BRB No. 11-0868

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| MICHAEL D. DALTON | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| MARITIME SERVICES CORPORATION | ) | DATE ISSUED: 02/27/2013 |
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| and | ) | |
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| SAIF CORPORATION | ) | |
| | ) | DECISION and ORDER on |
| Employer/Carrier-Respondents | ) | MOTION FOR RECONSIDERATION |

Appeal of the Decision and Order Awarding Compensation and Benefits and Order Granting Reconsideration and Modifying July 22 Decision and Order of Richard M. Clark, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, LLP), Portland, Oregon, for employer/carrier.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant has filed a timely motion for reconsideration of the Board's Decision and Order in the captioned case, *Dalton v. Maritime Services Corp.*, BRB No. 11-0868 (Aug. 30, 2012) (unpub.) (Boggs, J., concurring & dissenting). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Claimant challenges the Board's affirmance of the administrative law judge's maximum medical improvement finding and calculation of claimant's average weekly wage. Employer responds, opposing claimant's motion for reconsideration. Employer, however, also asserts, as it did previously before the Board, that claimant's bonus should not be considered part of his "wages" for purposes of calculating average weekly wage. Furthermore, claimant and employer each request clarification of Board's decision as it

pertains to the inclusion of the 1999 bonus in the calculation of claimant's average weekly wage. We grant, in part, claimant's motion for reconsideration for the reasons set forth below.

After consideration of claimant's contentions regarding the Board's affirmance of the administrative law judge's finding that claimant's condition reached maximum medical improvement on March 4, 2004, no member of the panel has voted to vacate or modify the Board's decision. Therefore, claimant's motion for reconsideration, as it pertains to this issue, is denied. 20 C.F.R. §802.409.

Regarding the administrative law judge's average weekly wage finding, claimant contends there is no factual basis identified by either the administrative law judge or the Board to support the conclusion that the two-year period immediately preceding claimant's 2001 injury was the most representative of claimant's pre-injury earnings. Claimant further asserts that the administrative law judge should not have included claimant's earnings in the year immediately preceding his 2001 injury as the record establishes that those earnings, which were based on employer's annual gross receipts, were depressed due to an economic recession.

The administrative law judge's decision to average claimant's earnings in the two years prior to his March 17, 2001 injury is within his discretion and is, as the Board observed, supported by substantial evidence. The administrative law judge's rejection of claimant's earnings for 1998, based on the undisputed downward trend in claimant's earnings in the three years preceding his injury,[1] as well as claimant's admission that his employment was sporadic, is sufficiently explained, and the Board specifically identified the evidentiary basis for the administrative law judge's finding. HT at 44; *see Dalton*, slip op. at 5 n. 3 and 4. Therefore, we reject claimant's contention that there is no factual basis to support the administrative law judge's decision to calculate claimant's average weekly wage based on his earnings from the two years prior to his March 17, 2001 injury.

Moreover, we reject claimant's assertion that his earnings in the year immediately preceding his injury should not have been used by the administrative law judge because they do not accurately reflect his ability to earn wages at the time of injury. Employer's annual gross receipts remained depressed for several years after claimant's injury and did not significantly recover until 2008 and 2009. This evidence is, therefore, inconclusive to show, as claimant suggests: 1) that his earnings for 2001 were merely an aberration and did not accurately reflect his ability to earn wages for employer at the time of his injury; and 2) that claimant would have, in fact, earned additional income in subsequent years such that the administrative law judge should have included claimant's potential post-

[1]In this regard, between March 1998 and March 1999, claimant earned $41,505.67; between March 1999 and March 2000 he earned $33,551.89; and between March 2000 and March 2001, claimant earned $19,052.10.

injury earnings in calculating his average weekly wage. As the Board stated, post-injury events generally are not relevant to an average weekly wage determination. 33 U.S.C. §910; *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 18 BRBS 100(CRT) (D.C. Cir.), *cert. denied*, 479 U.S. 1094 (1986); *Hawthorne v. Ingalls Shipbuilding, Inc.*, 28 BRBS 73 (1994), *modified on other grounds on recon.*, 29 BRBS 103 (1995); *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991. The Board's decision to reject claimant's contention that the administrative law judge should have considered evidence regarding employer's post-injury gross receipts in the calculation of claimant's average weekly wage was therefore appropriate. Claimant's motion for reconsideration regarding the administrative law judge's calculation of claimant's average weekly wage based on the two-year period immediately preceding claimant's injury is denied.

Claimant lastly contends that the Board erred by implying that the administrative law judge should include in his average weekly wage determination the "net" amount of the bonus he received in December 1999, $2,406.52, rather than the gross amount, $3,950. Employer responds that the Board's inclusion of any bonus money was incorrect; in the alternative, employer contends that the approach espoused by the dissenting member should be adopted: the administrative law judge should determine on remand whether the bonus would or would not recur, and on that basis decide on its inclusion in the average weekly wage calculation.

The bonuses that were paid by employer in this case fall within the definition of "wages" under the Act, 33 U.S.C. §902(13),[2] as they represent monetary compensation paid to claimant as a consequence of his work for employer. *See generally Wausau Ins. Companies v. Director, OWCP [Guthrie]*, 114 F.3d 120, 31 BRBS 41(CRT) (9th Cir. 1997). Although the payment of bonuses was discretionary based on the company's financial situation, employees were informed at their hiring that they could receive bonuses based on hours worked. EX 37 at 18-19, 25-26. Unlike in *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001), the bonuses were not "one-time" only for the

[2]33 U.S.C. §902(13) provides:

> The term "wages" means 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 title 26 (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.

termination of a guaranteed income program, nor did they occur after the employee's injury as in *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992). Thus, the Board did not err in holding that any bonuses should have been included in the calculation of claimant's average weekly wage if they were received within the time frame the administrative law judge used in calculating average weekly wage. *See Sproull v. Director, OWCP*, 86 F.3d 895, 30 BRBS 49(CRT) (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997). We thus reject employer's contention that the Board improperly held that claimant's bonus is includable in the calculation of his average weekly wage.

Nonetheless, we modify our decision to reflect that it is the gross amount of the applicable bonus that should be included in the calculation of the average weekly wage. Additionally, the administrative law judge should determine whether the entire 1999 bonus or some pro-rated portion should be included in the calculation of claimant's average weekly wage, given that he did not use claimant's earnings for the entire period for which the bonus was paid, i.e., calendar year 1999.

Accordingly, claimant's motion for reconsideration is denied, and the Board's decision is affirmed, regarding the administrative law judge's maximum medical improvement finding and the decision to calculate claimant's average weekly wage based on the two-year period immediately preceding claimant's injury. Claimant's motion for reconsideration regarding the amount of the bonus to be included in the calculation of his average weekly wage is granted, and the Board's decision is modified to reflect that, on remand, the administrative law judge should consider the 1999 bonus in terms of the gross amount paid and determine how much of the bonus should be included in the calculation of claimant's average weekly wage. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I maintain my original position that, pursuant to *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001), the administrative law judge must first consider, on remand, whether the bonus paid on December 27, 1999, was a sufficiently regular payment prior to claimant's injury such that it should be included in claimant's annual earning capacity at the time of his injury, as such a finding is necessary to the determination of whether claimant's injury caused him to lose the capacity to earn this sum. *See* 33 U.S.C. §902(10). Therefore, I reiterate that the case must be remanded for this finding in the first instance. In all other respects, I concur in my colleagues' decision.

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JUDITH S. BOGGS
Administrative Appeals Judge