BRB No. 99-1306

STEPHEN WEIDNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KALAMA SERVICES	)	DATE ISSUED:
	)	
and	)	
	)	
CIGNA INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Phil Watkins (Law Offices of Phil Watkins), Corpus Christi, Texas, for claimant.

Cynthia A. Galvan and Kenneth G. Engerrand (Brown, Sims, Wise & White), Houston, Texas, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration (98-LHC-2674) 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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 hired by employer on November 10, 1995, to work as a laboratory

technician on the Johnston Atoll located about 800 miles southwest of Hawaii. Claimant's contract was for a period of one year. The contract provided that claimant's normal work week was for 6 days a week, 8 hours per day, 48 hours per week at $12.47 per hour, with time and a half, or $19.46 per hour, for any hours beyond 40. Employer paid for claimant's transportation to and from the Johnston Atoll. Employer also provided claimant free room and board "for the convenience of employer." Emp. Ex. 10. Claimant slipped and fell in a shower stall on January 13, 1996, injuring his back. The initial diagnosis was acute lumbar strain, but a subsequent MRI revealed a herniation which necessitated several back surgeries. Claimant returned to light duty work on February 1, 1996, and continued to work until March 26, 1996. Tr. at 25-26. Claimant received temporary total disability benefits from March 27, 1996, until May 31, 1996. Emp. Ex. 3. He underwent back surgery on April 16, 1996. Claimant was released for work on June 1, 1996, by Dr. Denno, based on a job description that did not require heavy lifting, repetitive bending, stooping or squatting, and claimant worked until September 31, 1996. Cl. Ex. 3 at 15. Claimant then took leave for further evaluation of his increasing back and bilateral leg pain. On October 25, 1996, employer informed claimant by letter that he was being terminated for the convenience of the company.

In his decision, the administrative law judge awarded claimant temporary total disability benefits from January 17 to 31, 1996, from March 27 to May 31, 1996, and from October 1, 1996, and continuing, based on an average weekly wage which included the value of the room and board provided to claimant. The administrative law judge denied employer's motion for a credit against compensation due for $2,490.24 which it had paid claimant following his termination.

On appeal, employer challenges the administrative law judge's award of temporary total disability compensation benefits for two specific periods of time, and the calculation of claimant's average weekly wage. Employer also argues that it is entitled to a credit against any compensation liability for the $2,490.29 payment it made to claimant upon his termination. Claimant responds, urging affirmance of the administrative law judge's decisions in their entirety. Employer has filed a supplemental brief calling the Board's attention to recent case law relevant to the average weekly wage issue.

Employer disputes two periods for which the administrative law judge found it liable for temporary total disability benefits. Employer first argues that the administrative law judge erred in awarding claimant temporary total disability benefits for January 30-31, 1996, as, on January 29, 1996, Dr. Lee released claimant to return to work without restrictions. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work-related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). A claimant's credible complaints of pain alone may establish total disability. *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The

administrative law judge found that although claimant was in fact released for work on January 29, 1996, Cl. Ex. 10 at 3-4, claimant testified he continued to suffer considerable back pain and was not able to return to full time duties, thus establishing a *prima facie* case of total disability. Tr. at 25. The administrative law judge further relied on evidence that claimant related back pain to Dr. Denno on April 3, 1996, that subsequent tests revealed that claimant suffered a herniated disc as a result of the January 13, 1996, fall, and that he ultimately had to undergo surgery on April 16, 1996. It is within the discretionary powers of the administrative law judge to determine the credibility of witnesses and to evaluate and draw inferences from the medical evidence of record. *Johnson v. Director, OWCP*, 911 F.2d 247, 24 BRBS 3(CRT) (9th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). The administrative law judge's conclusion that claimant could not return to his usual employment is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's finding that claimant established a *prima facie* case of total disability on January 30 and 31, 1996.

Once claimant has established that he is unable to perform his usual employment duties due to a work-related injury, the burden shifts to employer to establish the availability of suitable alternate employment. *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194, 21 BRBS 122(CRT) (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980). An employer can meet its burden by offering the employee a light duty position at its facility. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93(CRT) (5th Cir. 1996)*; Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). The administrative law judge found that employer offered no evidence that light duty employment was available to claimant on January 30 or 31, 1996, and that, therefore, claimant was entitled to temporary total disability benefits on those days. As employer does not challenge the finding that it did not establish suitable alternate employment on those dates, the award of benefits is affirmed.

Employer also challenges the administrative law judge's temporary total disability award for October 1, 1996, to March 3, 1997. The administrative law judge found that claimant credibly testified that he had to quit work on September 31, 1996, because of continuing back pain which rendered him unable to work. Tr. at 29-28, 30; Decision and Order at 12. The administrative law judge reasoned that although Dr. Denno released claimant to return to work on October 22, 1996, Emp. Ex. 11, the exam by Dr. Gutzman on October 25, 1996, showed objective evidence of significant back problems. Additionally, subsequent testing confirmed significant back pathology, which necessitated two additional back surgeries. The administrative law judge also observed that despite releasing claimant for work, Dr. Denno refilled claimant's prescription for Talwin which employer prohibited claimant from using while working at the Johnston Atoll facility. Contrary to employer's

argument, Dr. Denno's release of claimant to return to work, even considering the doctor's status as claimant's treating physician, is not necessarily dispositive of whether claimant could return to work. Therefore, as the administrative law judge's finding that claimant could not return to work during this period is supported by substantial evidence, it is affirmed. *See Delay v. Jones Washington Stevedoring Co.,* 31 BRBS 197, 202 (1998).

Employer argues, in the alternative, that as claimant continued to receive his salary until November 24, 1996, when he was placed in lay-off status and his contract not renewed, it is not liable for any compensation benefits from November 25, 1996, until March 4, 1997, because claimant's loss of employment for that period was due to a reduction in force unrelated to his injury. The administrative law judge rejected this argument, noting that the October 26, 1996, letter of termination makes no reference to a reduction in force, but gives the reason for termination as "convenience of company" as provided in the contract. Cl. Ex. 6. The administrative law judge also stated that claimant's termination came at a time when employer was denying claimant a right to consult and obtain medical treatment from physicians other than his supervisor, Dr. Gahlinger, and was concerned that claimant had legal actions pending against employer. The evidence, as rationally credited by the administrative law judge, establishes that claimant was unable to return to his job due to his work-related injury; claimant's discharge has no effect on this determination which rests on claimant's physical capabilities alone. As the administrative law judge acted within his discretion in finding that the evidence establishes that claimant was medically unable to return to his usual work as of October 1, 1996, and as employer herein presented no evidence of the availability of suitable alternate employment that claimant could perform but for his discharge, we affirm the administrative law judge's award of temporary total disability benefits. *See Manship v. Norfolk & Western Ry. Co.,* 30 BRBS 175, 179 (1996); *see also Norfolk Shipbuilding & Drydock Corp. v. Hord*, 193 F.3d 797, 33 BRBS 170(CRT) (4th Cir. 1999).

Employer next challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c), 33 U.S.C. §910(c), of the Act. Employer alleges that the administrative law judge should have calculated claimant's average weekly wage under Section 10(b), 33 U.S.C. §910(b), based on employer's evidence that a medical laboratory technician, an employee in the same classification as claimant, would earn $35,070.88 per year. Employer argues that the mere nine week period during which claimant actually worked, which the administrative law judge used as a basis to derive claimant's average weekly wage, does not provide a proper basis to reach a fair and reasonable approximation of claimant's annual earning capacity at the time of the injury. Employer also asserts that the administrative law judge erred in including overtime beyond claimant's contractual 48 hours, as there is no evidence that claimant was promised additional overtime work on a regular basis or that additional overtime would, in fact, have been available during the rest of the contract year.

Section 10(c) of the Act, 33 U.S.C. §910(c), is a catch-all provision to be used in instances when neither Section 10(a) nor Section 10(b), 33 U.S.C. §910(a), (b), can be reasonably and fairly applied.[1] *See Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98 (1997, *aff'd*, 169 F.3d 615, 33 BRBS 1 (CRT) (9th Cir. 1999); *Newby v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 155 (1988). The object of Section 10(c) is to arrive at a sum which reasonably represents the claimant's annual earning capacity at the time of his injury. *See Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991); *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982). The fact-finder has broad discretion in determining average weekly wage. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979)*; see also Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000). The Board will affirm an administrative law judge's determination of claimant's average weekly wage under Section 10(c) if the amount represents a reasonable estimate of claimant's annual earning capacity at the time of the injury. *See Richardson*, 14 BRBS at 855.

In rendering his decision under Section 10(c), the administrative law judge declined to apply Section 10(b) because he found that the record did not contain evidence of actual wages earned by other laboratory technicians, but only a statement by employer's accountant that a laboratory technician would earn $35,070.88 per year. The administrative law judge found that employer provided no explanation as to how the accountant arrived at this figure. Section 10(b) expressly requires evidence regarding the earnings "of an employee of the same class working in similar employment in the same or a neighboring place." 33 U.S.C. §910(b); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 276, 32 BRBS 91(CRT) (5th Cir. 1998). Accordingly, finding no credible evidence of actual wages earned by other laboratory technicians at the time of claimant's injury, the administrative law judge rationally declined to use Section 10(b) to calculate claimant's average weekly wage. As the result reached by the administrative law judge is reasonable, we affirm the administrative law judge's determination of claimant's average weekly wage under Section 10(c). *See, e.g., Bunol*, 211 F.3d at 297-298, 34 BRBS at 32 (CRT); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991). Moreover, it was not irrational for the administrative law judge to include in claimant's average weekly wage the wages earned from the number of overtime hours claimant actually worked prior to his injury, rather than on the number of overtime hours provided in claimant's employment contract. *See generally Fox v. West State, Inc.*, 31 BRBS 118 (1997).

[1]Neither employer nor claimant argues that Section 10(a) is applicable to the instant case.

Employer next challenges the administrative law judge's inclusion of the value of the claimant's room and board in his average weekly wage calculation. We agree that the administrative law judge's analysis on this issue cannot stand. The compensation protocol provided by the Longshore Act governs a claim under the Defense Base Act except to the extent the Defense Base Act modifies a provision of the Longshore Act. 42 U.S.C. §1651(a) (1982); *AFIA/CIGNA Worldwide v. Felkner*, 930 F.2d 1111, 24 BRBS 154(CRT) (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991); *Pearce v. Director, OWCP*, 603 F.2d 763, 10 BRBS 867 (9th Cir. 1979). Under the Longshore Act, a claim is filed with the district director in the circuit in which the injury occurred. In this case, as the Johnston Atoll is located off Hawaii, it falls within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Therefore, the law of the Ninth Circuit controls this case, and *Wausau Ins. Companies v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997), is the controlling case law.[2] In reversing the Board's decision in *Guthrie v.*

[2]Employer argues that the administrative law judge erred in relying on the Board's decision in *Quinones v. H. B. Zachry, Inc.*, 32 BRBS 6 (1998), to include in his calculation of claimant's average weekly wage the value of the room and board provided claimant by employer. As employer notes, subsequent to the issuance of the administrative law judge's decision, the Board's decision in *Quinones* was reversed by the United States Court of Appeals for the Fifth Circuit in *H.B. Zachry Co. v. Quinones*, 206 F.3d 474, 34 BRBS 23 (CRT) (5th Cir. 2000). In this decision, the Fifth Circuit adopted the Ninth Circuit's holding in *Guthrie*. Thus, although this case is controlled by the law of the Ninth Circuit, the disposition of this issue would be the same if it arose in the Fifth Circuit.

Holmes & Narver, Inc., 30 BRBS 48 (1996), the United States Court of Appeals for the Ninth Circuit held, after setting forth Section 2(13) of the Act, 33 U.S.C. §902(13),[3] that the

[3]Section 2(13) 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 (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)(1998).

Longshore Act "defers to the IRS criteria for deciding whether non-monetary compensation counts as wages." *Guthrie*, 114 F.3d at 120, 31 BRBS at 42(CRT). The court thus held that the value of the employee's meals and lodgings "furnished . . . for the convenience of the employer" are not to be included as wages.[4] *Id.*; *see also McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71(CRT)(9th Cir. 1998) (*per diem* not included in wages as it was not subject to tax withholding). Decision and Order at 16-19. Pursuant to the Ninth Circuit's decision in *Guthrie*, the room and board should not be included in calculating claimant's average weekly wage as they are not subject to income tax withholding under the Internal Revenue Code, as they were furnished for the convenience of the employer on the business premises of the employer, and claimant was required to accept the room as a condition of his employment. The administrative law judge determined that the value of claimant's room and board is $154 per week. Consequently, we modify the administrative law judge's determination of average weekly wage, excluding $154 attributed to room and board, to reflect an average weekly wage of $721.22.

[4]Section 119 of the Internal Revenue Code states that the value of meals and lodging provided by an employer is income unless the meals and lodging are "furnished . . . for the convenience of the employer" and "(1) in the case of meals, the meals are furnished on the business premises of the employer, or (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment." 26 U.S.C. §119(a). Meals and lodging within this section are excluded from withholding from income. 26 C.F.R. §31-3401(a)-1(b)(9).

Finally, we reject employer's contention that it is entitled to a credit for the severance payment it made to claimant instead of giving him a month's notice of his termination. Employer argues that even if claimant is awarded temporary total disability from October 1,1996, to March 4, 1997, it is entitled to a credit of $2,490.24, because it continued to pay claimant's salary from October 1, 1996, to November 24, 1996.[5] Under Section 14(j) of the Act employer is entitled to a credit for its prior payments of compensation against any compensation subsequently found due. Section 14(j) provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment[s] of compensation due." 33 U.S.C. §914(j); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998). "[E]mployer, however, is not entitled to a credit when it continues the employee's salary under a formal salary continuance plan unless it shows that these payments were intended to be advance payments of compensation." *Id.*, 122 F.3d at 317-318, 31 BRBS at 132 (CRT). In the present case, employer's Services Employment Agreement does not provide that the payment is intended to be in lieu of compensation. The employment contract provides that, upon termination for convenience of employer, "[e]mployer may, at its discretion, and at any time, terminate the Employment Agreement by giving thirty (30) days' advance notice or pay in lieu of advance notice." Cl. Ex. 9 at 8. The employee's entitlement to such payment regardless of whether he is disabled indicates that it is not intended as advance payment of compensation. *See Branch v. Ceres Corp*., 29 BRBS 53 (1995). Thus, the evidence indicates that the payment to claimant represented severance pay in lieu of advance notice of termination. As there is no evidence in this case that the aforementioned payment was intended as compensation, this payment is 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). Therefore, we affirm the administrative law judge's denial of a credit for this payment.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Denying Motion for Reconsideration are modified to reflect that claimant's average weekly wage is $721.22. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

ROY P. SMITH

[5]The administrative law judge's initial reason for the denial of a credit was that claimant denied ever receiving a check for severance pay and there was no record of a canceled check or issuance of one. Employer filed a Motion for Reconsideration, attaching a statement from its workers' compensation specialist with a copy of the canceled check evidencing its payment.

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge