BRB No. 00-1029

EDWARD SIMINISKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CERES MARINE TERMINALS	)	DATE ISSUED: July 23, 2001
	)	
Self-Insured Employer-Petitioner	)	
	)	
and	)	
	)	
I.T.O. CORPORATION OF BALTIMORE	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Myles R. Eisenstein, Baltimore, Maryland, for claimant.

Lawrence P. Postol (Seyfarth Shaw), Washington, D.C., for self-insured employer Ceres Marine Terminals.

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher, L.L.P.), Jersey City, New Jersey, for self-insured employer I.T.O. Corporation of Baltimore.

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

PER CURIAM:

Employer Ceres Marine Terminals (Ceres) appeals the Decision and Order - Awarding Benefits (1997-LHC-1717) of Administrative Law Judge Mollie W. Neal 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On November 15, 1996, claimant was driving a "fifth wheel" for Ceres. He hit a bump and was thrown to the ceiling of the cab, striking and injuring his left shoulder and his neck. When he came down, he injured his left knee when it jammed between the seat and the door. Tr. at 36-37. Ceres paid temporary total disability and medical benefits from November 16, 1996, through March 11, 1997. Emp. Ex. 1. An associate of claimant's treating physician, Dr. Heiner, released claimant to return to work on March 11, 1997. Claimant returned the next day and was assigned to work in the hold of a ship for ITO Corporation of Baltimore (ITO). While standing still, preparing to throw a chain under steel to be unloaded by a crane, claimant's left knee buckled. Although he did not fall, his knee began hurting and he was unable to continue working. Emp. Ex. 28 at 22-23; Tr. at 46-49. Claimant returned to his treating physician, Dr. Russell, and was referred to an orthopedic surgeon, Dr. Bennett, who performed arthroscopic surgery on claimant's knee in April 1997. After further treatment on his knee, additional treatment of his left shoulder and participation in a work hardening program, claimant was released on October 2, 1997, to return to work on October 6, 1997. Cl. Exs. 4g-q, 6f-k; ITO Exs. 12, 16, 17. Claimant filed a claim against Ceres for additional benefits, and Ceres disputed the claim, arguing that claimant suffered an intervening injury while working for ITO on March 12, 1997.

The administrative law judge found that claimant was unable to return to work as a longshoreman between November 16, 1996, and October 6, 1997. Decision and Order at 14. She found that such disability was caused by the 1996 injury, as the knee buckling on March 12, 1997, was the natural progression or unavoidable result of the 1996 injury and not a new injury or aggravation. In so finding, she credited the opinions of Drs. Bennett, Russell and Hunt. Decision and Order at 22-23. The administrative law judge included in claimant's average weekly wage the $4,000 claimant received in 1996 as part of a contractual buyout of the Guaranteed Annual Income (GAI) program.[1] *Id.* at 18-19. Accordingly, the

[1]The GAI program fulfilled the employers' obligations under the union contract to guarantee the workers a minimum number of work hours per year. If the work load were to fall short, the worker would be entitled to payment from the GAI program as substitution for that lost work. *See* Tr. at 198-200.

administrative law judge awarded claimant temporary total disability benefits from November 16, 1996, through October 6, 1997. *Id.* at 27. The administrative law judge also awarded claimant medical benefits and interest. Ceres appeals the administrative law judge's decision, challenging the findings on intervening injury and average weekly wage. Claimant and ITO respond, urging affirmance.

Ceres first contends the administrative law judge erred in finding that no new injury or aggravation occurred on March 12, 1997, and that she erred in failing to fully discuss the evidence on this issue. In cases under the Act involving multiple traumatic injuries, the determination of the responsible employer turns on whether the claimant's condition is the result of the natural progression or is an aggravation of a prior injury. If the claimant's disability resulted from the natural progression of the initial injury, then the claimant's employer at the time of that injury is the employer responsible for compensating the claimant for the entire disability. If there had been a second injury which aggravated, accelerated or combined with the earlier injury, resulting in the claimant's disability, the employer at the time of the second injury is liable for all medical expenses and compensation related thereto. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Abbott v. Dillingham Marine & Manufacturing Co.*, 14 BRBS 453 (1981), *aff'd mem.*, No. 81-7801 (9th Cir. 1982).

In this case, the record contains conflicting evidence as to whether claimant's disability was the result of the natural progression of the 1996 injury or an aggravation on March 12, 1997. In support of its argument that an aggravation occurred, Ceres relies on the opinions of orthopedic experts, Drs. Cohen and Pushkin, and a portion of Dr. Russell's testimony. Dr. Russell, a board certified orthopedic surgeon who is semi-retired, treated claimant following both injuries. He referred claimant to Dr. Pushkin, who examined claimant three times between December 1996 and February 1997. Dr. Pushkin discharged claimant in February 1997 based on his examination and negative MRI results, concluding surgery was not necessary; thereafter, he determined that "something happened" on March 12, 1997, which aggravated or worsened claimant's left knee condition. Emp. Exs. 13-14, 18; ITO Exs. 18-20. Dr. Cohen, Dr. Pushkin's partner, believed as of April 15, 1997, that claimant needed no further treatment, as his injuries were resolving, and that he could be working in regular duty, using his braces if necessary. He reported no objective findings in July 1997 which would have warranted claimant's April 29 surgery, and he opined that the arthroscopic findings were non-traumatic in nature and not related to the 1996 work injury.[2] Emp. Exs. 15, 19-20; ITO Exs. 22-25. Ceres also argues that part of Dr. Russell's opinion

[2]Dr. Bennett reported finding chondromalacia of the patella and synovial plica during surgery. Emp. Ex. 23.

supports its position, as Dr. Russell stated that claimant's physical activities on March 12, 1997, could have caused an aggravation of the knee condition and could have exacerbated claimant's shoulder condition. Tr. at 120, 125, 132. Additionally, it asserts that a comparison between Dr. Heiner's reports of March 11 and March 13, 1997, demonstrates a new injury or aggravation occurred on March 12, 1997. Cl. Exs. 5g-h.

The administrative law judge rejected Ceres's evidentiary arguments. She stated that, although Ceres made "a valiant attempt" to show that claimant sustained an aggravation or new injury on March 12, 1997, its attempt failed, as she accepted the "well-reasoned and well-documented opinions of the medical experts offered by Claimant and [ITO.]" Decision and Order at 21-22. The administrative law judge first highlighted the June 5, 1997, letter of Dr. Bennett wherein he answered questions posed by Ceres's counsel. In that letter, Dr. Bennett stated that the findings of the arthroscopy were consistent with an injury in 1996, could have been caused by direct trauma to the knee, and were more chronic than would be expected of an injury occurring only six weeks before the surgery. He also noted that there was no new pattern of symptoms or acute findings after March 12, 1997. Based on this evidence, Dr. Bennett concluded that the knee pathology was caused by the November 1996 injury. Decision and Order at 22; Cl. Ex. 6f at 31-33; ITO Ex. 17. The administrative law judge also noted that Dr. Bennett reiterated his opinions in a deposition, withstanding "intense cross-examination." Decision and Order at 22; Cl. Ex. 6f. Next, the administrative law judge cited the opinion of Dr. Russell as support for her conclusion that claimant's disability was related to his 1996 injury. Decision and Order at 22-23. Dr. Russell, who testified at the hearing, agreed with Dr. Bennett's conclusion that the arthroscopy findings were caused by trauma and were more chronic than what would have been present if they were attributable to an injury on March 12, 1997.[3] Tr. at 151, 160. Finally, the administrative law judge credited and accepted the opinion of Dr. Hunt, which she found to be "well-reasoned and well-documented." Decision and Order at 23. Dr. Hunt, who examined claimant in December 1997 at ITO's request and reviewed the medical records, stated that while claimant may have sustained a strain to his shoulder, neck and knee on November 15, 1996, there is not "a scintilla of objective evidence that [claimant] sustained any injury March 12, 1997." ITO Ex. 26.

[3]Dr. Russell opined that claimant's buckling knee was not a new injury, aggravation or worsening, but, rather, was a symptom and was the natural result of the 1996 injury. He also stated that examination on March 20, 1997, revealed muscular atrophy and that any "buckling" problems were due to muscle weakness. Moreover, although he would not criticize Dr. Heiner's release of claimant, he believed that the knee buckling proved that claimant was not ready to return to work. Nonetheless, Dr. Russell stated he would defer to Dr. Bennett's opinion as to claimant's knee condition. Tr. at 147. With regard to any shoulder flare-ups, Dr. Russell concluded they were directly related to the 1996 injury and not to any new occurrences. Tr. at 145, 148-151, 156, 160, 163, 165, 170.

The record before us thus contains conflicting evidence on the factual question of whether a new injury or aggravation occurred on March 12, 1997. It is solely within the administrative law judge's discretion to determine the weight to be accorded the evidence on this matter. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Board may not reweigh the evidence, *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff'd*, No. 80-1870 (D.C. Cir. 1981), and that is precisely what Ceres seeks in this case. As there is substantial evidence to support the administrative law judge's decision, we must affirm the finding that claimant's disability between November 16, 1996, and October 6, 1997, is related to his November 15, 1996, injury. Thus, we affirm the administrative law judge's finding that Ceres is liable for claimant's benefits.[4] *See Madrid v. Coast Marine Construction Co.*, 22 BRBS 148 (1989); *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988).

Ceres next contends the administrative law judge erred in computing claimant's average weekly wage. Specifically, it asserts that the one-time payment claimant received in 1996, by contractual agreement with the union in exchange for the termination of the GAI program, should not have been included in the calculation. According to the record, under the collective bargaining agreement which became effective on October 1, 1996, the GAI program was eliminated, and in consideration for the loss of this benefit, "a lump sum payment of no less than $4,000 [would] be paid to each employee eligible for G.A.I. benefits as of September 30, 1996." Ceres Ex. 41. Only eligible union members were granted this

[4]We also reject Ceres's assertion that the administrative law judge violated Section 557 of the Administrative Procedure Act, 5 U.S.C. §557, by failing to fully discuss the evidence of record. It is clear from her 28-page decision that she did not shirk her responsibility in this regard. While she did not specifically accept or reject each and every piece of evidence, as Ceres would require, she fully considered the evidence and decided to credit claimant's and ITO's evidence over that of Ceres. *See Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54 (2d Cir. 2001); *Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978).

one-time payment. *Id.* The administrative law judge found that this payment constituted a GAI payment and, based on Board precedent, GAI payments are included in the definition of "wages" under Section 2(13), 33 U.S.C. §902(13). *Branch v. Ceres Corp.*, 29 BRBS 53 (1995); *Rayner v. Maritime Terminals, Inc.*, 22 BRBS 5 (1988); *McMennamy v. Young & Co.*, 21 BRBS 351 (1988). Therefore, she included the $4,000 payment in claimant's average weekly wage. Decision and Order at 18.

Section 10 of the Act provides the means by which a claimant's average weekly wage is to be determined. 33 U.S.C. §910. The administrative law judge found that Section 10(c) of the Act, 33 U.S.C. §910(c), should be used to calculate claimant's average weekly wage in this case, and no party challenges that decision. Decision and Order at 17. It is well-established that, under Section 10(c), it is not always necessary or appropriate to use a claimant's actual earnings to determine his average weekly wage. The goal is to reach a figure which is a reasonable representation of the claimant's annual earning capacity. *Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979); *see also Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987); *Richardson v. Safeway Stores, Inc.* 14 BRBS 855 (1982). Thus, if actual earnings in the year prior to the injury do not reflect the amount of work normally available to the claimant, then actual earnings should not be used and the Section 10(c) calculation should be adjusted. *See Hawthorne v. Director, OWCP*, 844 F.2d 318, 21 BRBS 22(CRT) (6th Cir. 1988).

Initially, we reject employer's contention that the GAI payment at issue here is not a "wage" under Section 2(13) of the Act, 33 U.S.C. §902(13). It is clear that, consistent with the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, the GAI payment is a wage. The Fourth Circuit has interpreted Section 2(13) as "the 'money rate' of compensation that is to be provided (1) for the employee's services (2) by an employer (3) under the employment contract in force at the time of injury." *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 319, 33 BRBS 15, 20(CRT) (4th Cir. 1998). In *Wright*, the court specifically held that annual GAI payments fall within this definition and thus may be included in calculating claimant's annual earning capacity under Section 10.

Nonetheless, we reverse the administrative law judge's inclusion of this particular GAI payment in claimant's average weekly wage, as it is undisputed that this amount was a one-time payment for termination of the program. As this payment would not recur in the future, it does not represent an amount which affects claimant's earning capacity. Although the *Wright* court did not address the precise issue of inclusion of a one-time payment in computing average weekly wage, its discussion of pre- and post-injury wage-earning capacity provides guidance in the present case. After holding that vacation, holiday and container royalty payments should be included as "wages" only if they are earned through actual work as opposed to through disability credit, the court acknowledged that there may be

situations where those payments are not to be included as wages. *Wright*, 155 F.3d at 329-330, 33 BRBS at 28-30(CRT). The Fourth Circuit stated that the purpose of the Act is to compensate injured workers by paying them an amount equal to two-thirds of the decrease in their earning capacity. *See* 33 U.S.C. §908. To accomplish this task,

> the Act looks to the period *after* the injury and asks two questions. What would the worker have been able to earn if he was injury free and what will the worker earn given that he is, in fact, injured? * * * Section 10 uses a claimant's 'average weekly wages' *before* the injury (normally the year prior to the injury) to estimate the earning capacity that he would have had *after* the date of injury if he had been injury free. We refer to this as a claimant's pre-injury earning capacity because this was his capacity to earn future wages before the disabling injury. In other words, the Act looks to the past to project what might have been in the future. . . .

Wright, 155 F.3d at 329, 33 BRBS at 30(CRT) (emphasis in original). Applying this analysis to Wright's situation, the court stated that if Wright was already entitled to the special payments before he was injured, then those amounts should not be included in his average weekly wage, as "he had no (pre-injury) capacity to earn any additional vacation, holiday, or container royalty pay" until the next contract year. *Id.*, 155 F.3d at 330, 33 BRBS at 30(CRT). Such exclusion assures that the calculated average weekly wage reasonably represented Wright's actual pre-injury capacity to earn those special payments. Inclusion of those amounts would award him compensation for wages that could not have been earned or lost between the date of his injury and the beginning of the next contract year, when he could again begin to earn his entitlement to the special payments. *Id.*

Pursuant to *Wright*, we hold that the $4,000 buyout payment at issue here should not be included as part of claimant's average weekly wage, as doing so would inflate his average weekly wage beyond what he is reasonably expected to earn in future years. Although the contract in effect at the time of his injury called for the payment to be made due to the abolition of the GAI program, claimant's eligibility for the $4,000 payment was based on the hours he worked prior to September 30, 1996, the previous contract year. Thus, claimant's eligibility for the money was determined before his injury. Further, although claimant's eligibility for payment was based on previously worked hours, this one-time payment is akin to a "bonus" in consideration of the ending of the program.[5] Claimant's injury in November

[5]The Board addressed the issue of whether a post-injury bonus should be included in a claimant's average weekly wage in *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). In that case, the Board rejected the claimant's assertions, holding that the computation was properly made pursuant to Section 10(a), 33 U.S.C. §910(a), and that even if it were to be made under Section 10(c) a post-injury bonus is contingent upon events

1996 had no effect on his ability to receive this payment in 1996 or on his inability to receive it in the future. Rather, as this amount represents a one-time payment, it does not affect claimant's ongoing earning capacity in future years. Accordingly, the buyout is not an amount which should be included to compensate claimant for earnings lost due to his injury. Having received his one-time entitlement, he has no capacity to earn it again or to lose it due to his injury, and it is thus not appropriate to include it in calculating his annual earning capacity.

The conclusion that the payment is not included is analagous to other Section 10(c) cases wherein singular events in the year prior to injury affect a claimant's actual earnings so that they are not representative of the claimant's annual earning capacity. For example, in *Hawthorne*, 844 F.2d 318, 21 BRBS 22(CRT), the United States Court of Appeals for the Sixth Circuit held that computation of wages under Section 10(c) must account for the amount a claimant would have earned during the year but for time lost due to a strike. If the calculation did not take such time lost into consideration, the computation would not fairly and accurately approximate the claimant's annual earning capacity. *See also Le Batard v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 10 BRBS 317 (1979). The same consideration is also given when a claimant is unable to work the full year due to a different injury, *see Brien v. Precision Valve/Bailey Marine,* 23 BRBS 207 (1990); *Klubnikin v. Crescent Wharf & Warehouse Co.*, 16 BRBS 182 (1984), seasonal working conditions, *Tri-State Terminals, Inc. v. Jesse,* 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979) (construing earning capacity to mean "the amount of earnings the claimant would have the potential and opportunity to earn absent injury"), or layoff, *see Holmes v. Tampa Ship Repair & Dry Dock Co.*, 8 BRBS 455 (1978). Thus, under Section 10(c), the administrative law judge is not confined to using actual earnings but instead must seek to determine an amount which reasonably represents the claimant's annual earning capacity. *See Cummins v. Todd Shipyards Corp.*, 12 BRBS 283 (1980) (Miller, J., dissenting on other grounds). Similarly, a one-time bonus or other payment which inflates claimant's earnings in the year prior to

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which may or may not occur and thus is too speculative to include as wages. The issue of whether wages should include the pre-injury bonus the claimant received was not before the Board, as the parties agreed to include it.

injury may also result in actual wages which do not reflect the claimant's annual earning capacity.[6]

[6]Unusual fluctuations are distinguished from pay increases. Once they become effective, pay increases become a regular part of the claimant's wages, and a disability would affect the claimant's ability to earn wages at the higher rate. Continuing increases are, of course, properly factored in under Section 10(c). *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986); *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462 (1981).

In the present case, inclusion of the one-time buyout artificially increases the calculation of claimant's earning capacity by compensating him for an amount which he did not lose due to the injury and does not have the opportunity to earn again. The administrative law judge accepted claimant's computation of average weekly wage based on seven weeks in 1995 and 45 weeks in 1996, including the $4,000 payment, and computed an average weekly wage of $1,213.26.[7] Excluding this amount, claimant's average weekly wage is modified to $1,136.35, with a resulting compensation rate of $757.67.[8]

Accordingly, the administrative law judge's average weekly wage calculation is modified in accordance with this opinion. In all other respects, her decision is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[7]$66,044.09 divided by 51 weeks of work in 1995 rounds to a weekly wage of $1,294.98. Multiplying that figure by seven weeks equals $9,064.86. $54,025.08 divided by 45 weeks in 1996 rounds to a weekly wage of $1,200.55. Multiplying that figure by 45 equals $54,024.75. Adding the two totals results in an annual wage of $63,089.61. Dividing that figure by 52 results in an average weekly wage of $1,213.26. Cl's Post-Hearing Brief at 9.

[8]The earnings for seven weeks in 1995 remains the same, $9,064.86. $54,025.08 minus $4,000 equals $50,025.08. That figure divided by 45 weeks in 1996 rounds to a weekly wage of $1,111.67. Multiplying that figure by 45 equals $50,025.15. Adding the two totals results in an annual wage of $59,090.01. Dividing that figure by 52 results in an average weekly wage of $1,136.35. Two-thirds of $1,136.35 is $757.67.