BRB No. 97-1118

LUCIAN M. MEEKINS	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
I.T.O. CORPORATION OF VIRGINIA	)	
	)	
Self-insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and Order Granting Motion to Reconsider but Denying Credit of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Gerard E.W. Voyer and Donna White Kearney (Taylor & Walker, P.C.), Norfolk, Virginia, for self-insured employer.

Before: SMITH, BROWN and MCGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Granting Motion to Reconsider But Denying Credit (96-LHC-847) of Administrative Law Judge Fletcher E. Campbell, Jr., 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 the 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).

The parties stipulated to the facts of this claim. Claimant suffered a work-related injury on January 25, 1995, and did not return to work until September 25, 1995. In the year preceding his injury, claimant earned $57,830.68, including

$10,158.28 in container royalty and vacation and holiday pay, EX-12 at 2-4; the parties stipulated that his pre-injury average weekly wage was $1,112.13. Employer voluntarily paid claimant temporary partial disability benefits of $611.19 per week from January 26, 1995 to September 24, 1995. Employer derived this amount by taking a credit of $130.23 per week, a figure which it arrived at by dividing the $10,158.28 in container royalty and vacation/holiday payments claimant received in the year prior to his injury by 52 weeks and then subtracting two-thirds of that amount from the $741.42 in temporary total disability compensation benefits claimant otherwise would have been entitled to receive based on 66 2/3 percent of his full average weekly wage. On December 6, 1990, claimant filed a claim for $4,512.22 in additional compensation, asserting that he was entitled to the full amount of temporary total disability compensation and that employer had improperly taken a credit based on the container royalty and holiday/vacation pay claimant received prior to his injury. In addition, claimant asserted that a credit also was not warranted based on his receipt of similar payments post-injury in light of *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, 96 F.3d 1438, 30 BRBS 74 (CRT) (4th Cir. 1996)(table).

In a Decision and Order dated April 8, 1997, the administrative law judge held that as *Branch* was controlling, the container/royalty and holiday/vacation pay claimant received post-injury by virtue of the union contract were not "wages" pursuant to Section 2(13) of the Act, 33 U.S.C. §902(13). Decision and Order at 5. The administrative law judge also found that employer's use of a credit based on the container royalty, holiday and vacation payments made during the year prior to his injury was improper because only payments made during the period of disability could be credited. *Id.* at n.5. Employer then filed a motion for reconsideration in which it attempted to distinguish *Branch.* This motion was denied. Employer now appeals the administrative law judge's determination that it is not entitled to a credit for container royalty and holiday/vacation pay claimant received. Claimant responds, requesting affirmance of the decision below.

We affirm the administrative law judge's decision. The vacation, holiday and container royalty payments claimant received subsequent to his work injury by virtue of the provisions of the union contract do not constitute post-injury wages under Section 2(13) and thus have no impact on his post-injury wage-earning capacity. Employer's argument on appeal that these payments must be treated as wages for all purposes in order to avoid claimant's receiving an impermissible double recovery is rejected for the reasons stated in *SEACO v. Richardson*, 136 F.3d 1290 (11th Cir. 1998); *Eagle Marine Services v. Director, OWCP*, 115 F.3d 735, 31 BRBS 49 (CRT) (9th Cir. 1997); *Wright v. Universal Maritime Service Corp.*, 31 BRBS 195 (1998); *Branch*, 29 BRBS at 53. Contrary to employer's assertions, neither the fact that the

holiday pay claimant received in June 1995 was based on 1,505 hours of actual hours worked by claimant in the October 1, 1993, until September 30, 1994, contract year, nor the fact that prior to his injury he had worked 695.5 hours of the requisite 700 hours necessary to be eligible for the container royalty and vacation pay he received in December 1995, results in a credit or establishes a post-injury wage-earning capacity. As these payments were either entirely or primarily based on work claimant performed prior to his injury, they are indicative of claimant's pre-injury rather than his post-injury wage-earning capacity and thus do not convert his total disability to a partial disability. *See Richardson*, 136 F.3d at 1292-1293. Inasmuch as the administrative law judge properly found that on the facts presented claimant is entitled to compensation for temporary total disability under Section 8(b), 33 U.S.C. §908(b), that determination is affirmed.

Accordingly, the administrative law judge's Decision and Order and Order Granting Motion to Reconsider But Denying Credit are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge