BRB No. 91-1314

ALFRED R. WOLFSKILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EAGLE MARINE SERVICES,	)	
LIMITED	)	DATE ISSUED:_____)
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

J. Bradford Doyle, Seattle, Washington, for claimant.

Robert H. Madden and Steven T. Russell (Madden & Crockett), Seattle, Washington, for employer.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (89-LHC-2510) of Administrative Law Judge Ellin M. O'Shea 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, 1988, and employer paid claimant temporary total disability compensation based on an average weekly wage of $754.04 from November 13, 1988 to January 13, 1989.[1] During that time period, claimant received several days of holiday pay, and employer took a credit against claimant's

[1]Claimant's average weekly wage, which included holiday and vacation pay, is not disputed.

temporary total disability payments for those holidays, thereby compensating claimant for temporary partial disability for the weeks in which he received holiday pay.[2]

In her decision, the administrative law judge found that employer was not entitled to a credit against the holiday pay claimant received. The administrative law judge distinguished the facts in this case from those of *Andrews v. Jeffboat, Inc.*, 23 BRBS 169 (1990), in which the Board held that employer was entitled to a credit for holiday pay against temporary total disability compensation, noting that in *Andrews*, the union contract provided that holiday pay is intended "in lieu of compensation." Decision and Order at 8. In this case, the administrative law judge found that there was no such contractual language, and that *Andrews* is limited to its facts. The administrative law judge also concluded that there is no authority under the Act for deducting holiday pay from an injured worker's average weekly wage or his disability benefits on the basis this pay represents actual post-injury earnings or post-injury earning capacity. Decision and Order at 10. The administrative law judge therefore denied employer a credit.

On appeal, employer contends that its entitlement to a credit flows from the recognition that claimant incurred no wage loss on a paid holiday. Employer contends that if claimant receives holiday pay while he is injured, this payment reduces his loss in wage-earning capacity and claimant therefore should not be compensated at the full compensation rate for these days. Employer also contends that the administrative law judge construed the Board's holding in *Andrews* too narrowly. Claimant responds, urging affirmance of the administrative law judge's decision.

We reject employer's contention that the administrative law judge erred in denying it a credit for the holiday pay claimant received while he was injured. In *Andrews*, 23 BRBS at 169, the Board held that on days the claimant received holiday pay, the employer was not required to pay him compensation because the evidence demonstrated that the contract specifically provided that holiday pay was to be in lieu of compensation. *See generally* 33 U.S.C. §914(j). Thus, the Board reasoned that the claimant incurred no wage loss on the days he received holiday pay. *Id.* at 174. Contrary to employer's contention that the administrative law judge construed *Andrews* too narrowly, the Board's decision in *Andrews* clearly states that the holding rests on the "facts of this case" regarding the intention that holiday pay is to be in lieu of compensation. *Id.*

More recently the Board addressed the issue of a credit for holiday pay in *Sproull v. Stevedoring Service of America*, ___ BRBS ___, BRB Nos. 89-1209/A/B, 90-804 (Oct. 24, 1994), *modifying in pert. part on recon. en banc* 25 BRBS 100 (1991) (Brown, J., concurring and dissenting). In its original decision in *Sproull*, the Board held that the employer was entitled to a

[2]To be eligible for a paid holiday, an employee must be A- or B-registered, work 800 hours in the qualifying year, and be "available for work" at least 2 out of 5 days during the payroll week in which the holiday falls, unless he is out of work because of sickness or injury. Jt. Ex. 8. Employees are permitted to work on some holidays and receive both their salary and holiday pay; however, the holidays for which claimant received holiday pay are "non-working" holidays. Jt. Ex. 7.

credit for its disability payments on the days the claimant received holiday pay, citing the decision in *Andrews*. *Sproull*, 25 BRBS at 107-108. On reconsideration, the Board held that employer was not entitled to a credit for holiday pay against temporary disability compensation paid claimant, because unlike in *Andrews*, the union contract did not provide that compensation "was intended in lieu of holiday pay." *Sproull*, slip op. at 6. As the bargaining agreement in this case does not provide that holiday pay is to be in lieu of compensation, the administrative law judge correctly distinguished this case from *Andrews.*

In its decision on reconsideration in *Sproull*, the Board further noted that registered employees who were eligible for a paid holiday could work on the holiday and receive payment as prescribed in the collective bargaining agreement, and that if the claimant had not been injured, he could have received both his holiday pay and wages. *Id.* The Board therefore stated that the claimant arguably sustained a wage loss due to his injury on the holidays. *Id.* In this case, employer contends that regardless of whether the injured employee receives holiday pay for a "working" or "non-working" holiday, the payment is the result of previously worked hours and is merely a contractual deferment of compensation. Employer thus avers that there is no loss of earning capacity on the days claimant received holiday pay, and that because claimant's average weekly wage includes holiday pay earned prior to the injury, claimant receives a double recovery.

The administrative law judge found that a claimant's entitlement to temporary total disability compensation is premised on his complete inability to earn his pre-injury wages due to his injury. She rejected employer's contention, as being contrary to Section 2(10) of the Act, 33 U.S.C. §902(10),[3] that receipt of "benefits" under a collective bargaining agreement is indicative of a claimant's ability to earn wages. Thus, the administrative law judge stated that although holiday pay is properly included in the definition of "wages" as set forth in Section 2(13) of the Act, 33 U.S.C. §902(13), absent the employee's physical ability to earn such wages, mere receipt of holiday pay does not reduce total disability to partial disability. Decision and Order at 9-10.

[3]Section 2(10) of the Act states, in pertinent part:

"Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment....

33 U.S.C. §902(10).

We affirm the administrative law judge's conclusion, and reject employer's contentions. Given that claimant was unable to perform any work during the period he received holiday pay, and that claimant's entitlement to holiday pay is premised on his meeting the prerequisites specified in the collective bargaining agreement, *see* note 2, *supra*, it cannot be said that the receipt of holiday pay is merely deferred compensation for services rendered. Moreover, it is irrelevant that claimant's average weekly wage includes holiday pay received in the 52 weeks prior to the injury, as that pay was for specific holidays that occurred prior to the injury. *See generally Sproull*, slip op. at 4. Claimant's receipt of holiday pay for holidays occurring after the injury has not previously been taken into account. Therefore, as there is no evidence in this case that the holiday pay is intended as compensation, as is required for a credit under Section 14(j), we affirm the administrative law judge's denial of a credit.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge