrative law judge included claimant's earnings for the last three quarters of 1999, except for the bonus he received during that time frame. The administrative law judge found, relying on *Johnson v. Newport New Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992), that claimant's receipt of bonus money in 1998 and 1999 did not constitute "wages" for purposes of calculating claimant's average weekly wage as the receipt of the bonus was contingent upon the occurrence of events which may or may not have occurred. We cannot affirm this finding. In *Johnson*, the claimant sought to include a bonus that she might have received had she not been injured and continued working. In this case, in contrast, claimant had already earned the bonus and it had been paid to him, and thus was part of his "wages." *See* 33 U.S.C. §902(13); *see generally Wausau Ins. Companies v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997); *see also Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001). Unlike the payment at issue in *Siminski*, the record reflects that the bonus was not a one-time payment. Therefore, the bonus claimant received in 1999 should have been included in the calculation of his average weekly wage as it was received within the time frame the administrative law judge used in calculating claimant's average weekly wage. *See Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997) (wages should be included in claimant's average weekly wage based on the time-frame in which they are earned). We, therefore, vacate the administrative law judge's average weekly wage finding and remand for the limited purpose of recalculating claimant's average weekly wage to include bonus money paid to claimant during the time frame included by the administrative law judge.[5]

[5]The administrative law judge's finding that the 1998 bonus payment did not fall within the definition of "wages" is harmless error as the administrative law judge rationally rejected the use of claimant's earnings for the entire period in which that bonus was paid.

Accordingly, the administrative law judge's average weekly wage calculation is vacated in part, and the case is remanded for further consideration of this issue consistent with this opinion. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully disagree with my colleagues with respect to their holding that the bonus paid to claimant in 1999 must be included in the calculation of claimant's average weekly wage. The majority holds that the bonus earned by claimant in calendar year 1999, and paid to him on December 27, 1999, should have been included in the calculation of claimant's average weekly wage as it was a part of the "wages" he received within the time frame the administrative law judge used to calculate claimant's average weekly wage. I agree with the majority that this case is, in contrast to the administrative law judge's finding, distinguishable from *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992), since the bonus was earned and received by claimant prior to the injury; unlike *Johnson*, claimant is not seeking inclusion of a future bonus in his average weekly wage. However, it is necessary for the administrative law judge to determine whether the pre-injury payment of a bonus was discretionary and too sporadic to reasonably be considered a part of claimant's annual earning capacity at the time of his injury, or whether the bonus was paid with sufficient regularity so as to accurately represent claimant's ability to earn such wages into the future.[6]

[6]The testimony of employer's Chief Executive Officer, Mr. Selfridge, outlining the factors regarding eligibility for the payment of bonuses, is instructive on this issue. EX 37 at 24-26.

In *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001), the administrative law judge included in the calculation of claimant's average weekly wage a one-time sum of $4,000, which claimant received prior to his injury, as a contractual buyout of the Guaranteed Annual Income (GAI) program. Upon employer's appeal, the Board affirmed the administrative law judge's finding that the GAI payment was a "wage" under Section 2(13) of the Act, 33 U.S.C. §902(13). Nevertheless, the Board reversed the administrative law judge's inclusion of this GAI payment in claimant's average weekly wage, as it was undisputed that this amount was a one-time payment for termination of the program. The Board specifically held that since the payment would not recur in the future, it does not represent an amount which affects claimant's earning capacity.

Pursuant to *Siminski*, 35 BRBS at 139-141, I would instruct the administrative law judge that he must first consider, on remand, whether the bonus paid on December 27, 1999, was a sufficiently regular payment prior to claimant's injury such that it should be included in claimant's annual earning capacity at the time of his injury. In *Siminski*, the Board stated, "a one-time bonus or other payment which inflates claimant's earnings in the year prior to injury may result in actual wages which do not reflect the claimant's annual earning capacity." *Id.* at 141. Thus, a finding regarding the nature of the bonus payment is necessary to the determination of whether claimant's injury caused him to lose the capacity to earn this sum. *See* 33 U.S.C. §902(10). Therefore, I would remand the case for this finding in the first instance. In all other respects, I concur in my colleagues' decision.

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JUDITH S. BOGGS
Administrative Appeals Judge