BRB Nos. 96-0533
and 96-0533A

FREDA STORY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE	)	DATE ISSUED:
CENTER	)	
	)	
and	)	
	)	
GATES McDONALD & COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Nahum Litt, Administrative Law Judge, United States Department of Labor.

John E. Houser, Thomasville, Georgia, for claimant.

Robert M. Sharp (Sharp & Gay, P.A.), Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (94-LHC-0979) of Administrative Law Judge Nahum Litt 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). 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).

Claimant, who began working as a barber at employer's location at Mayport Naval Base in

Florida in October 1991,[1] suffered an injury to her shoulder and neck while working for employer on January 21, 1992, when she reached down to pick up a pair of clippers. Claimant was diagnosed with cervical spondylosis and cervical radiculopathy, and, according to the opinion of Dr. Faillace, reached maximum medical improvement on June 22, 1992. Dr. Faillace returned claimant to work with the restriction to avoid physical activities which might injure her cervical spine and upper extremities. Claimant attempted to return to work for employer as a barber but was discharged. She also attempted to work as a barber for a different employer, but her complaints of pain prevented her from doing so. In December 1993, Dr. Fiore opined that claimant could perform only sedentary work. While Drs. Faillace and Fiore have recommended surgery, claimant has declined for fear of the risks involved.

At the hearing, the only issues in dispute were the calculation of claimant's average weekly wage and the nature and extent of claimant's disability. In his Decision and Order, the administrative law judge initially determined that claimant's average weekly wage should be calculated pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c). The administrative law judge next found that tips claimant received during her thirteen weeks of employment with employer were not to be included in the calculation of her average weekly wage; the administrative law judge then found that claimant's average weekly wage was $386.40, based on her earnings during her thirteen weeks of employment with employer.[2] Lastly, the administrative law judge found that employer established the availability of suitable alternate employment commencing on October 27, 1994, and awarded claimant temporary total disability compensation from January 1992 until October 1994, based on claimant's average weekly wage of $386.40, and permanent partial disability compensation at a rate of $271.40, based on claimant's post-injury wage earning capacity of $115 per week, thereafter.

On appeal, claimant contends that the administrative law judge erred by failing to include the amount of tips she earned while working for employer in the calculation of her average weekly wage. Employer responds, urging affirmance of the administrative law judge's determination that tips are not to be included in the calculation of claimant's average weekly wage. Employer, in its cross-appeal, challenges the administrative law judge's decision to utilize Section 10(c) of the Act to calculate claimant's average weekly wage.

We first address claimant's appeal of the administrative law judge's conclusion that tips earned while working for employer are not to be included in the calculation of her average weekly wage. In addressing this issue, the administrative law judge determined that Congress's decision in 1984 to remove the term "gratuities" from the amended Act's definition of "wages" indicated an

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[1]Prior to her employment with employer, claimant worked as a bus driver in Georgia for approximately two months, and as a barber at a naval hospital in Beaufort, South Carolina.

[2]The administrative law judge made this calculation by dividing claimant's earnings while working for employer, $4,714.28, by the number of days she worked for employer, 61. The administrative law judge then multiplied this number by 260 days, and, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), divided that amount by 52. Decision and Order at 8.

intent that tips would no longer be included in computing wages under the Act. Next, in applying Section 2(13) as amended to the case at bar,[3] the administrative law judge determined that tips are not an advantage received from the employer, and that, in the instant case, tips were not reported to employer for purposes of withholding tax. Decision and Order at 8. The administrative law judge thus concluded that tips should not be included in the calculation of claimant's average weekly wage.

Section 2(13) of the Act, as it existed prior to the 1984 Amendments, defines "wages" as:

> the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

33 U.S.C. §902(13)(1982)(amended 1984).

Section 2(13) of the 1984 Act 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)(1988).[4]

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[3]All parties agree that, as claimant's work-injury occurred in 1992, Section 2(13) of the Act as amended in 1984 is applicable. *See* Section 28(e)(1) of the Longshore and Harbor Workers Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1655.

[4]Section 2(13) as amended in 1984 codifies the holding of the United States Supreme Court in *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155 (CRT)(1983). In *Morrison-Knudsen*, the Court, in construing Section 2(13) prior to the 1984 Amendments, stated that where benefits received are not "money recompensed," or "gratuities received from others," the narrow question is whether the benefits are a "similar advantage" to board, rent, housing, or lodging in that the benefits have a present value that can be readily converted into a cash equivalent on the basis of their market value. The Court held that employer contributions to union trust funds for health and welfare, pensions, and training were not such "similar advantages." *Morrison-Knudsen*, 461 U.S. at 630, 15 BRBS at 157 (CRT). Section 2(13) as amended in 1984 specifically excludes 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 benefit

The question of whether tips may be included in the calculation of a claimant's average weekly wage is one of first impression for the Board. When interpreting a statute, the starting point is the plain meaning of the words of the statute. *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989); *see Vinson v. Newport News Shipbuilding & Dry Dock Co.,* 27 BRBS 220 (1993). If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency that administers the policy under the statute, must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Initially, while our analysis of the issue rests on the specific language of Section 2(13), we note our disagreement with the administrative law judge's conclusory statement that in changing the definition of wages to delete a specific reference to gratuities, Congress "obviously" intended to exclude tips. There is no discussion in the legislative history regarding tips or Congressional intent in omitting this language. The only clear reason for the statutory change in 1984 is adoption of the holding in *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155 (CRT) (1983), regarding fringe benefits. *See* note 3, *supra*. Therefore, it is mere speculation to attempt to divine Congressional intent on this issue.

In any event, it is unnecessary to do so, as the statutory definition of wages in the amended Act resolves the issue presented. Section 2(13) contains two clauses, the first providing that wages are the "money rate" at which the employee's services are compensated by an employer under the contract of hire, and the second specifying that this provision includes the "reasonable value of any advantage which is received from employer and included for purposes of any withholding of tax." The administrative law judge here addressed the second clause, stating that tips were not an advantage received from an employer and were not reported by employer for purposes of withholding tax. In so stating, he erred in not addressing whether tips are covered by the first clause of Section 2(13).

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plan. 33 U.S.C. §902(13)(1988); *see Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

Accordingly, our analysis of amended Section 2(13) begins with the first clause of that subsection, which 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 . . ." 33 U.S.C. §902(13)(1988). Thus, the first question that must be addressed when determining whether tips are included in a claimant's wages is whether the gratuities that claimant received during her employment with employer were contemplated as part of the "money rate" at which she was to be compensated by employer under the contract of hire. If the answer to this query is in the affirmative, the second clause of Section 2(13) need not be reached, as, generally, a clause beginning with the word "including," as is the case with Section 2(13), is meant to be exemplary, not exclusive. Put another way, while wages under the Act are defined as "*including* . . . any advantage which is received from the employer and included for purposes of any withholding of tax . . ." (emphasis added), this clause does not *exclude* other types of income included in the contract of hire from the definition of wages.[5] *See Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd on other grounds sub nom. Cretan v. Director, OWCP*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, U.S. , 114 S.Ct. 2705 (1994). *See generally Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). Thus, the Board has held that, even if a benefit is not subject to withholding, it may be included as "wages" under Section 2(13), so long as it is part of the agreement under the contract of hire. *See Cretan*, 24 BRBS at 43.

In the instant case, if the contract of hire between claimant and employer contemplated tips as part of the "money rate" at which claimant was to be compensated, then claimant's tips must be included in her average weekly wage.[6] The administrative law judge did not address the question of whether the tips claimant received during her employment with employer were contemplated as part of the "money rate" under the contract of hire, and there is evidence in the record which, if credited, could support a finding that tips were part of the "money rate" at the time of claimant's contract of hire.[7] Accordingly, the administrative law judge's determination that tips are not to be included in

[5]For example, the Board has previously held that payments received from a fund rather than directly from employer are wages, if they are part of the contract of hiring. *See Trice v. Virginia International Terminals, Inc.*, 30 BRBS 165 (1996); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *McMennamy v. Young & Company*, 21 BRBS 351 (1988).

[6]We need not address, therefore, whether tips are "an advantage" received from employer and included in income tax withholding, although we note that tips are, in any event, to be included for purposes of withholding tax under Subtitle C of the Internal Revenue Code. *See* 26 U.S.C. §3102.

[7]William Shearin, employer's workers' compensation insurance specialist, testified that claimant was paid 50 percent of her commissions, with a guaranteed minimum wage of $4.65 per hour. Tr. at 70-71. Mr. Shearin stated: "Tips are not reported to the Navy Exchange as part of the employee's wages. Tips they receive are their tips. Technically, the Navy Exchange does not want to face the issue, because if we prohibited employees, barbers, from accepting tips, we wouldn't have any barbers." Tr. at 70. Regarding her receipt of weekly gratuities, claimant testified that each week she filled out a work schedule sheet in which she listed the number of haircuts she performed the

the calculation of claimant's average weekly wage is vacated, and the case is remanded for consideration of whether the tips claimant received were part of the "money rate" at which she was compensated by employer under the contract of hire, pursuant to Section 2(13) of the Act. If claimant's tips are found to be part of the "money rate" at which she was compensated by employer, the administrative law judge must then make a finding regarding the amount to be included in claimant's average weekly wage.

We will now address the contention raised by employer in its cross-appeal of the administrative law judge's decision. Employer, based on claimant's testimony regarding her salary at the Navy Exchange in South Carolina during the year prior to her employment with employer, challenges the administrative law judge's calculation of claimant's average weekly wage at the time of her injury, contending that the administrative law judge should have calculated her average weekly wage under Section 10(a) of the Act rather than Section 10(c) of the Act. *See* 33 U.S.C. §910(a), (c). We disagree. Section 10(a) is to be applied when an employee has worked substantially the whole of the year immediately preceding his injury and requires the administrative law judge to determine the average daily wage claimant earned during the preceding twelve months. 33 U.S.C. §910(a); *see Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1988). This average daily wage is then multiplied by 260 if claimant was a five-day per week worker, or 300 if claimant was a six-day per week worker; the resulting figure is then divided by 52, pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), in order to yield claimant's statutory average weekly wage. 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(b), can be reasonably and fairly applied.[8] *See 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 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 Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996).

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previous week and the amount of tips she received. *See* Tr. at 53-59; Cl. Ex. 2.

[8]In the instant case, no party contends that Section 10(b) is applicable.

In the instant case, the administrative law judge declined to utilize Section 10(a) since he found that the record was unclear as to the dates of claimant's employment as a barber at the naval hospital in Beaufort, South Carolina, as well as her wages earned at that location. Thus, the administrative law judge found that, since the evidence does not clearly establish that claimant worked in the same employment for "substantially the whole of the year" prior to her injury, claimant's average weekly wage could not be calculated pursuant to Section 10(a). Our review of the record reveals no payroll information regarding the wages claimant earned at Beaufort, South Carolina, or the specific dates of her employment at that location; rather, the only evidence regarding these issues is in the form of claimant's testimony.[9] We thus hold that the administrative law judge rationally determined that Section 10(a) could not be applied to the instant case, and that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c). On remand, the administrative law judge should again apply Section 10(c) of the Act.

Accordingly, the administrative law judge's determination that tips are not to be included in the calculation of claimant's average weekly wage is vacated, and the case is remanded for reconsideration consistent with this decision. In all other respects, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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[9]Claimant testified that she averaged $200 to $250 per week while employed at Beaufort, South Carolina. *See* Emp. Ex. at 16.