BRB Nos. 92-2507
and 92-2507A

JAMES LAWTON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
STEVENS SHIPPING AND TERMINAL COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION AND ORDER

Appeal of the Decision and Order Granting Benefits of Eric Feirtag, Administrative Law Judge, United States Department of Labor.

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

Stephen E. Darling (Sinkler & Boyd, P.A.), Charleston, South Carolina, for self-insured employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Granting Benefits (91-LHC-1738) of Administrative Law Judge Eric Feirtag 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 was injured on February 19, 1990, when he was hit on the head by a falling lashing rod. He was treated at a hospital emergency room for a laceration, and the report noted that claimant complained of headaches and "electrical shocks." After a period of treatment and recuperation, claimant returned to work on October 8, 1990, and has continued to work with no problems. Claimant sought temporary total disability benefits under the Act for the period from February 19, 1990, until his return to work on October 8, 1990, at the maximum compensation rate based on an

average weekly wage of $1,012.02.[1]

The administrative law judge found that claimant was temporarily totally disabled from the date of the injury, February 19, 1990, through October 7, 1990, and that he was entitled to compensation based on his average weekly wage of $1,012.02, which includes container royalty, holiday and vacation pay. The administrative law judge also found that the treatment provided by Drs. Barone and Woods was neither necessary nor authorized, and thus that employer is not liable for payment for their medical services. Lastly, the administrative law judge found that employer is entitled to a pro-rated credit for container royalty, holiday and vacation payments claimant received in December 1990, after he returned to work, in the amount of $10,160.97.

[1]Employer paid claimant temporary total disability benefits at the rate of $469.53, based on the average weekly wage of $704.30, for the period from February 19, 1990, to May 28, 1990.

In its appeal, employer contends that the administrative law judge erred in finding claimant temporarily totally disabled from May 29, 1990, through October 7, 1990, and that the administrative law judge improperly included container royalty, vacation and holiday pay in the calculation of claimant's average weekly wage. Claimant responds, urging affirmance of these findings as they are supported by substantial evidence and are in accordance with law. In his appeal, claimant contends that the administrative law judge erred in awarding employer a credit for the container royalty, holiday and vacation pay.[2] Claimant also contends that the administrative law judge erred in finding that employer is not liable for the services provided by Drs. Barone and Woods, alleging he was refused treatment by employer's physician. Employer responds, urging affirmance of these findings.

Extent of Disability

Initially, we reject employer's contention that the administrative law judge erred in finding claimant temporarily totally disabled for the period from May 29, 1990, when he was released for work by his treating physician, through October 8, 1990, when claimant returned to work. Employer contends that there is no medical evidence to support claimant's complaints of headaches after May 29, 1990.

To establish a *prima facie* case of total disability, claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). Claimant's credible complaints of pain alone may be enough to meet his burden. *See generally Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46 (CRT)(5th Cir. 1990); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

On May 4, 1990, Dr. Booker stated that claimant could try to return to work if the headaches did not continue and he was not sedated. Dr. Booker stated on June 11, 1994, that there was no neurological reason why claimant could not return to work. Claimant, however, continued to have pain, and he sought treatment from Dr. Woods, who referred him to a neurologist, Dr. Barone. Dr. Barone diagnosed that claimant was suffering from a headache following head trauma, and reported in a letter to Dr. Woods dated August 15, 1990, that claimant's brain map was normal. Moreover, he noted that the patient was advised his condition is temporary and should clear completely. Emp. Ex. 4; Cl. Ex. 7. The administrative law judge found that even though they could find no neurological bases for the headaches, the reports of Drs. Woods and Barone support a finding that claimant continued to experience severe post-traumatic headaches after May 1990.

In addition, claimant testified that he continued to suffer from headaches after he was

[2]Claimant has filed a supplemental brief, accompanied by a motion to file this brief out of time. In this brief, claimant further addresses the issue of employer's entitlement to a credit for container royalty, vacation and holiday pay by citing a recent decision of an administrative law judge. Employer has filed a brief in opposition to claimant's motion. We accept claimant's supplemental brief, and we will consider employer's memorandum to be a response thereto. We note, however, that decisions of administrative law judges are not binding upon the Board.

released from treatment by Dr. Booker, and that Drs. Woods and Barone could not do anything for claimant's headache, except prescribe pain killers and advise him that his head would heal in time. Eventually, claimant sought treatment from Mary Collier, a reflexologist, who prescribed an herb medicine and foot pressure therapy. Shortly after this treatment, claimant returned to work on October 8, 1990, and has not missed any further time from work due to the February 1990 injury.

The administrative law judge found claimant's testimony regarding his headaches to be persuasive and, in conjunction with the medical evidence, found that it supports a finding that claimant was not able to return to work prior to October 8, 1990. The administrative law judge considered all of the evidence of record, and employer has raised no reversible error committed by the administrative law judge in weighing the evidence and making credibility determinations. *See Uglesich v. Stevedoring Services of America*, 24 BRBS 180 (1991). Therefore, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability during the period from May 28 through October 7, 1990. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988).

Average Weekly Wage

We also reject employer's contention that the administrative law judge improperly included container royalty, vacation and holiday pay in the calculation of claimant's average weekly wage. The Board has held that vacation pay paid to a claimant properly comes within the meaning of "wages" as defined in Section 2(13) of the Act, 33 U.S.C. §902(13) (1988),[3] and is to be included in the calculation of claimant's average weekly wage. *Duncan v. Washington Metropolitan Area Transit Authority*, 24 BRBS 133 (1990); *Waters v. Farm Export Co.*, 14 BRBS 103 (1981), *aff'd*, 710 F.2d 836 (5th Cir. 1983); *Baldwin v. General Dynamics Corp.*, 5 BRBS 579 (1977). This includes vacation pay received in lieu of vacation, *i.e.*, claimant receives the vacation pay whether he takes a vacation or not. *Waters*, 14 BRBS at 106.

Employer concedes that claimant in the instant case received vacation and holiday pay if he

[3]Section 2(13) states, in pertinent part:

> 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 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...The term wages does not include fringe benefits. . . .

See also Morrison-Knudsen Construction Co. v. Director, OWCP, 461 U.S. 624, 15 BRBS 155 (CRT) (1983).

worked 700 hours in the preceding year, whether he took vacation or not. Thus, the pay was either for time taken for vacation, *Duncan*, 24 BRBS at 136, or was in lieu of vacation, *Waters*, 14 BRBS at 106, and includable as wages in either case. Moreover, we reject employer's contention that vacation and holiday pay should be considered fringe benefits, and thus excluded from the definition of "wages" under Section 2(13). The value of the vacation and holiday pay is readily ascertainable, based on claimant's qualification for the benefits and the contract rate of payment, and the payments are included for purposes of income tax withholding. Tr. at 31-33. Thus, the payments are readily calculable and fall within the plain language of Section 2(13). *See generally McMennamy v. Young & Co.*, 21 BRBS 351 (1988) (guaranteed annual income payments included in average weekly wage); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988)(overseas post allowance, foreign service additives, incentive compensation, and foreign housing allowances included in average weekly wage).

We also affirm the administrative law judge's inclusion of container royalty payments in claimant's average weekly wage inasmuch as the Board's holding in *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990), is dispositive of this issue. Like the claimant in *Lopez*, claimant in the instant case was paid container royalties in November based on the hours worked that contract year, and taxes were withheld from the payment.[4] *See* Tr. at 31-33; *Lopez*, 23 BRBS at 300-301. Thus, the container royalty payments were properly included in claimant's average weekly wage.

Credit

In his appeal, claimant contends that the administrative law judge erred in finding that employer is entitled to a credit of $10,160.97 for the proportionate amount of container royalty, holiday and vacation pay claimant "earned" during the period of his disability. Initially, the administrative law judge found that claimant did not lose any amount of container royalty, holiday or vacation pay as a result of his injury, as he had worked the requisite 700 hours prior to the injury. Further, the administrative law judge found that because employer paid these monies in full in December 1990, after claimant returned to work, to require benefits to be paid based on a compensation rate which includes these monies in average weekly wage would make claimant more than whole at employer's expense. Therefore, the administrative law judge found that employer is entitled to some credit for the container royalty, holiday and vacation pay paid to claimant, but only for the amount that is proportionate to the period of time for which employer also was responsible for paying benefits.[5]

[4]We will not address employer's contentions regarding the Board's decision in *Richnow v. T. Smith & Son, Inc.*, BRB No. 87-3542 (Jan. 31, 1990), as it is unpublished and lacks precedential value. *See Lopez*, 23 BRBS at 300 n. 2.

[5]The administrative law judge calculated the credit based on the 231 days, or 63.5 percent of one year, employer was found liable for temporary total disability benefits. Claimant received a total of $16,001.52 in container royalty, holiday and vacation pay for the year. Thus, the administrative law judge found employer entitled to a credit based on 63.5 percent of this figure, which equals $10,160.97.

Section 14(j) allows employer a credit for its prior payments of compensation against any compensation subsequently found due.[6] Specifically, Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j). Employer may receive a credit only if the payments it makes to claimant are shown to be advance payments of compensation. *See generally 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).

In *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990), the Board held that the employer was entitled to a credit for holiday pay against its liability for temporary total disability compensation because the evidence established that the bargaining agreement provided that holiday pay was to be "in lieu of compensation." Recently, in *Sproull v. Stevedoring Services of America*, BRBS , BRB Nos. 89-1209/A/B, 90-804 (Oct. 25, 1994), *modifying in pert. part on recon. en banc* 25 BRBS 100 (1991) (Brown, J., dissenting on other grounds), the Board reviewed the question of whether an administrative law judge erred by denying employer a credit for vacation and holiday pay claimant received during a period of temporary total disability. In its original decision in *Sproull*, the Board held that employer was entitled to a credit for disability payments on the days the claimant received holiday pay, citing the decision in *Andrews*. *Sproull*, 25 BRBS at 107-108. On reconsideration, the Board held that employer was not entitled to the credit, as, unlike in *Andrews*, the bargaining agreement did not provide that holiday pay was intended to be in lieu of compensation. *Sproull*, slip op. at 6.

In the instant case, as in *Sproull*, there is no evidence that container royalty, vacation and holiday pay was intended to be in lieu of compensation. In fact, these payments are in addition to wages; claimant testified that he receives these payments by working at least 700 hours in the preceding contract year. Tr. at 33, 39. Moreover, claimant's receipt of container royalty, vacation and holiday pay in November and December 1990 does not make him more than whole at employer's expense. Claimant earned the right to these payments by working the required 700 hours prior to his injury. Moreover, his average weekly wage is calculated based on his wages in the 52 weeks prior to his injury on February 7, 1990. 33 U.S.C. §910. Thus, claimant's average weekly wage would have taken into account the container royalty, vacation and holiday pay he received at the end of 1989, and claimant is not receiving the benefit of the 1990 payments twice. We,

[6]The only other provisions of the Act which provide for a credit are Section 33(f), 33 U.S.C. §933(f), which entitles employer to credit the employee's net third-party recovery against its liability for the same disability under the Act, and Section 3(e), 33 U.S.C. §903(e), which entitles employer to a credit for amounts claimant received for the same injury or disability under a state compensation act or the Jones Act. Neither of these sections is applicable in the instant case.

therefore, reverse the administrative law judge's finding that employer is entitled to a credit for vacation and holiday pay.[7]

Unauthorized Medical Treatment

Claimant also contends that the administrative law judge erred in finding that employer is not liable for payment for the medical services of Drs. Woods and Barone. We disagree. The administrative law judge found that Dr. Booker was claimant's physician of choice and that claimant's failure to obtain authorization from employer before he sought treatment from another physician is not excused. Moreover, the administrative law judge found that the evidence does not establish that the treatment provided by Drs. Woods and Barone was necessary.

Once claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or district director. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406. Once employer refuses to provide treatment or to satisfy claimant's request for treatment, claimant is released from the obligation of continuing to seek employer's approval. *Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988). Claimant then need only establish that the treatment subsequently procured on his own initiative was necessary for the injury, in order to be entitled to such treatment at employer's expense. *Id.*

Following the work-related accident, claimant was evaluated in the emergency room and subsequently referred to Dr. Booker, a neurologist. Dr. Booker continued to treat claimant with medication for his headaches until his last examination on June 11, 1990, when he reported that claimant's headaches were better and that there was no neurological reason claimant could not return to work. Emp. Ex. 7. Because claimant continued to suffer from headaches after his last appointment with Dr. Booker, he sought treatment from Dr. Woods, a physician referred to him by his daughter. Claimant testified that Dr. Woods could not help his headaches and thus referred him to Dr. Barone, a neurologist. Tr. at 28. Finally, claimant was seen by the reflexologist on September 28, 1990.[8]

Initially, we reject claimant's unsubstantiated contention that even though he may have selected Dr. Booker as his treating physician upon referral from the hospital, once the employer agreed to pay for Dr. Booker's services, Dr. Booker became "employer's" physician. Section 7(c)(2) of the Act, 33 U.S.C. §907(c)(2), and Section 702.406 of the regulations, 20 C.F.R. §702.406, provide the only method by which claimant can change from his initial choice of physician, and the fact that employer has paid for the services of that physician as required by the Act is not relevant.

[7]Inasmuch as we reverse the administrative law judge's finding that employer is entitled to a credit for royalty payments, and holiday and vacation pay, we will not address claimant's alternative contention that any credit given should be multiplied by a factor of two-thirds.

[8]Claimant does not seek reimbursement for the services provided by Ms. Collier inasmuch as she is not a physician.

It is undisputed that claimant did not seek authorization from employer for treatment by Dr. Woods, and Dr. Woods referred claimant to Dr. Barone. *See* Tr. at 48; *see generally Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986). Thus, inasmuch as claimant did not seek employer's authorization to change from his initial choice of physician, we affirm the administrative law judge's finding that employer is not liable for the medical services rendered by Drs. Woods and Barone.[9] *See Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989).

Accordingly, the Decision and Order of the administrative law judge granting employer a credit of $10,160.97 for the proportionate amount of container royalty, holiday and vacation pay earned by claimant during the period of disability is reversed. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[9]Given this resolution, we need not address claimant's contentions that the administrative law judge erred in finding that the services of Drs. Woods and Barone were not necessary.