BRB No. 05-0412

| | | |
|---|---|---|
| RICHARD DOUCET, JR. | ) | |
| | ) | |
| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| L & M BOTRUC RENTAL, INCORPORATED | ) | DATE ISSUED: 01/30/2006 |
| | ) | |
| and | ) | |
| | ) | |
| LOUISIANA WORKERS' COMPENSATION CORPORATION | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

C. Arlen Braud, II, Michelle O. Gallagher, Janna C. Bergeron (Braud & Gallagher, L.L.C.), Madisonville, Louisiana, for claimant.

Travis R. LeBleu (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2004-LHC-1418) of Administrative Law Judge Patrick M. Rosenow 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 is a self-employed welder who owns his company, "Richard Doucet Welding." Tr. at 41. He is hired by various companies as a welder where he is required to provide his personal welding equipment per the industry standard. Decision and Order at 6; Tr. at 16, 54, 59, 85-86. Claimant began working for employer in 1997, and on September 23, 2002, he injured his neck and back at work. Cl. Ex. 1. Employer voluntarily paid claimant temporary total disability benefits commencing October 13, 2002, based on an average weekly wage of $1,150.79. Cl. Exs. 1, 3, 5.

The sole issue before the administrative law judge was the calculation of claimant's average weekly wage. The administrative law judge found that the entirety of the $28 per hour employer paid claimant should be included in claimant's average weekly wage, rejecting employer's argument that claimant should be compensated only for that portion of the hourly wage paid for his labor and not for the part attributable to his providing his welding equipment. The administrative law judge applied Section 10(c) of the Act, 33 U.S.C. §910(c), determined that claimant's average weekly wage was $1,974.26, and awarded ongoing temporary total disability benefits from October 23, 2002.[1]

On appeal, employer contends that a portion of the hourly wage paid to claimant was for expenses associated with his welding equipment and that, therefore, it should not be included in claimant's average weekly wage. Claimant responds in support of the administrative law judge's decision.

Employer argues that a portion of the $28 per hour it paid claimant was reimbursement for claimant's welding equipment expenses. Employer avers, therefore, that claimant's average weekly wage should not be based on the whole hourly wage paid. Employer finds support for this contention in claimant's income tax records which show itemized business deductions for his welding equipment, and because claimant's previous employers had paid claimant separately for expenses and for his labor. Employer also argues that the administrative law judge should have determined claimant's average weekly wage based on the wages of the replacement welder it hired when claimant was injured.

Section 2(13) 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

[1] The administrative law judge also awarded claimant an assessment pursuant to Section 14(e) of the Act, 33 U.S.C. §914(e), medical benefits pursuant to Section 7, 33 U.S.C. §907, and an attorney's fee pursuant to Section 28, 33 U.S.C. §928.

> 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)(emphasis added). The Fifth Circuit has held that Section 2(13) is clear on its face that "wages" equals monetary compensation plus taxable advantages. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 479, 34 BRBS 23, 27(CRT) (5th Cir. 2000); *see also James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426, 431, 34 BRBS 35, 38(CRT) (5th Cir. 2000). This case involves only the first phrase of Section 2(13) as the calculation of claimant's average weekly wage concerns the monetary rate employer paid claimant.

We affirm the administrative law judge's inclusion of claimant's full $28 hourly rate in the determination of his average weekly wage. The administrative law judge rationally rejected employer's arguments that a portion of the hourly rate should be excluded based on claimant's income tax records. *See generally Rountree v. Newpark Shipbuilding & Repair*, 13 BRBS 862, 869 (1981), *rev'd*, 698 F.2d 743, 15 BRBS 94(CRT) (5th Cir. 1983), *panel decision rev'd en banc*, 723 F.2d 399, 16 BRBS 34(CRT) (5th Cir. 1984), *cert. denied*, 469 U.S. 818 (1984)(Board rejected employer's contention that computation of average weekly wage under Section 10(c) for claimant, formerly a self-employed welder, required a formula using his gross earnings less his income tax deductions because deductions are not necessarily indicative of actual expenses).[2] *See also Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988).

The administrative law judge also properly recognized that there is no evidence in this case that employer designated a percentage of the hourly rate as reimbursement for expenses or required claimant to submit separate expense vouchers. Employer paid claimant $28 an hour plus 50 cents a mile. Tr. at 22. Both claimant and Mr. Pitre, employer's vice-president, testified that employer never told claimant that a portion of his hourly rate would be allocated for equipment expenses. Tr. at 23, 52, 65. Additionally, the invoices claimant submitted to employer did not separately itemize charges for labor and equipment, and none of employer's paychecks to claimant indicates that a portion of claimant's salary was for expenses. Cl. Exs. 6-8, 9; Emp. Ex. 1. Claimant testified that some of his previous employers would specify an amount for labor and amount for expenses by issuing him two separate checks. Tr. at 18.

[2] The Board's decision applying Section 10(c) in *Rountree* was reversed by a panel of the Fifth Circuit on the issue of the applicability of Section 10(b), 33 U.S.C. §910(b). The Fifth Circuit's panel decision subsequently was reversed, as the *en banc* court held that the Board's decision was not a final, appealable order.

As for employer's argument that the industry standard dictated that 40 percent of claimant's hourly wage be earmarked as reimbursement for expenses, the administrative law judge rationally rejected the use of this extrinsic "evidence" in view of the language of Section 2(13) defining "wages" as the "money rate" at which claimant is compensated. The administrative law judge therefore relied on the full "money rate" claimant was paid. Moreover, claimant testified that only 35 percent of his previous employer apportioned his salary between labor and expenses, and that, of two companies which did so, one designated $10 per hour for labor and $15 per hour for expenses, and the other designated $18 per hour for labor and $10 per hour for expenses. Decision and Order at 2, 4; Tr. at 16-17, 19. In addition, claimant testified that he was never told that employer would cover only 60 percent of his salary under its workers' compensation policy or that his compensation rate should he become injured would be lower because he used his own equipment.[3] Decision and Order at 5; Tr. at 27, 66. We therefore reject employer's contention that it established that 40 percent of claimant's hourly rate should be designated as reimbursement for expenses.

Employer further contends that the administrative law judge should have determined claimant's average weekly wage based on the earnings of the replacement welder it hired.[4] Section 10(c) of the Act states that the earnings of "other employees of the same or most similar class working in the same or most similar employment" may be relevant in determining the claimant's average weekly wage. 33 U.S.C. §910(c); *see generally Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). In this case, employer merely supplied the wages of the welder it hired to replace claimant. No evidence was offered from which the administrative law judge could ascertain whether the replacement welder had similar experience to that of claimant such that use of the replacement welder's wages would be reasonable. Claimant worked for employer for five years prior to his injury, and the administrative law judge therefore rationally relied only on claimant's actual earnings with employer to calculate his average weekly wage. *Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

The administrative law judge's inclusion of claimant's full $28 hourly rate in the determination of his average weekly wage is rational, supported by substantial evidence, and in accordance with law. Thus, it is affirmed as it represents the dollar measure of the compensation provided for claimant's services by employer under the contract of hiring in

[3] In 1999, employer agreed to provide workers' compensation coverage in lieu of raising his wage rate. Tr. at 23-24.

[4] Employer's replacement welder earns $40,000-45,000 per year, with a monthly truck allowance of $1,200, and thus has a lower average weekly wage (asserted by employer as $865.39) than claimant. Emp. Br. at 5; Decision and Order at 6; Tr. at 61-62.

force at the time of the injury. *James J. Flanagan Stevedores*, 219 F.3d 426, 34 BRBS 35(CRT); *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15(CRT) (4th Cir. 1998); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999). Since employer does not challenge any other aspect of the administrative law judge's decision, including his computation of claimant's average weekly wage as $1,974.26 under Section 10(c), we affirm the administrative law judge's decision in all respects.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge