BRB No. 93-1274

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| PAUL S. BRUCE, JR. | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| UNIVERSAL MARITIME SERVICES | ) | DATE ISSUED: |
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| Self-Insured | ) | |
| Employer-Petitioner | ) | DECISION and ORDER |

Appeal of the Decision and Order-Determining Average Weekly Wage of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Patrick A. Roberson, (Smith, Somerville & Case), Baltimore, Maryland, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Determining Average Weekly Wage (92-LHC-2598) of Administrative Law Judge Edward Terhune Miller 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 if they 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 while working for employer on November 12, 1991, and employer voluntarily paid claimant temporary total disability compensation in the amount of $391.40 per week from November 13, 1991, to February 27, 1992, and again from March 9, 1992, to August 20, 1992. Employer unilaterally terminated benefits on August 2, 1992, claiming that claimant was able to return to work. Claimant was temporarily totally disabled due to a prior injury from September 4, 1990, until January 9, 1991.

Claimant sought additional temporary total disability compensation for the period between August 3, 1992, and September 21, 1992. The only issues before the administrative law judge were the applicable average weekly wage and employer's entitlement to a credit under Section 14(j) of the Act, 33 U.S.C. §914(j), for vacation, holiday, and container royalty payments it made while claimant was temporarily totally disabled due to the work injury.[1] The parties agreed that these issues could be resolved based on the documentary record without a hearing.

The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), based on claimant's earnings in the year immediately preceding the injury. The administrative law judge divided claimant's earnings of $34,774.10, as evidenced on W-2 forms and check stubs, which included his vacation/holiday and container royalty payments, by the 43 5/7 weeks he actually worked, arriving at an average weekly wage of $795.49. He further determined that employer was not entitled to a credit against the vacation and container royalty pay claimant received. Relying on *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991)(Brown, J., concurring and dissenting), *modified in part on recon. en banc*, 28 BRBS 271 (1994) (Brown and McGranery, JJ., concurring in pert. part and dissenting in part), however, the administrative law judge allowed employer a credit for disability payments against holiday pay claimant received under the contract.

On appeal, employer contends that the administrative law judge erred in applying Section 10(c) rather than Section 10(a) of the Act in determining claimant's average weekly wage. Employer further asserts that in calculating the average weekly wage, the administrative law judge properly divided the amount claimant earned while actually working by the 43 5/7 weeks he worked, but that he should have divided the vacation/holiday and container royalty payments claimant received in calendar year 1991 by 52, because these benefits accrued over 52 weeks.[2] Employer also maintains that it is entitled to a credit for the payments it continued to make into the container royalty and the vacation/holiday funds while claimant was temporarily totally disabled. Claimant responds, urging affirmance.[3]

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[1]Pursuant to the applicable union contract, the contract year runs from October 1 through September 30. Holiday payments are made in December of the contract year following the eligibility year and vacation benefits are paid within 30 days after the quarter of eligibility. Cl. Ex. 3 at 57-60. Employees are permitted to work on some holidays and receive both salary and holiday pay. Emp. Ex. 3 at 57-58.

[2]Claimant's income during the 1991 calendar year, according to his W-2 form and pay stubs was $34,774.10, including holiday/vacation and container royalty pay. The administrative law judge divided this by the 43 5/7 weeks claimant worked, obtaining an average weekly wage of $795.49. Using employer's suggested calculations, claimant's income from wages, $26,352.04, divided by the number of weeks he actually worked, 43 5/7, results in a figure of $602.82. The vacation/holiday and container royalty figure of $8,422, when divided by 52 weeks yields $161.96, for an average weekly wage of $764.88 (actually $764.78).

[3]In his response brief, claimant moved for summary dismissal of employer's appeal for failure to

Initially, we reject employer's contention that the administrative law judge erred in determining claimant's average weekly wage under Section 10(c) rather than Section 10(a). In the present case, the administrative law judge rationally employed Section 10(c) because there was no evidence of record sufficient to establish whether claimant was a six-day or five-day per week worker, a prerequisite to application of Section 10(a). *See Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.* 25 BRBS 88 (1991). Although, as employer argues, the collective bargaining agreement suggests that the normal straight-time work week is five days, the administrative law judge's determination that this evidence was inconclusive as to claimant's status was clearly within his discretion.[4] *See Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137, 139 (1991).

We also reject employer's argument that in calculating claimant's average weekly wage the administrative law judge erred by failing to divide claimant's holiday/vacation and container royalty payments by 52 weeks rather than the 43 5/7 weeks claimant worked. Under Section 10(c) the administrative law judge has broad discretion to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury. *Browder*, 24 BRBS at 216; *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). Inasmuch as claimant worked from January 9, 1991 until his injury on November 12, 1991, or approximately 8 months, it was not unreasonable for the administrative law judge to assume that claimant earned the 675 hours necessary for vacation and holiday pay, and the 700 hours necessary to obtain container royalty pay during the 43 5/7 weeks he actually worked. *See generally Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

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raise a substantial question of law or fact. By Order dated August 26, 1993, the Board, noting that the motion was not filed as a separate document as required by Section 802.219 of the Board's Rules of Practice and Procedure, 20 C.F.R. §802.219, accepted claimant's response brief and stated that the motion to dismiss would be addressed on the merits in the Board's decision. Inasmuch as employer's appeal does raise substantial questions of law and fact, we deny claimant's motion and will consider claimant's arguments in response to employer's appeal on the merits. On November 30, 1995, the Board denied another motion to dismiss filed by claimant on September 8, 1995.

[4]Moreover, the administrative law judge noted that assuming that claimant worked a five-day work week, his average weekly wage would be identical whether calculated under Section 10(a) or Section 10(c) of the Act, 33 U.S.C. §910(a), (c).

Finally, we reject employer's contentions that it is entitled to a credit for the vacation/holiday and container royalty payments employer continued to make while claimant was temporarily totally disabled due to the subject work injury. Under Section 14(j) of the Act employer is entitled only to a credit for its prior payments of compensation against any compensation subsequently found due. In its original decision in *Sproull*, the Board held that employer was entitled to a credit for its disability payments on the days claimant received holiday pay, citing the decision in *Andrews v. Jeffboat*, 23 BRBS 169 (1990). On reconsideration, however, the Board held that employer was not entitled to a credit for holiday pay against the temporary disability compensation paid to the claimant, because the union contract in *Sproull*, unlike that in *Andrews*, did not specifically provide that the holiday pay "was intended in lieu of compensation." *Sproull*, 28 BRBS at 276.

The present case is similar to *Sproull* in that the union contract does not specifically provide that the payments from the vacation/holiday or container royalty funds were intended to be in lieu of compensation. Under the union agreement in the present case, an employee becomes eligible for payments from the vacation/holiday fund if he works or receives credit for 675 hours during each contract year, and the container royalty fund after 700 hours. An employee is credited 20 hours for every week he is out on temporary total disability. The employee's ability to earn these benefits regardless of whether he is disabled indicates that these payments are not intended as advance payments of compensation and stem from the union contract itself rather than any provision of the Longshore Act. *See Branch v. Ceres Corp*., 29 BRBS 53 (1995). As there is no evidence in this case that the aforementioned payments were intended as compensation, these payments are 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). Accordingly, we affirm the administrative law judge's denial of a credit for the vacation and container royalty payments.[5]

Accordingly, the administrative law judge's Decision and Order-Determining Average Weekly Wage is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[5]The administrative law judge did allow a credit for the holiday pay received, relying on the Board's initial decision in *Sproull*. Claimant has not appealed the allowance of this credit to the Board, and it therefore will not be addressed.