

BRB No. 01-0778

JAMES C. BAKER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TRUCK & TRAILER EQUIPMENT	)	DATE ISSUED: <u>June 20, 2002</u>
COMPANY	)	
	)	
and	)	
	)	
LOUISIANA WORKERS'	)	
COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, United States Department of Labor.

Mesonie J. Halley, Jr. (Pitre, Halley & Associates), Lake Charles, Louisiana, for claimant.

Ted Williams (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-3311) of Administrative Law Judge Clement J. Kennington 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured his back in a work-related accident on September 30, 1996. Thereafter, claimant underwent surgery and continued to be temporarily totally disabled. The sole issue presented at the hearing is whether employer's contribution to claimant's Individual Savings Plan (ISP) account with the Southern States Savings and Retirement Plan, made pursuant to a collective

bargaining agreement between employer and Teamsters Local 969, should be included in the calculation of claimant's average weekly wage.

The administrative law judge found that employer's contributions to claimant's ISP constitute a "fringe benefit" under Section 2(13) of the Act, 33 U.S.C. §902(13). Therefore, the administrative law judge found that employer's contributions do not constitute "wages" under the statutory definition, and are excluded from the calculation of claimant's average weekly wage. Decision and Order at 4. On appeal, claimant challenges the administrative law judge's finding that employer's contribution to his ISP is a "fringe benefit" which must be excluded from the calculation of his average weekly wage. Employer responds, urging affirmance.

Section 2(13) of the Act 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 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). In a pre-1984 Amendment case addressing the inclusion of employer contributions to union trust funds for health and welfare, pension and training, the Supreme Court formulated a standard that "wages" include benefits with a present value that can readily be converted into a cash equivalent on the basis of their market value.<sup>1</sup> *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155(CRT) (1983). In *Morrison-Knudsen*, the payments at issue were employer's 35 cents per man-hour contributions to the trust funds. The Court held that such payments were a fringe benefit excluded from wages, because the benefits could not be obtained on the open market through private insurance, and receiving the benefits required the earning of pension credits related to hours worked and vesting.

Claimant argues that the administrative law judge erred in finding that employer's

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<sup>1</sup>The pre-1984 Amendment version of Section 2(13) defined "wages" as:

the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury, including the reasonable value of board, rent, housing, and gratuities, received in the course of employment from other than the employer.

33 U.S.C. §902(13) (1982) (amended 1984).

contributions to his ISP are appropriately excluded from his average weekly wage calculation. Claimant contends that the administrative law judge erred in determining that the ISP benefits are not easily convertible into cash or readily calculable; claimant also avers that there is no vesting period.

In the instant case, employer made contributions to claimant's ISP in accordance with the schedule set forth in the collective bargaining agreement. The agreement provides for a flat rate weekly contribution to the Individual Savings Plan for all full-time employees who work at least one day per week.<sup>2</sup> CX 1 at 7. The plan documents state that there is immediate vesting in all employer and employee contributions. CX 3. The collective bargaining agreement has a separate provision for payments made to a pension plan by employer. CX 1.

We affirm the administrative law judge's finding that the Act expressly excludes employer's contributions to claimant's ISP from the calculation of his "wages" in order to determine his average weekly wage and corresponding compensation rate. Where the language of a statute has a plain and unambiguous meaning with regard to the particular dispute in a case, no further inquiry is necessary. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Here, Congress has directly spoken to the precise question at issue, in that the plain language of the Act excludes employer's contributions to a retirement plan from the definition of "wages." Although Article 12 of the collective bargaining agreement is captioned "Individual Savings Plan," CX 1, the requisite supporting legal documents state the plan's name is the "Southern States Savings and Retirement Plan." CX 2, 3 (emphasis added). The administrative law judge, therefore, properly found that the express language of the Act, stating that "wages" do not include employer's payments for or contributions to a "retirement" plan, bars inclusion of employer's contributions to the plan at issue here, from the calculation of claimant's average weekly wage.

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<sup>2</sup>Claimant contends that for the one year period preceding his September 30, 1996 work accident, employer paid \$65 per week into his ISP, totaling \$3,380. See CX 1 at 7; CX 4. Thus, claimant argues that he is entitled to a recalculation of benefits, whereby an additional 2/3 of \$3,380 or \$2,252.66 per year, \$43.31 per week, should be added to his total disability benefits.

Moreover, even though this retirement plan does not have the characteristics of the fringe benefits at issue in *Morrison-Knudsen*, in that the employer's contribution appears to be readily calculable,<sup>3</sup> there is immediate vesting, and similar plans are readily available on the open market, *e.g.*, Individual Retirement Accounts, these characteristics cannot override the plain language of the Act regarding the exclusion of payments by employer to a retirement plan.<sup>4</sup> Consequently, we affirm the administrative law judge's denial of an increased average weekly wage as it rational, supported by substantial evidence, and in accordance with law.

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<sup>3</sup>See n. 2 *supra*; CX 1. Any error in the administrative law judge's finding to the contrary is harmless, however, due to the express exclusion from wages of the payments at issue.

<sup>4</sup>In *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *rev'd on other grounds*, 27 BRBS 93(CRT) (9<sup>th</sup> Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994), the Board addressed the issue of whether payments into a tax-sheltered annuity were excluded from "wages" under Section 2(13). The employee elected to put \$6,000 of his base salary into the annuity; employer made no other contributions to the annuity. The Board affirmed the administrative law judge's finding that this \$6,000 should be included in average weekly wage, as such an annuity could be purchased on the open market like an IRA, it was earned when paid, and it immediately vested. The plan in the instant case has such features also, but the distinguishing factor here is that the payments were not sheltered salary payments, but additional employer payments into a retirement plan.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge