

flipped. He stopped work on September 20, 1989 and did not return. At the time of his injury, appellant worked as a temporary employee from 8:00 a.m. to 4:30 p.m. Monday through Friday. The Office accepted the claim for low back strain, cervical strain and a herniated nucleus pulposus at L3-4. The Office paid appellant compensation for total disability beginning November 7, 1989.

On February 6, 2007 the Office requested that appellant submit a periodic medical report from his attending physician. In a work restriction evaluation dated March 27, 2007, Dr. Michael P. Barker, an attending Board-certified physiatrist, found that he could work for 1 to 2 hours per day with restrictions on sitting up to 1 hour, walking and standing 15 minutes, no overhead reaching and pushing, pulling and lifting up to 5 pounds for 15 minutes. He found that appellant could not operate a motor vehicle at work but could operate a motor vehicle for 30 minutes to and from work.

In an e-mail message dated April 9, 2007, the employing establishment noted that appellant could work two hours per day and indicated that it could “use him to possibly cover phones during lunch times or something else that will be within his limitations.” On April 23, 2007 the employing establishment offered him a temporary job for two hours per day as a purchase and hire carpenter with a detail to the engineering service as a supply clerk. The position would last 90 to 120 days. Appellant accepted the position on April 27, 2007 and returned to work on May 17, 2007.

In a June 26, 2007 progress report, Dr. Barker noted that appellant experienced increased cervical pain while performing his work duties. He diagnosed chronic low back and cervical pain with underlying multilevel disc disease and a history of a liver transplant. Dr. Barker opined that he could continue working two hours per day.

By decision dated July 30, 2007, the Office reduced appellant’s compensation effective May 13, 2007, finding that his actual earnings as a supply clerk for two hours per day fairly and reasonably represented his wage-earning capacity.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.¹ Section 8115(a) of the Federal Employees’ Compensation Act² provides that, 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.³ Generally, wages actually earned are the best measure of a wage-earning capacity and in the absence of showing that they do not fairly and reasonably represent the injured employee’s wage-earning capacity, must be accepted as such a measure.⁴ The formula

¹ *Gregory A. Compton*, 45 ECAB 154 (1993).

² 5 U.S.C. §§ 8101-8193.

³ 5 U.S.C. § 8115(a); *Loni J. Cleveland*, 52 ECAB 171 (2000).

⁴ *Lottie M. Williams*, 56 ECAB 320 (2005).

for determining loss of wage-earning capacity based on actual earnings, developed in the *Albert C. Shadrick* decision,⁵ has been codified at 20 C.F.R. § 10.403. The Office calculates an employee's wage-earning capacity in terms of percentage by dividing the employee's earnings by the current pay rate for the date-of-injury job.⁶ Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity should be made after an employee has been working in a given position for more than 60 days.⁷

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings:

"a. *Factors considered.* To determine whether the claimant's work fairly and reasonably represents his or her WEC [wage-earning capacity], the CE [claims examiner] should consider whether the kind of appointment and tour of duty (see FECA PM 2.900.3) are at least equivalent to those of the job held on date of injury. Unless they are, the CE may not consider the work suitable.

"For instance, reemployment of a temporary or casual worker in another temporary or casual (USPS) position is proper, as long as it will last at least 90 days, and reemployment of a term or transitional (USPS) worker in another term or transitional position is likewise acceptable. However, the reemployment may not be considered suitable when:

- (1) *The job is part time* (unless the claimant was a part-time worker at the time of injury) or sporadic in nature;
- (2) *The job is seasonal* in an area where year-round employment is available....
- (3) *The job is temporary* where the claimant's previous job was permanent."⁸

ANALYSIS

The Office accepted that appellant sustained cervical strain, low back strain and a herniated disc at L3-4 due to a September 20, 1989 employment injury. At the time of his injury, appellant worked in a temporary position for 40 hours per week. The Office paid him compensation for total disability beginning November 7, 1989.

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁶ 20 C.F.R. § 10.403(c).

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(c) (December 1993).

⁸ *Id.*

On March 27, 2007 Dr. Barker found that appellant could work for 1 to 2 hours per day with restrictions on lifting up to 5 pounds for 15 minutes, no overhead reaching, sitting for 1 hours and walking and standing for 15 minutes. On April 23, 2007 the employing establishment offered him a temporary position for 90 to 120 days as a purchase and hire carpenter with a detail to the engineering section as a supply clerk. Appellant accepted the position and returned to work on May 17, 2007. On July 30, 2007 the Office reduced his compensation based on its finding that his actual earnings as a part-time supply clerk fairly and reasonably represented his wage-earning capacity. Appellant's actual earnings, however, were based on a part-time position of two hours per day.⁹ As the Office procedure manual indicates, in situations where an employee is working full time when injured and is reemployed in a part-time position, a formal wage-earning capacity determination is generally not appropriate.¹⁰ The Board has held that the Office must address the issue and explain why a part-time position is suitable for a wage-earning capacity determination based on the specific circumstances of the case.¹¹ The Office did not address this issue in its loss of wage-earning capacity determination. The Office found that his actual earnings as a supply clerk represented appellant's wage-earning capacity without acknowledging that the actual earnings were based on a part-time position and he was not a part-time employee when injured. The Board finds that the Office failed to meet its burden of proof in determining his wage-earning capacity.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation effective May 13, 2007.

⁹ As appellant was a temporary employee at the time of his injury, the Office properly determined his wage-earning capacity based on a temporary position. *Id.*

¹⁰ *Id.*

¹¹ *Connie L. Potratz-Watson*, 56 ECAB 316 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 30, 2007 is reversed.

Issued: April 25, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board