

On August 2, 1991 appellant, then a 36-year-old city carrier, sustained multiple injuries when he was involved in an employment-related motor vehicle accident. The accepted conditions include cervical and lumbar strain, left knee strain, depression and postconcussion

syndrome. After a brief return to work following the accident, appellant was placed on the periodic rolls based on an annual salary of \$33,061.00.

On February 23, 2003 appellant returned to work as a modified carrier technician, working for four hours daily for two weeks, then six hours daily for two weeks, returning to a full eight-hour day in the fifth week at an annual rate of \$45,101.00. Following an inquiry by the Office, in a June 24, 2003 letter, the employing establishment advised that appellant's date-of-injury pay rate was \$35,578.00 with a current pay rate for that position of \$44,271.00.

By decision dated July 8, 2003, the Office determined that appellant's actual earnings as of February 24, 2003 fairly and reasonably represented his wage-earning capacity. The Office reduced his wage-loss compensation to zero as his earnings exceeded the current wages of the job he held when employed. On July 15, 2003 appellant requested a hearing, stating his wage-earning capacity was based on an incorrect pay rate.<sup>1</sup> At the hearing held on June 14, 2004, appellant contended that he was entitled to benefits, such as sick and annual leave that he lost during the period he was on disability compensation, and that it was unfair that he received only 75 percent of his salary as compensation. He further asserted entitlement to step increases while on total disability. The hearing representative explained the limits of compensation benefits and noted that there was a discrepancy in the record regarding appellant's date-of-injury pay rate, but stated that this would not affect the determination that he had a zero percent loss of wage-earning capacity.

Following the hearing, on July 16, 2004 the employing establishment informed the Office that appellant's date-of-injury pay rate was \$33,061.00 with a current rate of \$45,095.00, noting that appellant's current salary was \$45,330.00. By decision dated September 9, 2004, the Office hearing representative determined that the correct date-of-injury pay rate was \$33,061.00 and affirmed the prior decision, finding that the erroneous pay rate information contained in the July 8, 2003 decision did not affect the determination that appellant had no loss of wage-earning capacity.

### **LEGAL PRECEDENT**

It is well established that, once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Federal Employees' Compensation Act<sup>3</sup> provides that

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<sup>1</sup> On September 4, 2003 appellant filed a recurrence claim, noting a date of recurrence of July 1, 2003. He thereafter filed claims for compensation for the period August 11 to October 19, 2003. On May 24, 2004 the Office issued a preliminary finding that an overpayment in compensation in the amount of \$44.90 had been created. The record before the Board does not contain final decisions regarding the above matters, and as its jurisdiction is limited to a review of final decisions of the Office pursuant to 20 C.F.R. § 501.2(c), these issues are not before the Board.

<sup>2</sup> See *James M. Frasher*, 53 ECAB 794 (2002); *Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>3</sup> 5 U.S.C. §§ 8101-8193.

in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.<sup>4</sup> Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.<sup>5</sup> After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Alfred C. Shadrick*<sup>6</sup> decision will result in the percentage of the employee's loss of wage-earning capacity.<sup>7</sup> This has been codified by regulation at 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.<sup>8</sup> Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days and no later than 90 days after the return to work.<sup>9</sup>

For all claims under the Act, compensation is to be based on the pay rate as determined under section 8101(4) which defines "monthly pay" as the monthly pay at the time of injury or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.<sup>10</sup>

### ANALYSIS

The Board finds that appellant's pay rate for compensation purposes, on which the wage-earning capacity decision was based, was \$33,061.00 annually in that this was the salary appellant was receiving at the time of injury and the time his disability began.<sup>11</sup> At the time appellant was placed on the periodic rolls, the Office secured pay rate information from the employing establishment that appellant's pay rate on the date of injury was \$33,061.00, and it was this base rate that was used for compensation purposes until he returned to work in February 2003. While the employing establishment erroneously provided a date-of-injury pay rate of \$35,578.00 on June 24, 2003, by letter dated July 16, 2004, the employing establishment certified that the correct date-of-injury pay rate was \$33,061.00. This error was harmless as it

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<sup>4</sup> 5 U.S.C. § 8115(a); see *James M. Frasher*, *supra* note 2.

<sup>5</sup> *Roberta R. Moncrief*, 52 ECAB 418 (2001); *Hubert F. Myatt*, 32 ECAB 1994 (1981).

<sup>6</sup> 5 ECAB 376 (1953).

<sup>7</sup> See *James M. Frasher*, *supra* note 2; *Alfred C. Shadrick*, *id.*

<sup>8</sup> 20 C.F.R. § 10.403(d) (1999); see *Afegalai L. Boone*, 53 ECAB 533 (2002).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c)(1) (July 1997).

<sup>10</sup> *John M. Richmond*, 53 ECAB 702 (2002).

<sup>11</sup> 5 U.S.C. § 8101(4); *id.*

has no effect on the determination that appellant had a zero percent loss of wage-earning capacity. His actual weekly earnings at the time of the July 8, 2003 wage-earning capacity decision were \$867.32 which were greater than 100 percent of the current pay for his date-of-injury weekly earnings of \$851.36.

Regarding appellant's contention that he was entitled to step increases and accrual of leave while on disability compensation, the applicable provisions of the Act specify that compensation for disability shall be computed on the basis of the employee's monthly pay as defined in the Act.<sup>12</sup> There is no authority for computing compensation on any other basis. Monthly pay as defined in the Act does not include any allowance for leave or step increases. The Act is not intended to compensate an injured employee for what may be termed "fringe benefits" such as leave.<sup>13</sup> The probability that an employee, if not for his work-related condition, might have had greater earnings is not proof of a loss of wage-earning capacity and does not afford a basis for payment of compensation under the Act,<sup>14</sup> and cost-of-living increases were reflected in the compensation appellant received from October 1991 to February 2003.

In the instant case, appellant returned to a modified carrier technician position on February 23, 2003 and therefore had been working the requisite 60 days when the Office determined his wage-earning capacity on July 8, 2003. Where there are actual earnings, the compensation entitlement should be determined by applying the *Shadrick* formula.<sup>15</sup> The Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing actual earnings by current date-of-injury pay rate. Based on the pay rate information provided by the employing establishment on July 16, 2004, appellant's weekly earnings at that time were \$871.73 and the current weekly pay rate for his date-of-injury position was \$867.32, again demonstrating that his current weekly earnings were greater than 100 percent of the current pay of his date-of-injury position, resulting in a 0 percent loss of wage-earning capacity. The Board finds that appellant's actual annual earnings of \$45,271.00 or \$867.32 weekly establish that he has no loss of wage-earning capacity. The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represented his wage-earning capacity and the Office properly reduced appellant's compensation in accordance with the *Shadrick* formula.

### **CONCLUSION**

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity effective February 23, 2003, the date he returned to work.

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<sup>12</sup> See 5 U.S.C. § 8114.

<sup>13</sup> *Helen A. Pryor*, 32 ECAB 1313 (1981).

<sup>14</sup> *Dempsey Jackson, Jr.*, 40 ECAB 942 (1989).

<sup>15</sup> 20 C.F.R. § 10.403.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated September 9, 2004 is affirmed.

Issued: September 15, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board