

MARTIN BESWICK)	BRB Nos. 97-0222
)	
Claimant-Respondent)	
)	
v.)	
)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED)	DATE ISSUED:
)	
Self-Insured Employer-Petitioner)	
)	
BENJAMIN BURNS)	BRB No. 97-0223
)	
Claimant-Respondent)	
)	
v.)	
)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED)	
)	
Self-Insured Employer-Petitioner)	
)	
RICHARD SCHLICHTING)	BRB No. 97-0224
)	
Claimant-Respondent)	
)	
v.)	
)	
I.T.O. CORPORATION OF BALTIMORE, INCORPORATED)	
)	
Self-Insured Employer-Petitioner)	DECISION and ORDER

Appeals of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Bernard Sevel (Sevel & Sevel), Baltimore, Maryland, for claimants.
 Robert J. Lynott (Thomas & Libowitz, P.A.), Baltimore, Maryland, for

employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN,
Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-372, 96-LHC-373, 96-LHC-374) of Administrative Law Judge Robert G. Mahony awarding temporary total disability benefits on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).¹ 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

¹By order dated November 22, 1996, the Board consolidated these appeals. 20 C.F.R. §802.104(a). The claims also were consolidated before the administrative law judge.

Upon consideration of the Decision and Order of the administrative law judge, the arguments on appeal, and the administrative records as a whole, we conclude that the Decision and Order is supported by substantial evidence and that it accords with applicable law. The vacation, holiday and container royalty payments claimants received during the periods they were medically unable to work do not constitute wages within the meaning of Section 2(13), 33 U.S.C. §902(13), and thus had no impact on claimants' post-injury wage-earning capacity. As a result, the administrative law judge properly found that each claimant is entitled to compensation for temporary total disability under Section 8(b), 33 U.S.C. §908(b), rather than for temporary partial disability as alleged by employer. *Eagle Marine Services v. Director, OWCP*, 115 F.3d 735 (9th Cir. 1997). The "post-injury receipt of holiday pay does not `fairly and reasonably represent' a wage-earning capacity under [Section] 8(h)." *Id.*, 115 F.3d at 737; *Branch v. Ceres Corp.*, 29 BRBS 53 (1995), *aff'd mem.*, 96 F.3d 1438 (table), 30 BRBS 74 (CRT)(4th Cir. 1996);² *see generally Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49 (CRT)(9th Cir. 1996), *cert. denied*, 117 S.Ct. 1333 (1997).

²This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Pursuant to that court's Local Rule 36(c), the citation of unpublished decisions "is disfavored...." Nevertheless, Local Rule 36(c) provides that an unpublished disposition with precedential value may be cited in relation to a material issue in a case if there is no published opinion that would serve as well (if all other parties are served with a copy of the decision). With this in mind, we quote the unpublished decision of the Fourth Circuit in *Branch*, the facts of which are indistinguishable from the instant case:

We therefore hold that the claimant's receipt of payments from the [Container Royalty and Vacation/Holiday] Funds while disabled are not "wages" within the meaning of Section 2(13) of the Act, 33 U.S.C. §902(13). As such, the claimant's "disability" was "total in character," and he is entitled to compensation benefits pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b).

30 BRBS at 78 (CRT).

Accordingly, we affirm the Decision and Order of the administrative law judge awarding claimants temporary total disability benefits.

SO ORDERED.

BETTY JEAN HALL
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge