BRB Nos. 96-0533A
and 98-1458

FREDA STORY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NAVY EXCHANGE SERVICE CENTER	)	DATE ISSUED: August 6, 1999
	)	
and	)	
	)	
GATES McDONALD & COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order on Remand and Supplemental Order Awarding Fees and Costs of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

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

Michael S. Guillory, Antonio Le Mon and Gregory S. Unger (Michael S. Guillory, a Professional Law Corporation), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand and Supplemental Order Awarding Fees and Costs (94-LHC-0979) of Administrative Law Judge Anne Beytin Torkington 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). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

This is the second time this case is before the Board. To summarize the facts, 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.

[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.

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, Administrative Law Judge Nahum Litt 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). Judge Litt next found that the tips claimant received during her thirteen weeks of employment with employer were not to be included in the calculation of her average weekly wage; Judge Litt 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, Judge Litt 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 for a weekly loss of $271.40, based on claimant's post-injury wage- earning capacity of $115 per week, thereafter.

On appeal, the Board vacated Judge Litt's determination that tips are not to be included in the calculation of claimant's average weekly wage. The Board reasoned that in determining whether tips are to be included in the calculation of claimant's average weekly wage under Section 2(13) of the Act, 33 U.S.C. §902(13)(1994), the first inquiry 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. As Judge Litt did not address this question in his analysis, the Board remanded the case for reconsideration consistent with the Board's ruling. Holding that Judge Litt rationally determined that Section 10(a) of the Act, 33 U.S.C. §910(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) of the Act, 33 U.S.C. §910(c), the Board instructed that, on remand, Section 10(c) should again be applied. *Story v. Navy Exchange Service Center*, 30 BRBS 225 (1997).

Subsequent to the issuance of the Board's Decision and Order, employer filed a timely motion for reconsideration of the Board's decision, 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407(a), and requested that the Board review new evidence. In an Order issued on February 13, 1997, the Board informed employer that it lacked authority to

[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.

review new evidence, and that employer must request review of the new evidence with the administrative law judge below. On March 19, 1997, employer filed a motion to remand the case for modification proceedings before Judge Litt, and thereafter, the Board remanded the case to the Office of Administrative Law Judges for modification proceedings, subject to reinstatement of the case for consideration of employer's motion for reconsideration. Employer subsequently filed a motion for modification of Judge Litt's decision with the Office of Administrative Law Judges.

After the parties waived their right to a formal hearing, Administrative Law Judge Anne Beytin Torkington[3] (the administrative law judge) re-opened the record for the submission of additional evidence. In her Decision and Order on Remand, the administrative law judge found that tips were part of the "money rate" by which claimant was compensated under the contract for hire, pursuant to Section 2(13) of the Act. Next, the administrative law judge credited the amount of tips claimant recorded having received while working for employer, and, pursuant to Section 10(c) of the Act, found that claimant's average weekly wage was $549.20. Thus, the administrative law judge awarded claimant temporary total disability compensation from January 1992 until October 1994, based on claimant's average weekly wage of $549.20, and permanent partial disability compensation thereafter, for a loss of $434.20 in wage-earning capacity, the difference between claimant's average weekly wage and her post-injury wage-earning capacity of $115.

Claimant's counsel subsequently filed a fee petition for work performed before the administrative law judge, requesting $6,612, representing 35.1 hours of legal services at hourly rates of $175 and $190, plus $23 in costs. Employer filed objections to counsel's fee request. In a Supplemental Order Awarding Fees and Costs, the administrative law judge reduced the number of hours sought to 34.9, and thereafter awarded claimant's counsel an attorney's fee of $6,574, plus $23 for expenses.

In August 1998, employer formally requested that the Board consider the merits of its motion for reconsideration of the Board's initial decision in this matter. In an Order issued on August 26, 1998, the Board granted employer's request and reinstated for consideration employer's motion for reconsideration of the Board's January 9, 1997 decision, BRB No. 96-0533A. In its appeal of the administrative law judge's Decision and Order on Remand, employer challenges the administrative law

[3]Subsequent to the Board's Decision and Order in the instant case, Judge Litt left the Office of Administrative Law Judges, and consequently, the case was reassigned to another administrative law judge for decision.

judge's calculation of claimant's average weekly wage. Specifically, employer contends that the administrative law judge erred in finding that tips were contemplated by the parties as part of the "money rate" to be paid to claimant as part of the contract of hire. Employer further argues that in computing claimant's average weekly wage, the administrative law judge erred in crediting the work schedule sheet on which claimant listed the amount of tips she received. Employer lastly asserts that the administrative law judge failed to properly apply Section 10(c) in calculating claimant's average weekly wage. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer has also appealed the administrative law judge's fee award. Specifically, employer contends that counsel's hourly rate should have been reduced to $125, and that the ultimate fee awarded was excessive, maintaining that the instant case did not involve complex issues. Employer further contends that the administrative law judge's fee award was premature, inasmuch as employer is appealing the administrative law judge's Decision and Order on Remand and seeking reconsideration of the Board's initial decision. Claimant responds, urging affirmance of the administrative law judge's fee award, with the exception that claimant now asserts that counsel should be entitled to an hourly rate of $235. Employer's appeals of the administrative law judge's Decision and Order on Remand and Supplemental Order Awarding Fees and Costs are contained in BRB No. 98-1458. In its August 26, 1998 Order, the Board consolidated employer's motion for reconsideration in BRB No. 96-0533A, with its appeal in BRB No. 98-1458 for purposes of decision. We first address the arguments raised by employer's motion for reconsideration of the Board's initial decision, BRB No. 96-0533A. On reconsideration, employer contends that the Board erred in vacating Judge Litt's determination that claimant's tips were not to be included in the calculation of her average weekly wage. Specifically, employer argues that Congress's decision in 1984 to remove the term "gratuities" from the amended Act's definition of "wages" indicated its intent that tips no longer be included in computing wages under the Act. Employer further maintains that the testimony of William Shearin, employer's workers' compensation insurance specialist, that tips were not part of claimant's wages, was dispositive of the issue and should have been relied upon by the Board. For the reasons set forth below, employer's motion for reconsideration is granted but the relief requested is denied.

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)(1994). Prior to the 1984 Amendments to the Act, Section 2(13) specifically included, *inter alia*, gratuities received in the course of employment from others than employer in the definition of wages.[4] Employer's contention on reconsideration essentially parallels Judge Litt's conclusion in his decision that in changing the definition of wages under Section 2(13) to delete a specific reference to gratuities, Congress intended to exclude tips from the calculation of average weekly wage. In its initial decision, the Board noted that, as there is no discussion in the legislative history regarding tips or Congressional intent in omitting this language, it is mere speculation to attempt to divine Congressional intent on this issue. The only clear reason for the statutory change in 1984, the Board reasoned, was adoption of the holding in *Morrison-Knudsen Const. Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155 (CRT) (1983), regarding fringe benefits.[5] *See Story*, 30 BRBS at 227.

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[4]Specifically, 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).

[5]Section 2(13) as amended in 1984 codifies the holding of the United States Supreme Court in *Morrison-Knudsen Const. 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

The Board then began its analysis of Section 2(13) 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)(1994). The Board reasoned that in determining whether tips are included in a claimant's wages, the threshold question to be addressed 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. The Board stated that if the answer to this inquiry 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." *Story*, 30 BRBS at 227. 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. *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*, 512 U.S. 1219 (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. As an example, the Board noted that container royalty payments received from a fund rather than directly from an 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).

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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 plan. 33 U.S.C. §902(13)(1994); *see Denton v. Northrop Corp.*, 21 BRBS 37 (1988).

The United States Court of Appeals for the Eleventh Circuit, wherein appellate jurisdiction of this case lies, has yet to rule on whether the second clause of Section 2(13), which includes any "advantage" subject to withholding, was meant to be exemplary or exclusive. Two other circuit courts of appeals have addressed this issue, with differing results. In *Wausau Ins. Cos. v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT)(9th Cir. 1997), *rev'g Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48 (1996), the United States Court of Appeals for the Ninth Circuit reversed the Board's holding that the value of an employer-provided room and board was includable in an employee's average weekly wage. The court ruled that the Act defers to the Internal Revenue Service's criteria for deciding whether non-monetary compensation counts as wages. After determining that the value of meals and lodging was not income pursuant to Section 119 of the Internal Revenue Code, the court held that the value of the claimant's meals and lodging should not have been included as wages under the Act. *Wausau Ins. Cos.*, 114 F.3d at 122, 31 BRBS at 42 (CRT). The Ninth Circuit thus read the term "including" contained in Section 2(13) as "or," thereby interpreting the phrase "including the reasonable value of any advantage" as a mandatory limitation on the inclusion of non-monetary compensation in the definition of wages. Consistent with *Wausau Ins. Cos.*, the Ninth Circuit held that while a *per diem* a claimant received from an employer to pay for room and board was an "advantage," it was not a "wage" under the Act because it was not subject to withholding under the Internal Revenue Code. *See McNutt v. Benefits Review Board*, 140 F.3d 1247, 32 BRBS 71 (CRT)(9th Cir. 1998).

By contrast, the United States Court of Appeals for the Fourth Circuit, in *Universal Maritime Service Corp. v. Wright*, 155 F.3d 311, 33 BRBS 15 (CRT)(4th Cir. 1998), held that holiday, vacation, and container royalty payments are wages under Section 2(13) if they are earned through actual work. In its decision, the court specifically noted that the structure of the first sentence of Section 2(13) demonstrates that the "advantages" described in the latter part of the sentence illustrate one class of the compensation defined generally in the first part of the sentence. "The word 'including' in §2(13) indicates that the reasonable value of advantages that are received from employers and trigger tax withholding will necessarily be 'part of the larger [category] of' compensation for employees' services provided by employers under the prevailing employment contract." *Id.*, 155 F.3d at 319 n.10, 33 BRBS 20-21 n.10 (CRT).

We find the reasoning of the Fourth Circuit compelling and note that the Board has specifically declined to follow *Wausau Ins. Cos.* outside the Ninth Circuit. In *Quinones v. H. B. Zachery, Inc.*, 32 BRBS 6 (1998), the Board held that both case law and general rules of statutory construction support the interpretation that, while an advantage subject to tax withholding is a "wage" pursuant to Section 2(13), the

use of the term "including" does not mandate that a benefit not subject to tax withholding is not a wage *per se*. Rather, the Board explained, advantages subject to withholding are but one example of the benefits which may be included as wages. As the last sentence of Section 2(13) does not include room and board as fringe benefits which are excluded from the calculation of average weekly wage, the Board affirmed the administrative law judge's decision to include the value of the claimant's room and board in his average weekly wage calculation. *Id.*, 32 BRBS at 10. In the instant case, the Board's previous ruling that claimant's tips may be included in the calculation of her average weekly wage is in accordance with the language of the Act and serves its purpose of accurately corresponding claimant's benefits to her earnings with employer.[6] Accordingly, we reaffirm our previous holding that the term "including" as used in Section 2(13) is meant to be exemplary, not exclusive, and that claimant's tips must be included in her average weekly wage if they were part of

[6]The question of whether tips in general should be included in the calculation of claimant's average weekly wage under Section 2(13) is a matter of statutory construction and therefore, contrary to employer's contention, the testimony of Mr. Shearin is not dispositive of this issue. Mr. Shearin testified that claimant was paid 50 percent of her commissions with a guaranteed minimum wage of $4.65 per hour, and that while tips were not reported to the Navy Exchange as part of the employee's wages, employer was aware that its barbers did receive tips. Tr. at 70-71; *see Story*, 30 BRBS at 228 n.7. This testimony is relevant with respect to the factual issue of whether tips were part of claimant's "money rate" under the contract of hiring, the issue the administrative law judge considered on remand.

the "money rate" under the contract of hiring.[7] The relief requested in employer's motion for reconsideration is therefore denied. 20 C.F.R. §802.409. The Board's prior Decision and Order is affirmed in all respects.

We now consider the issues raised in employer's appeal of the administrative law judge's Decision and Order on Remand, BRB No. 98-1458. On appeal, employer contends that the administrative law judge committed error by including claimant's tips in the calculation of her average weekly wage. Specifically, employer asserts the issue of whether employer was aware that claimant received tips is not relevant to the inquiry, since tips were not contemplated as part of claimant's compensation by employer. Employer argues that its contention is supported by the fact that tipping violated its Standards of Conduct, and therefore, employer maintained no tip-reporting procedure.

We reject employer's contentions. In determining that tips were part of the "money rate" at which claimant was compensated by employer, the administrative law judge, on remand, credited the testimony of Leonard Gordon, claimant's supervisor, and Mr. Shearin. Mr. Gordon testified that he told new hires that tipping was not required, that a sign was posted in the barber shop informing customers that tipping was not required, and that the compensation of its employees is based on commission. Emp. Remand Ex. 3 at 20-24. He stated that employer kept no records of any tips that its barbers might have received. *Id*. at 32-33. However, Mr. Gordon conceded that the sign regarding tipping is no longer posted and that he could not say for sure whether he told claimant that tips were prohibited, as this was not part of his indoctrination check-off list. *Id.* at 20, 28. The administrative law judge noted that this deposition testimony contradicted the testimony contained in Mr. Gordon's affidavit attached to employer's motion for modification, wherein Mr. Gordon stated that he personally advised all barbers that tips violated employer's written Standards of Conduct, and that he told claimant that she was not allowed to

[7]The Board noted that while it was not necessary to address whether tips are an "advantage" received from employer and included in income tax withholding under Section 2(13), tips are to be included for purposes of withholding tax under Subtitle C of the Internal Revenue Code. *See* 26 U.S.C. §3102 (1999); *Story*, 30 BRBS at 228 n.6.

receive tips. However, the administrative law judge credited Mr. Gordon's deposition testimony with regard to tipping since this testimony was subject to cross-examination. The administrative law judge gave little weight to the testimony of Dorothy Hirsh, employer's general manager, that accepting tips would violate employer's Standards of Conduct, which prohibited employees from accepting "gifts, favors or gratuities from persons who do or seek to do business with the Navy Resale System." Emp. Remand Ex. 2-J; Emp. Remand Ex. 2 at 15. Rather, the administrative law judge found that this aspect of employer's Standards of Conduct was intended to prevent employees from being bribed by vendors, and did not concern the tipping of barbers. The administrative law judge found support for this interpretation in Mr. Gordon's deposition testimony that employer's written Standards of Conduct regarding gratuities had nothing to do with tipping barbers. Emp. Remand Ex. 2 at 23; *see* Decision and Order on Remand at 9.

The administrative law judge further relied on the hearing testimony of Mr. Shearin that tips are not reported to employer as part of an employee's wages, but that barbers do receive tips. Specifically, Mr. Shearin stated: "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. This testimony was supported by Mr. Gordon's testimony that "unofficially," he was aware that employer's barbers received tips and that it was traditional for customers to tip their barbers, even though tipping was not considered part of the barbers' income. Emp. Remand Ex. 3 at 31-32, 36. Concurring with Mr. Shearin, Mr. Gordon stated that tipping was an area that employer stayed away from. *Id.* at 35. Mr. Gordon conceded that he himself tipped barbers when receiving a haircut at employer's barber shop. *Id.* at 32, 35. Based on the foregoing evidence, the administrative law judge determined that although tipping was not formally part of any written or oral contract of hire, it was understood to be part of claimant's earnings, condoned and tolerated by employer. Thus, the administrative law judge concluded that tips were part of the "money rate" by which claimant was compensated by employer under the contract of hire, pursuant to Section 2(13) of the Act.[8] *See* Decision and Order on Remand at 9.

[8]Employer contends that in relying on two non-Act cases, *Hanks v. Tom Brantley's Tire Broker*, 500 So.2d 614 (Fla. Dist. Ct. App. 1986), and *Flores v. Carnival Cruise Lines*, 47 F.3d 1120 (11th Cir. 1995), the administrative law judge ignored the mandate of the Board to determine what was actually contemplated by the parties with respect to claimant's "money rate" under the contract of hire, pursuant to Section 2(13) of the Act. Contrary to employer's assertion, while the administrative law judge cited the above-mentioned cases for the general proposition that tips should be included in the calculation of a claimant's average weekly wage,

We hold that the administrative law judge rationally credited the testimony of Messrs. Gordon and Shearin in her determination that tips were part of the "money rate" by which claimant was compensated by employer. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 373 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Moreover, the administrative law judge's analysis of the question of whether tips should be included in the calculation of claimant's average weekly wage, pursuant to the Board's remand order, was in accordance with Section 2(13) of the Act. Accordingly, we affirm the administrative law judge's conclusion that tips were part of the "money rate" by which claimant was compensated by employer as it is rational, supported by substantial evidence and in accordance with law.

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the administrative law judge's ultimate determination was based on her reliance on the credible evidence. We therefore reject employer's contention in this regard.

Employer next contends that in calculating claimant's average weekly wage, the administrative law judge erred in crediting claimant's records of the tips she received while working for employer. We reject this contention. In her Decision and Order on Remand, the administrative law judge credited the records claimant kept of the tips she received during the sixty-one days she worked for employer, which totaled $1,986. Acknowledging that claimant's failure to represent these earnings in her income tax filings raised questions about her credibility, the administrative law judge nevertheless accepted these records as evidence of the amount of tips claimant earned. The administrative law judge recognized that income tax return forms do not provide a separate entry for tips, but rather, tips must be documented on W-2 forms, and that most people would want their income tax return to conform to their W-2 form. The administrative law judge stated claimant's possible income tax evasion was not to be condoned, but that employer, in effect, had colluded in such evasion by not providing a reporting system by which the tips the claimant received could be included in the W-2. Ultimately, the administrative law judge credited claimant's records as they were created contemporaneously with the receipt of the tips, at a time when litigation was not contemplated. *See* Decision and Order on Remand at 9. These records included employer's work schedule sheets, which showed the days claimant worked and the number of haircuts claimant performed each day. Claimant provided additional notations on her work schedule sheet of the amount of tips she received each day.[9] Cl. Ex. 2. The administrative law judge essentially credited claimant's testimony that claimant made these notations at the time she received the tips. *See* Tr. at 53, 56-57; Emp. Ex. 1 at 14-15.

In adjudicating a claim, it is well-established that an administrative law judge is entitled to evaluate the credibility of all witnesses, and may draw her own inferences and conclusions from the evidence. *See Calbeck*, 306 F.2d at 693; *Donovan*, 300 F.2d at 741; *Hughes*, 289 F.2d at 403. In the instant case, we hold that the administrative law judge's decision to credit the claimant's records of the amount of tips she received while working for employer is neither inherently incredible nor patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 1333, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied,* 440 U.S. 911 (1979). Accordingly, employer's contention is rejected.

Employer further challenges the administrative law judge's calculation of claimant's average weekly wage pursuant to Section 10(c). Specifically, employer

[9]At the hearing, claimant submitted as evidence a sheet which computed the total amount of tips she received while working for employer, which merely added the amounts she had noted on employer's work schedule. *See* Cl. Ex. 1.

asserts that the administrative law judge erred by not applying claimant's commission rate of pay, as testified to by Dorothy Hirsch and Leonard Gordon. Employer asserts that as there was no evidence of earnings by a similar class of employees, a proper Section 10(c) calculation cannot be done and, therefore, employer requests that the case be remanded for further consideration of the calculation of claimant's average weekly wage. We deny employer's request and hold that the administrative law judge's calculation of claimant's average weekly wage was properly made.

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.[10] *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). All sources of income are to be included in determining claimant's average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991); *Lobus v. I.T.O. Corp. of Baltimore, Inc.*, 24 BRBS 137 (1990). 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 her decision, under Section 10(c), the administrative law judge initially credited the amount of tips claimant recorded earning during the 61 days she worked for employer, as discussed. The administrative law judge then added this amount, $1,986, to the wages Judge Litt had previously determined claimant earned for this period, $4,714.28, reaching a total of $6,700.28. By dividing this figure by 61, the number of days claimant worked for employer, the administrative law judge reached a daily wage figure of $109.84, which she then multiplied by 260 days for a five-day per week worker, resulting in annual earnings of $28,558.40. Dividing this number pursuant to Section 10(d) of the Act, 33 U.S.C. §910(d), the administrative law judge calculated claimant's average weekly wage to be $549.20.

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

In the initial Decision and Order in this matter, Judge Litt found that claimant earned $4,714.28 during her employment with employer, without the inclusion of tips, based on a payroll summary employer submitted into evidence at the initial hearing. *See* Emp. Ex. 2; Decision and Order at 8. The administrative law judge, on remand, merely added the amount of tips claimant received, then adopted the same formula Judge Litt applied in determining claimant's average weekly wage.[11] The deposition testimony of Ms. Hirsch and Mr. Gordon essentially corroborated Mr. Shearin's testimony at the hearing that claimant's pay was based on a commission determined by the haircuts she performed, with a guaranteed minimum wage, and it does not conflict with the administrative law judge's calculation. Emp. Remand Ex. 2 at 13-14; Emp. Remand Ex. 3 at 10-11. Contrary to employer's contention, under Section 10(c), an administrative law judge may use the earnings of a class of employees similar to claimant, but is not required to do so. *See* 33 U.S.C. §910(c).[12] Additionally, it is disingenuous of employer to submit evidence of claimant's earnings, less the amount of tips claimant received, then assert error on the part of the administrative law judge for crediting the very figure employer proposed. The administrative law judge acted within her broad discretion under Section 10(c) by approximating claimant's average annual earnings and then dividing this figure by 52. *See Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990). As the result

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[11]In establishing a daily wage and multiplying that figure by 260, the administrative law judge utilized a formula similar to Section 10(a) to approximate claimant's average annual earnings. Employer does not contest this calculation, and it serves the goal of Section 10(c) of determining claimant's annual earning capacity.

[12]Section 10(c) provides:

> If either of the foregoing method of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. §910(c).

reached by the administrative law judge is reasonable and supported by substantial evidence, we affirm the administrative law judge's determination that claimant's average weekly wage is $549.20. *See, e.g., Wayland*, 25 BRBS at 59; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, *aff'd on recon.*, 25 BRBS 88 (1991).

We now consider employer's appeal of the administrative law judge's Supplemental Order Awarding Fees and Costs. Subsequent to the administrative law judge's Decision and Order on Remand, claimant's counsel submitted a fee petition to the administrative law judge requesting a fee of $6,612, representing 35.1 hours of services performed at hourly rates of $175 and $190, plus $23 in costs. In her Supplemental Order, the administrative law judge reduced the number of hours sought by counsel to 34.9, awarded counsel the requested hourly rates of $175 and $190, and thereafter awarded claimant's counsel a fee of $6,574, plus $23 in expenses.

On appeal, employer challenges the administrative law judge's award of an attorney's fee. Specifically, employer contends that the administrative law judge violated Rule 201 of the Federal Rules of Evidence, FED. R. EVID. 201, and 29 C.F.R. §18.1(a) by taking judicial notice of the hourly rates of attorneys working in the South listed in the 1998 Survey of Law Firm Economics, and erred in consequently awarding claimant's counsel hourly rates of $175 and $190. Employer additionally challenges the number of hours requested by counsel and awarded by the administrative law judge. Lastly, employer maintains that the administrative law judge's award is premature, as employer had not exhausted its appeals of the Board's initial decision and the administrative law judge's Decision and Order on Remand. Claimant responds, urging affirmance of the administrative law judge's award of an attorney's fee, with the exception that claimant now requests that the Board increase the hourly rate awarded to $235.

At the outset, we reject employer's contention that the administrative law judge violated Rule 201 of the Federal Rules of Evidence. 29 C.F.R §18.1 provides that rules governing administrative proceedings delineated in that subpart are to be followed to the extent they do not conflict with a rule of special application. Under Section 23(a) of the Act, 33 U.S.C. §923(a), and Section 702.339 of the implementing regulations governing the administration of the Act, administrative law judges are not bound by statutory rules of evidence, "but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties." 33 U.S.C. §923(a); 20 C.F.R. §702.339. As the rates charged by an attorney in a geographic area is relevant information, we hold that the administrative law judge acted within her discretion in relying on the 1998 Survey of Law Firm Economics.

Employer further contends that the fee awarded is excessive, maintaining that the instant case was routine and not complex. In awarding counsel the requested hourly rates of $175 and $190, the administrative law judge took into consideration that this case concerned a complex issue of first impression with regard to whether tips are to be included in the calculation of claimant's average weekly wage, and that the facts concerning whether the parties contemplated that tips would be part of claimant's compensation by employer were in dispute. We reject employer's contention that the awarded fee must be further reduced based on these criteria because employer has not satisfied its burden of showing that the administrative law judge abused her discretion in awarding a fee based on an hourly rates of $175 and $190. *See Ross v. Ingalls Shipbuilding, Inc.*, 29 BRBS 42 (1995); *see generally Snowden v. Ingalls Shipbuilding, Inc.*, 25 BRBS 245 (1991)(Brown, J., dissenting on other grounds), *aff'd on recon. en banc*, 25 BRBS 346 (1992)(Brown, J., dissenting on other grounds). Claimant's request that counsel's hourly rate be increased to $235, however, is denied. Claimant's request was made in a response brief, not a formal cross-appeal, and thus, such a request is not ordinarily considered on appeal. *See Garcia v. National Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Showmaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988). Even if claimant's request were to be considered a cross-appeal, it was not timely filed pursuant to Section 802.205 of the regulations, 20 C.F.R. §802.205.[13] We note that claimant's counsel may file a request for enhancement of his fee before the administrative law judge where the length of the appeals process has delayed payment of the attorney's fee. *See Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998).

Employer next objects to the number of hours awarded by the administrative law judge. We reject this contention, as employer has not shown that the administrative law judge abused her discretion in this regard. *See Ross*, 29 BRBS at 42; *Maddon v. Western Asbestos Co.*, 23 BRBS 55 (1989); *Cabral v. General Dynamics Corp.*, 13 BRBS 97 (1981). We note, however, that the administrative law judge disallowed one hour counsel requested for the preparation of his fee petition, performed at a rate of $190 per hour, but in her award reduced the requested hours by only .2 hour. Accordingly, the administrative law judge's fee award is modified to reflect a fee award of $6,422, representing 34.1 hours of services performed, a reduction of one hour.

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[13]Under Section 802.205 of the regulations, a cross-appeal must be filed within 14 days of the date of the notice of appeal. 20 C.F.R. §802.205. Employer filed its appeal of the administrative law judge's Supplemental Order Awarding Fees and Costs on December 4, 1998. Claimant's contention was raised in his response brief, which was filed on February 3, 1999.

Lastly, employer's contention that the administrative law judge's award of an attorney's fee is premature is without merit. It is well-established that while an attorney's fee award is not enforceable until the compensation order is final, an administrative law judge can award an attorney's fee during the pendency of an appeal. *See Mowl v. Ingalls Shipbuilding, Inc.*, 32 BRBS 51 (1998); *Lewis v. Bethlehem Steel Corp.*, 19 BRBS 90 (1986).

Accordingly, employer's motion for reconsideration is denied, and the Board's prior decision is upheld. The administrative law judge's Decision and Order on Remand is affirmed. The Supplemental Order Awarding Fees and Costs is modified to reflect a fee award of $6,422, representing 34.1 hours of services performed. In all other respects, the administrative law judge's Supplemental Order Awarding Fees and Costs is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge