BRB No. 99-1047

ARTHUR L. SYKES Claimant-Petitioner v. ALFRED L. NICHOLSON, LIMITED and P.M.A., INCORPORATED Employer/Carrier-Respondents	)))))))))))))))	DATE ISSUED: 7/7/2000 DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

James G. Muncie, Jr. (Midkiff & Hiner, P.C.), Richmond, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-1555) of Administrative Law Judge Richard E. Huddleston 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, the president and sole shareholder of the corporate employer,

worked as a marine surveyor, assessing the value of damage to cargo, docks, hulls, *etc.*, in the maritime industry.[1] He broke his ankle on May 26, 1996, during the course of his employment while on board a cargo ship monitoring the transfer of cargo from one ship to another at the Sewell's Point Anchorage. Claimant contends he is entitled to temporary total disability benefits from May 26 through August 14, 1996, and to temporary partial disability benefits thereafter, as he returned to light duty work earning less money. Employer does not dispute the fact of the injury, but disputes claimant's calculation of his average weekly wage and his entitlement to disability benefits.

The administrative law judge noted that the parties filed jointly to have the hearing canceled and to have the matter resolved on documentation and briefs alone. Decision and Order at 1. He then identified each item entered into the record, most of which pertained to claimant's earnings between 1992 and 1997. Despite "jurisdiction" being noted on both parties' pre-hearing statements as an undisputed matter, the administrative law judge stated that he needed to consider whether claimant fulfilled the status and situs requirements before he could proceed. 33 U.S.C. §§902(3), 903(a). He found that claimant, a marine surveyor, meets the status requirement. Decision and Order at 5. However, he noted that the only evidence of record concerning where the injury occurred was in claimant's answers to employer's interrogatories, and, although the issue was not contested, he found that the burden of showing situs rested with claimant and that on the record before him, claimant had not fulfilled his burden. Consequently, the administrative law judge held that claimant is not covered under the Act, as he did not provide sufficient evidence to show that his injury occurred in a geographically covered area. Decision and Order at 5. Nevertheless, the administrative law judge addressed the merits of the claim and found the following: a) claimant's relationship with employer does not bar him from recovering compensation; b) the question of whether loan repayments constitute "wages" for purposes of determining claimant's average weekly wage is an issue of first impression; c) the loan repayments do not constitute "wages;" and d) claimant did not suffer a loss of wage-earning capacity because he earned $1,000 per month for the five months prior to his injury and continuously thereafter. Decision and Order at 6. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant first contends the administrative law judge erred in addressing the issue of coverage, as the parties did not contest that issue. Specifically, claimant

[1]Claimant is the sole surveyor in the company. The only other employee, at the time of the injury, was a secretary. Emp. Ex. A at 5.

avers that the parties submitted their pre-hearing statements identifying jurisdiction as an undisputed issue and that the administrative law judge raised the issue on his own without notice to the parties. Moreover, claimant contends there is sufficient evidence in the record to establish that his injury occurred on a covered situs. Employer does not address this issue in its response brief.

As claimant states, both parties' pre-hearing statements identify jurisdiction as a matter on which the parties reached agreement. Cl's Brief at Exs. A-B. Additionally, claimant's claim for compensation form explains that the injury occurred while claimant was "on board [the] cargo ship *Pride of Donegal* [which was] anchored at Sewell's Pt. Anchorage" and that he broke his ankle when he "went across the deck [and] the toe of [his] left shoe caught under [a] wire sling." Cl's Brief at Ex. C. Employer's first report of injury states that claimant was injured "on board" the *M/S Pride of Donegal* which was anchored at Sewell's Point Anchorage, Norfolk, Virginia. Cl's Brief at Ex. D. In his answers to interrogatories, claimant stated: "on May 26, 1996 while transferring cargo from one ship to another[,] he tripped and fell and suffered a broken left ankle." Emp. Ex. K at 1. Despite these statements and the lack of a dispute on the issue, the administrative law judge stated:

> The only evidence on record regarding Claimant's location at the time he was injured is [in Emp. Ex. K at 1]. No evidence or stipulations were presented regarding the location of the ship, or whether it was upon navigable waters of the United States. As the issue was not contested by the parties, it is likely they assumed that it was obvious that the injury took place over such waters. However, the issue is a jurisdictional issue, and the burden of proof rests with the Claimant. Clearly, it is not possible to hang a finding that claimant's injury took place upon the navigable waters of the United States upon such a peg.

Decision and Order at 5.

An administrative law judge is permitted to expand a hearing to include consideration of an issue not previously raised but if he does so, *sua sponte* or on the motion of a party, he must give the parties notice that the issue will be raised and an opportunity to respond. 20 C.F.R. §702.336. Failure to follow these procedures is error. *Cornell University v. Velez*, 856 F.2d 402, 21 BRBS 155(CRT) (1st Cir. 1988); *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999); *Bukovac v. Vince Steel Erection Co., Inc.*, 17 BRBS 122 (1985); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984). In this case, it is clear the parties did not consider coverage an issue in dispute, and the administrative law judge, therefore,

was required to give the parties notice of this issue and time to respond thereto. *Id.*

Nonetheless, we need not remand for further findings regarding Section 3(a), as it is clear that claimant's injury occurred on a covered situs. Initially, the issue of coverage under Sections 2(3) and 3(a) may be waived; thus, the administrative law judge erred in finding it necessary that he address this uncontested issue. *See Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 14 BRBS 771 (9th Cir. 1982) (court held situs issue waived because it was not contested by the employer, reversing Board's decision to raise it as a matter of subject matter jurisdiction); *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981) (where claimant is injured on navigable waters, there is no question of subject matter jurisdiction, and the parties are permitted to stipulate to coverage). As the parties agree that claimant is covered under the Act, and as their statements that claimant was injured onboard a vessel are uncontradicted, we hold that claimant's injury occurred on a covered situs. *See Director, OWCP v. Perini North River Assoc.,* 459 U.S. 297, 15 BRBS 62 (CRT)(1983). Accordingly, the administrative law judge's finding to the contrary is reversed.

Claimant next contends the administrative law judge erred in determining his average weekly wage, and thus, the amount of post-injury benefits to which he is entitled.[2] This is the primary point of contention between the parties in this case. The dispute arises because claimant, as the president and sole shareholder of the corporation, made loans to the corporation and received, at times, loan repayments "in lieu of salary." Specifically, when the corporation was in need of cash in 1992 through 1994, claimant loaned it a total of $35,500. Emp. Ex. A at 7-8. He did not charge interest, and only one promissory note was signed, which required repayment of $17,200 to be made to claimant's wife. Emp. Ex. A at 7-10, 12. According to claimant, the entire loan has been repaid, with the disbursements noted by employer's accountant as payments to claimant "in lieu of salary." *Id.* at 11; Emp. Ex. B.

Claimant contends he is entitled to have those repayments considered in calculating his average weekly wage because the "economic reality" of the situation

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[2]No party challenges the determination that claimant's relationship with employer does not affect his eligibility for benefits, Decision and Order at 6. *See Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *aff'd in pert. part*, *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979).

was that they were in return for his services and he lived off of those payments just as he would have lived off his salary. In addition to the amounts denoted as loan repayments, claimant received salary payments of $1,000 per month in five months of the year prior to injury. Claimant thus argues that his average weekly wage is $557.69, based on an income of $29,000 ($24,000 loan repayment "in lieu of salary" plus $5,000 wages earned) between May 1995 and May 1996. Alternatively, claimant argues that the computation of the corporation's accountant should be used, making his average weekly wage $461.54, based on an income of $24,000 ($19,000 loan repayment "in lieu of salary" plus $5,000 wages earned) during that period. Employer, however, argues that claimant's average weekly wage is $96.15, based on the taxable wages of $5,000 claimant received during the year preceding the injury.

Section 10 of the Act provides the means by which a claimant's average weekly wage is to be determined. 33 U.S.C. §910. Subsections (a) – (c) provide the manner in which to calculate a claimant's average weekly wage, 33 U.S.C. §910(a)-(c); *Story v. Navy Exchange Service Center*, 33 BRBS 111 (1999); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). Section 10(c), which applies in this case, states:

> If either [subsection (a) or (b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee . . . *including the reasonable value of the services of the employee if engaged in self-employment*, shall reasonably represent the *annual earning capacity* of the injured employee.

33 U.S.C. §910(c) (emphasis added).

In addressing claimant's average weekly wage argument, the administrative law judge found that the payments in question were either wages or loan repayments. He reasoned that if they were wages, then the loan has not been paid off, and if they were loan repayments then the debt was satisfied and the payments were not compensation for services rendered. In light of claimant's testimony that the debt has been satisfied, the administrative law judge was unwilling to treat the payments as compensation for salary. Thus, he concluded that the sums designated as loan repayments were not "wages" under Section 2(13) of the Act.

Section 2(13) provides

> 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 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 of title 26 (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). The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, has interpreted this section defining "wages" as "the 'money rate' of compensation that is to be provided (1) for the employee's services (2) by an employer (3) under the employment contract in force at the time of injury." *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319, 33 BRBS 15, 20(CRT) (4th Cir. 1998). Pursuant to Section 2(13), "wages" also include the reasonable value of "any advantage" which is received from employer and is included for purposes of tax withholding.[3] *Id.*, 155 F.3d at 318, 33 BRBS at 20(CRT). Because the issue herein involves the "money rate" at which claimant's services were

[3]Based on statutory interpretation of the word "including" in Section 2(13), the Board has held that this clause regarding an advantage is exemplary of the types of advantage included in average weekly wage, rather than being exclusive. *Story*, 33 BRBS at 116; *see Wright*, 155 F.3d at 319 n.10, 33 BRBS at 20 n.10(CRT). The United States Courts of Appeals for the Fifth and Ninth Circuits, however, have held that an "advantage," *i.e., per diem* or the value of room and board, must be properly included in tax withholding in order to be included in wages. *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, __ BRBS __(CRT) (5th Cir. 2000); *McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT) (9th Cir.1998); W*ausau Ins. Companies v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997).

compensated rather than an "advantage," we are concerned here with the first clause of Section 2(13). *Story*, 33 BRBS at 117; *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997).

Clearly, whatever salary claimant received in exchange for his services constitutes his "wages" under Section 2(13). As claimant herein is the president, sole shareholder and sole employee performing surveying work of the corporate employer, he is essentially self-employed. *See generally Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991). In such cases, Section 10(c) contemplates that claimant's annual earning capacity include the reasonable value of claimant's services. Thus, Sections 2(13) and 10(c) are consistent in directing that claimant's average weekly wage be determined based on the value of his services.

In this case, there is no written "contract of hire" or specifically identified "money rate" at which claimant's services were compensated. Claimant asserts the "economic reality" that all sums paid to him were funds which he used for his living expenses; thus, he argues that, although the payments were deemed repayments of his loans, they were made "in lieu of salary" in return for services rendered and should be included in his average weekly wage. All payments made to claimant in 1995 were designated as being "in lieu of salary." From January through May 1996, claimant was paid a salary at the rate of $1,000 per month. In January 1996, claimant received an additional $2,000 and in February 1996, he received $1,000, with both of these payments designated as being made "in lieu of salary." All salary payments were delineated separately from the loan repayments by the corporation's accountant. Emp. Ex. B. Although claimant did not receive a "salary" for some of the months in which he received loan repayments, it is not contended that claimant was not working during this time. Thus, claimant continued to have an earning capacity during the entire year prior to injury, including those months when he received only loan repayments.

That is not to say that the full value of the loan repayments should be included in the computation of claimant's average weekly wage as claimant suggests, as such sums do not necessarily represent the value of claimant's services. In fact, by comparison with prior years, it appears that inclusion of the full loan repayments which occurred within the year preceding claimant's injury would skew claimant's yearly income to a greater amount than claimant's annual earnings in any previous year.[4] Thus, the administrative law judge did not

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[4]The evidence indicates that between 1988 and 1991, claimant's annual salary ranged between $4,000 and $9,000. Emp. Ex. A at 13-14. From 1992 through 1994, claimant took home no salary, living off his savings and a $3,000 loan repayment. In 1995, the corporation

err in declining to include the full loan repayment in claimant's wages.

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was able to repay more of the loan, with claimant receiving approximately $24,000.

That, however, does not end the inquiry. Since average weekly wage is to be based on the "reasonable value" of claimant's self-employment services, these amounts should be treated similar to the profits of a business, which are not included in determinations of earnings capacity.[5] 33 U.S.C. §910(c). There is evidence in this case which the administrative law judge can use to determine the value of claimant's services. For example, claimant was paid $1,000 per month between January and May 1996 for his services. Extrapolating that figure throughout the course of one year would result in an earning capacity of $12,000 per year. Employer's assertion that claimant's average weekly wage should be based on an *annual* income of $5,000 must be rejected. This amount was earned over the course of five months and thus does not represent claimant's annual earning capacity. The administrative law judge must arrive at a figure approximating claimant's earning capacity for an entire year of work under Section 10(c), and that amount is then divided by 52 pursuant to Section 10(d)(1), 33 U.S.C. §910(d)(1), to arrive at claimant's average weekly wage. *See Brien v. Precision Valve/Bayley Marine,* 23 BRBS 207 (1990). As the administrative law judge must ascertain the amount which reasonably represents claimant's annual earning capacity based on the reasonable value of claimant's self-employment, this case must be remanded for him to do so. We, therefore, vacate the administrative law judge's decision, and we remand this case for findings regarding average weekly wage in accordance with this opinion. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 14 BRBS 345 (D.C. Cir.), *cert. denied*, 449 U.S. 905 (1980); *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Wayland*, 25 BRBS at 53; *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987).

Claimant next contends the administrative law judge erred in denying disability benefits, claiming he is entitled to benefits for periods of temporary total and temporary partial disability during his recuperation from the broken ankle. The administrative law judge found that for the five months prior to his injury, claimant received $1,000 per month

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[5]In a case involving post-injury wage-earning capacity, the Board held that it is inappropriate to include purely speculative profits in the calculation of a claimant's wage-earning capacity, as that money is distinguishable from the value of the claimant's services. *Seidel v. General Dynamics Corp.*, 22 BRBS 403 (1989). Similarly, in a case which the Board held arose under Section 10(c), the Board held that in a case of self-employment, the reasonable value of claimant's services excludes profits and such intangibles as goodwill. *Roundtree v. Newpark Shipbuilding & Repair, Inc.,* 13 BRBS 862 (1981), *rev'd on other grounds,* 898 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*, 105 S.Ct. 88 (1984). In its initial decision, the Fifth Circuit did not review the Board's holding under Section 10(c) regarding the reasonable value of claimant's services, as it held Section 10(b) applied. Upon *en banc* review, however, this decision was vacated as interlocutory.

as salary. He found that claimant received this same amount at all times subsequent to his injury. Decision and Order at 6. Concluding from this fact that claimant suffered no loss in earning capacity, the administrative law judge determined that claimant was not disabled and is not entitled to benefits. *Id.* The administrative law judge's conclusion cannot be affirmed.

In a claim for total disability, the initial inquiry is whether claimant is able to perform the pre-injury duties of his employment following an injury. Where claimant proves that he is unable to do so, he has established a *prima facie* case of total disability, and the burden shifts to employer to demonstrate the availability of suitable alternate employment. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997). Where employer does not meet this burden, claimant is totally disabled. Section 8(b) provides that a claimant is entitled to temporary total disability benefits during the continuation of total disability at a rate of two-thirds of his average weekly wage. 33 U.S.C. §908(b); *Martinez v. St. John Stevedoring Co.*, 15 BRBS 436 (1983). Once claimant returns to work, under Section 8(e) he is entitled to temporary partial disability benefits if he can establish a loss of wage-earning capacity. 33 U.S.C. §908(e), (h); *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 40 (1992); *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149 (1988); *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979). The fact that claimant continued to receive salary payments in the months following his injury does not absolve the administrative law judge of the need to address these issues in order to determine the extent of disability.

The record here contains undisputed evidence that claimant was unable to work following his injury for the remainder of May and June 1996, he was limited to doing paperwork at home in July 1996, and he returned to the office on a part-time basis in August and September 1996. Emp. Exs. B, H. Contrary to the administrative law judge's reasoning, claimant's continued receipt of his salary payments indicates no loss of *actual earnings*; however, entitlement to disability benefits is not based on a loss of actual earnings but, rather, on a loss of wage-earning capacity. 33 U.S.C. §908(h); *Container Stevedoring Co. v. Director, OWCP [Gross]*, 935 F.2d 1544, 24 BRBS 213(CRT) (9th Cir. 1991). Moreover, where employer continues salary payments during a period of disability, it is entitled to a credit for those continued payments only if they have been specifically designated as being made in lieu of compensation or as advance payments of compensation. 33 U.S.C. §914(j); *Shell Offshore, Inc. v. Director, OWCP*, 112 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Van Dyke v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 388 (1978). When claimant returned to work, if he continued to be temporarily disabled, he is entitled to benefits for any loss in wage-earning capacity, and this issue requires findings consistent with Section 8(h) and evaluation of the relevant factors.[6] As the

[6]Once claimant's condition reaches permanency, he is limited to an award under the

administrative law judge did not engage in the requisite analysis, we vacate his decision. The case is remanded for further consideration of claimant's entitlement to both temporary total and temporary partial disability benefits.

Accordingly, the administrative law judge's finding that claimant's injury did not occur on a covered situs is reversed. His denial of disability benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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schedule for any permanent impairment. *Potomac Electric Power Co. v. Director, OWCP [PEPCO],* 449 U.S. 268, 14 BRBS 363 (1980).