BRB No. 93-0624

RONALD GUTHRIE	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
HOLMES & NARVER, INCORPORATED	)	
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION AND ORDER

Appeal of the Decision and Order Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Kevin Keaney (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Dennis R. VavRosky and Patric J. Doherty (VavRosky, MacColl, Olson, Doherty & Miller, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-1730) of Administrative Law Judge Alexander Karst 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 Defense Base Act, 42 U.S.C. §1651 *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).

On April 27, 1989, claimant sustained an injury to his lower back in the course and scope of his employment and subsequently underwent a lumbar laminectomy. As a result of his injury,

claimant has a left foot "drop," wears a foot brace, and has chronic leg pain. Claimant reached maximum medical improvement on May 24, 1990. At the time of his injury, claimant worked as a plumber and general repairman for employer on the Johnston Atoll, a United States nuclear and chemical warfare waste storage facility in the South Pacific about 800 miles southwest of Hawaii.

Unable to work within his medical restrictions on the Johnston Atoll, claimant began work with Fujitsu, a computer chip manufacturer, on April 23, 1990, in Gresham, Oregon. Claimant began as a heating, ventilation, and air conditioning technician level 3, but was subsequently shifted to work closer to his plumbing experience and promoted to level 4. At the time of the hearing, claimant was "lead man" of his work group. Claimant's position, which is not physically demanding and is admittedly within his medical restrictions, entails the supervision of others, paper work, timekeeping, and monitoring of equipment. He works four twelve hour shifts one week and three twelve hour shifts the next week beginning at 6:00 p.m. In 1990, claimant earned $36,312.28 in thirty-five weeks and in 1991 he earned $65,067.17.

In his Decision and Order, the administrative law judge denied the claim for permanent partial disability compensation, finding that claimant failed to establish a loss in his wage-earning capacity.[1] *See* 33 U.S.C. §908(h). On appeal, claimant challenges the administrative law judge's calculations regarding his average weekly wage and his actual post-injury wage-earning capacity. Employer responds, urging affirmance.

I. AVERAGE WEEKLY WAGE

Claimant initially contends that the administrative law judge erred by failing to include the value of the "subsistence and quarters"[2] provided by employer in determining claimant's average weekly wage. Claimant asserts that since he derived a clear benefit from the employer-provided "subsistence and quarters," those services fall within the definition of a "wage" under 33 U.S.C. §902(13). Claimant further contends that the fact that he did not actually receive funds or pay taxes on the "subsistence and quarters" is not relevant for the purpose of determining whether such services fall within the definition of wages. In this regard, claimant argues that since the "subsistence and quarters" was not provided for employer's convenience, but rather, was part of claimant's pay based upon the reality of where he worked, the administrative law judge's application of 26 U.S.C. §119 is incorrect.

Wages are defined in Section 2(13) of the Act 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

[1]Specifically, the administrative law judge found that claimant's post-injury weekly wage-earning capacity of $925.93 exceeded claimant's average weekly wage, which the administrative law judge calculated, under 33 U.S.C. §910(c), at $857.06.

[2]The "subsistence and quarters" in the instant case amounts to employer-provided meals and lodging for employees working on the Atoll.

time of 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 (related to employment taxes)." 33 U.S.C. §902(13)(1988). Fringe benefits are specifically excluded, 33 U.S.C. §902(13); an employer's contribution to such benefits generally is not readily calculable. *Morrison-Knudson Construction Co. v. Director, OWCP*, 461 U.S. 624, 15 BRBS 155 (CRT)(1983). The Board has held that while the plain language of Section 2(13) mandates that an advantage subject to tax withholding is a "wage," it does not mandate that a benefit not subject to tax withholding is not a wage *per se*. *Cretan v. Bethlehem Steel Corp.*, 24 BRBS 35 (1990), *aff'd in part and rev'd in part on other grounds*, 1 F.3d 843, 27 BRBS 93 (CRT)(9th Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994). In addition, the Board has held that it is not bound to apply the Internal Revenue Code's definition of "wages" for a determination of claimant's compensation rate under the Act. *Id.* In *Cretan*, the Board held that the administrative law judge properly included money paid by the decedent's employer into a tax-sheltered annuity in the decedent's average weekly wage, since that money was included in the decedent's contract of hiring.

In the instant case, the administrative law judge determined that subtitle C of Internal Revenue Code of 1954, 26 U.S.C. §3121(a)(19), exempts from withholdings "the value of any meals or lodging furnished by or on behalf of employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119." The administrative law judge then considered the language of 26 U.S.C. §119, which states, in pertinent part, that:

> There shall be excluded from gross income of any employee the value of any meals or lodging furnished to him . . . for the convenience of the employer but only if
>
> (1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> (2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

The administrative law judge found that claimant was required to accept the board and room provided by employer on the employer's premises and that this was for the convenience of the employer. The administrative law judge concluded that the value of the "subsistence and quarters" allowance, which was not paid directly to claimant and which was not subject to withholdings under 26 U.S.C. §3121, could not be considered as part of his wages for the purpose of calculating his average weekly wage. The administrative law judge, therefore, based his determination that claimant's subsistence and quarters was not included in his wages solely on the Internal Revenue Code. In coming to this conclusion, the administrative law judge failed to consider the definition of wages as enunciated by the Board in *Cretan*.[3]

[3]This is further supported by the administrative law judge's brief discussion of *Denton v. Northrop Corp.*, 21 BRBS 37 (1988). In his Decision and Order, the administrative law judge distinguished

Claimant was provided with lodging, meals, recreation, transportation and medical care during the course of his employment on the Atoll. The Atoll was inhabited only by about 1,100 adult United States Department of Defense personnel and the employees of its contractors, and the only housing available was government owned. As a condition of employment, claimant was obligated to live on the Atoll. Section 5 of claimant's employment contract, entitled "Job Facilities," states that "[r]oom and board will be furnished by the Contractor at the site of work at no charge to the employee." Claimant's Exhibit 61. Consequently, employer provided subsistence and quarters to its employees in addition to salaries. Inasmuch as the "subsistence and quarters" was provided to claimant by employer under the terms of claimant's employment contract, and the value of these services is readily ascertainable at a daily rate of $30,[4] the room and board provided by employer cannot be deemed a fringe benefit as the amount is readily calculable. These services satisfy the definition of "wages" under Section 2(13) of the Act. *See generally McMennamy v. Young & Co.*, 21 BRBS 351 (1988). Consequently, we hold that the "subsistence and quarters" is, as a matter of law, includable in claimant's average weekly wage. *See Cretan*, 24 BRBS at 43-44; *Lopez v. Southern Stevedores*, 23 BRBS 295, 301 (1990); *Denton v. Northrop Corp.*, 21 BRBS 37, 46-47 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6, 8 (1985).

Claimant next argues that the administrative law judge erred in using Section 10(c) to calculate claimant's average weekly wage. Claimant avers that, contrary to the administrative law judge's finding, application of 33 U.S.C. §910(a) to determine the average weekly wage would not result in "a gross distortion of reality." Claimant asserts that the administrative law judge confused what claimant was actually paid in the year prior to his injury with claimant's "wage-earning capacity." Claimant, therefore, argues that Section 10(a) would result in an amount which accurately reflects his average weekly wage.

Section 10, 33 U.S.C. §910, sets forth three alternative methods for determining claimant's average annual wage, which is then divided by 52 pursuant to Section 10(d), 33 U.S.C. §910(d), to arrive at an average weekly wage. Sections 10(a) and (b), 33 U.S.C. §910(a), (b), are the statutory provisions relevant to a determination of an employee's average annual wages where an injured employee's work is regular and continuous. The computation of average annual earnings must be made pursuant to Section 10(c), 33 U.S.C. §910(c), if subsections (a) or (b) cannot be reasonably and fairly applied.

Denton, in which the Board held that a foreign housing allowance is included in wages, since claimant, in the instant case, "was neither paid the allowance nor was he taxed on it." Decision and Order at 3. Under *Cretan*, these factors do not necessarily preclude a housing allowance from inclusion in the Act's definition of "wages."

[4]This figure is set out in a memorandum entitled *Welcome To Johnston Atoll*, wherein the installation commander specifically noted that subsistence and quarters was currently $30 per day. Claimant's Exhibit 62.

The object of Section 10(c) is to arrive at a sum that reasonably represents a 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). It is well-established that an administrative law judge has broad discretion in determining an employee's annual earning capacity under Section 10(c). *See Bonner v. National Steel & Shipbuilding Co.*, 5 BRBS 290 (1977), *aff'd in pert. part*, 600 F.2d 1288 (9th Cir. 1979). 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 Hicks v. Pacific Marine & Supply Co., Ltd.*, 14 BRBS 549 (1981).

In the present case, a majority of employer's workers, including claimant, worked on the Johnston Atoll for the term of their contracts, usually 13 weeks, and then were required to take leave, off island, for a maximum of forty-two days, before returning for another contract term. Employer's Exhibit 25. In the year prior to his injury, claimant had eleven weeks of unpaid leave between contracts and worked a total of 41 six-day weeks.[5] The administrative law judge found that claimant worked under a series of short-term contracts that had to be renewed after each expired. Additionally, the administrative law judge determined that claimant was, in effect, compelled to take extended unpaid leaves off the Atoll. Thus, claimant's employment was not necessarily continuous, and the pay he actually received was about the maximum he could have earned in that job. In light of these facts, the administrative law judge rationally found that "the use of Section 10(a) would result in a gross distortion of reality," and thus, properly concluded that the use of Section 10(a) would not fairly approximate claimant's earning capacity at the time of his injury. *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987).

The administrative law judge, after noting that the calculation of claimant's average weekly wage should be made pursuant to Section 10(c),[6] divided claimant's actual earnings of $44,567.27[7] by 52 and thus fixed claimant's average weekly wage at the time of his injury at $857.06. The formula used by the administrative law judge, pursuant to Section 10(c), in calculating claimant's average weekly wage is reasonable, supported by substantial evidence, and consistent with the goal

[5]Claimant's employment records indicate that he was away from the Atoll, on leave without pay, for five weeks from July 20, 1988 through August 27, 1988, and another six weeks from February 2, 1989 through March 16, 1989. Employer's Exhibits 71, 74.

[6]The administrative law judge found that the record contained no evidence upon which to base a calculation of claimant's average weekly wage under Section 10(b). Decision and Order at 4.

[7]The administrative law judge noted that the $44,567.27 that claimant earned while working for employer during the 52 weeks prior to his injury was the only specific figure that he could use under Section 10(c). The administrative law judge permissibly determined that $44,567.27 was representative of claimant's average annual earnings because the record reflects that: his employment, prior to September 1987, as a plumbing contractor and grower of Christmas trees was not "the same or most similar" to his position with employer; claimant showed a $14,516.00 loss in 1986; and claimant's 1987 income is not a part of the record.

of arriving at a sum which reasonably represents claimant's annual earnings at the time of his injury. *See Gatlin*, 935 F.2d at 819, 25 BRBS at 26 (CRT); *Gilliam*, 21 BRBS at 91; *Hicks*, 14 BRBS at 549. However, inasmuch as the administrative law judge failed to include in this calculation claimant's weekly total for "subsistence and quarters," we hold that this sum does not accurately reflect claimant's pre-injury earnings. Accordingly, we modify the administrative law judge's finding that claimant's average weekly wage is $857.06 to account for the $210 per week claimant received for subsistence and quarters and, thus, hold that claimant's pre-injury average weekly wage is $1,067.06.

II. WAGE-EARNING CAPACITY

Claimant next contends that his earnings with Fujitsu do not fairly represent his post-injury wage-earning capacity. Wage-earning capacity, argues claimant, should be determined, not on the basis of unusual hours carrying a wage differential but on the basis of usual hours not carrying the wage differential. Citing *Cook v. Seattle Stevedore Co.*, 21 BRBS 4 (1988), claimant contends that the administrative law judge improperly factored into his calculation of claimant's post-injury wage-earning capacity the twelve percent wage differential he received for working the night shift. Additionally, claimant asserts that the administrative law judge failed to adequately consider certain factors which establish that the position with Fujitsu is a one-of-a-kind job unreflective of claimant's true post-injury earning capacity. The factors alluded to by claimant are that he received his job only through the help of a co-worker and that the vocational testimony clearly establishes that due to his injury claimant could earn only $7.50 per hour on the open market, which is less than half of what he earned at Fujitsu.

Section 8(h) of the Act, 33 U.S.C. §908(h), provides that claimant's wage-earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his wage-earning capacity. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 23 BRBS 108 (CRT) (5th Cir. 1990). Some of the factors to be considered in determining whether claimant's post-injury wages fairly and reasonably represent his post-injury wage-earning capacity include claimant's physical condition, age, education, industrial history, the beneficence of a sympathetic employer, claimant's earning power on the open market and any other reasonable variable that could form a factual basis for the decision. *Cook*, 21 BRBS at 6; *Devillier v. National Steel & Shipbuilding Co.*, 10 BRBS 649 (1979).

In finding that claimant's actual post-injury earnings with Fujitsu fairly and reasonably represent claimant's wage-earning capacity, the administrative law judge initially considered the longevity of claimant's present position and found that there is every indication from the record that claimant's position will continue into the future, and is not sheltered employment. The administrative law judge rationally based this determination on the fact that claimant had been promoted a level in only a short period of time, that claimant was now a "lead man" who supervises or assigns the work of others, and that his employer "apparently" thought so highly of him that it

hired a friend of his on claimant's recommendation. The administrative law judge next found that neither the fact that claimant was working the night shift nor that claimant obtained his position on the recommendation of a friend was relevant to the question of whether claimant's wages at Fujitsu were a fair measure of his wage-earning capacity.[8] Additionally, the administrative law judge found that neither claimant's age, education, presumed dyslexia, nor any physical or mental disability prevented or impaired claimant's ability to hold his job. Moreover, the administrative law judge permissibly rejected claimant's contention that if he lost his job he would not be able to obtain the same type of job on the open market as too speculative, because his employment with Fujitsu is regular and the record establishes that it is expected to continue into the future.[9] *See generally Cook*, 21 BRBS at 4. The administrative law judge then adjusted claimant's actual gross earnings of $65,067 to take into account amounts

[8]Contrary to claimant's contention there is no evidence that claimant's receipt of a night shift differential is not a "normal" employment condition, particularly since, as employer notes, night shifts are a common practice in many industries. Additionally, the fact that claimant obtained his job at Fujitsu on a lead from a friend does not make that job suspect. While "the beneficence of a sympathetic employer" is among the factors to be considered in determining wage-earning capacity, there is no evidence in this case to establish that claimant's position was obtained and/or held in such a manner. Claimant has not shown that his job with Fujitsu was created because employer felt sorry for him.

[9]The administrative law judge also gave little credence to the testimony of claimant's vocational expert, who opined that if claimant lost his job with Fujitsu, he would be reduced to $7.50 an hour for employment in the open market.

paid for training purposes and for inflation to arrive at $925.93[10] as a fair measure of claimant's post-injury wage-earning capacity. As the administrative law judge evaluated the evidence of record pursuant to the factors relevant to Section 8(h) and there is substantial evidence in the record to support his conclusion that claimant's actual earnings, less overtime paid for training and inflation, represent his wage-earning capacity, that finding is affirmed.

[10]In calculating the reduction for overtime paid for training, the administrative law judge relied upon claimant's statements that seventy-five percent of the $25,000 that he earned in overtime pay was for training in 1991 which would not be repeated in future years. The administrative law judge, therefore, reduced claimant's actual earnings by $18,750, or seventy-five percent of claimant's overtime pay, to arrive at an adjusted annual wage of $51,004.50. The administrative law judge then divided that figure by 52, to find an average post-injury weekly wage of $980.86. In figuring for inflation, the administrative law judge took judicial notice of the 5.6 percent increase in the National Average Weekly Wage, *see* 33 U.S.C. §906(b)(1)-(3), from 1989 to 1991, and accordingly, reduced claimant's average post-injury weekly wage by that amount. *See Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Consequently, the administrative law judge arrived at a post-injury wage-earning capacity of $925.93.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is modified to reflect an average weekly wage of $1,067.06, and ongoing permanent partial disability benefits of $94.09[11] per week from April 23, 1990, the date that employer began his employment with Fujitsu. In all other respects the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

[11]This figure represents 66 and 2/3 percent of $141.13, the difference between claimant's average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21).