

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEVEN BLACK and U.S. POSTAL SERVICE,
POST OFFICE, Minneapolis, MN

*Docket No. 99-765; Submitted on the Record;
Issued December 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity based upon his actual earnings as a distribution clerk.

On October 31, 1991 appellant, then a 45-year-old tractor trailer driver, sustained a herniated disc in the performance of duty. He underwent surgery on January 31, 1992. Appellant received compensation benefits for wage loss for periods of partial and total disability from December 21, 1991 through May 12, 1992. On May 13, 1992 he returned to work in a light-duty capacity. Effective April 30, 1994 appellant accepted a permanent limited-duty position as a distribution clerk, Grade 5, step O with an annual salary of \$35,271.00. This position was within the restrictions set forth by his attending physician.

On February 28, 1998 appellant filed a claim for wage loss for the period April 30, 1994 through February 25, 1998. He claimed that he had a loss of wages due to his return to work in a position at a lower level (Grade 5) than his job held at the time of injury (Grade 6).

By letter dated March 11, 1998, the employing establishment advised the Office that appellant's salary for his position held at the time of injury was \$31,214.00 per year for a Grade 6, step H tractor trailer operator and that his limited-duty position as a distribution clerk was a Grade 5, step O position with a yearly salary of \$35,271.00.

By decision dated March 18, 1998, the Office determined that appellant had no loss of wage-earning capacity based upon his current position of distribution clerk which had wages equal to the current grade and step of his position held at the time of injury as a tractor trailer driver. The Office noted that he had performed the position for more than 60 days and the position was within the work restrictions established by his attending physician.

By letter dated August 28, 1998, appellant requested reconsideration on the grounds that his position held at the time of injury was a Grade 6 motor vehicle operator position and his current position was a Grade 5 distribution clerk position and the top pay of a Grade 6 position currently was \$38,604.00 and the current top pay for a Grade 5 position was \$37,623.00. He asserted that if he had not been injured he would be earning the wages of a Grade 6 position.

By decision dated November 5, 1998, the Office denied modification of its March 18, 1998 decision. The Office noted that appellant returned to work as a Grade 5 distribution clerk earning an annual salary of \$35,271.00 as of April 30, 1994. It noted that, in calculating compensation for loss of wage-earning capacity, it compared the April 30, 1994 rate of pay of the job, step and grade that appellant held at the time of injury with the April 30, 1994 rate of pay for the distribution clerk position. The Office noted that on April 30, 1994 appellant was employed as a Grade 5, step O distribution clerk earning \$35,271.00 annually or \$678.28 per week and night differential pay of \$29.68 for a total weekly pay rate of \$707.97. It noted that on April 30, 1994 his position, grade and step held at the time of injury paid \$34,080.00 annually which equaled \$653.38 weekly and night differential pay of \$24.50 for a total weekly pay of \$677.88. The Office stated that appellant had no loss of earnings because he was earning more on April 30, 1994 in his Grade 5 distribution clerk position than his Grade 6 position held at the time of injury was paying on that same date.¹

The Board finds that the Office properly determined that appellant had no loss of wage-earning capacity based upon his actual earnings as a distribution clerk.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.³

The Federal Employees' Compensation Act⁴ provides that wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.⁵ The Board has recognized that actual wages earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do

¹ This record contains additional evidence which was not before the Office at the time it issued its November 5, 1998 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997).

² *Sylvia Bridcut*, 48 ECAB 162, 164 (1996); *James B. Christenson*, 47 ECAB 775, 778 (1996).

³ 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120, 121 (1995).

not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁶

In this case, the Office determined that appellant no longer had any loss of wage-earning capacity because the full-time weekly pay of his position on April 30, 1994 exceeded the full-time weekly pay of his position held at the time of injury on the same date.⁷

Appellant contends that he had a loss of wage-earning capacity because, subsequent to April 30, 1994, he began to earn less than he would have earned had he remained in his position held at the time of injury. He asserts that the Office, at the time of its determination of his wage-earning capacity, should have based its determination on the top salary for a Grade 6 position at that time which was \$38,604.00. However, in determining loss of wage-earning capacity, the Office may select any date for the comparison of earnings and "current" pay rate for the position held at the time of injury. The Code of Federal Regulations provides:

"An employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's earnings by the current pay rate. The comparison of earnings and 'current' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability. *Any convenient date* may be chosen by the Office for making the comparison as long as the two wage rates are in effect on the date used for comparison."⁸ (Emphasis added.)

In this case, on April 30, 1994 appellant was employed as a Grade 5, step O distribution clerk with a salary of \$35,271.00. The total weekly pay rate equaled \$707.97, including night differential pay. Appellant's total weekly pay rate as of April 30, 1994 for his job at Grade 6, step H held at the time of injury was \$677.88, including night differential pay. Accordingly, since the April 30, 1994 pay rate for the distribution clerk position was greater than the "current" pay rate for the pay rate at the time of injury, the Office properly found that appellant did not have any loss of wage-earning capacity. The Board has held that any subsequent difference in pay is not compensable if it is due merely to subsequent increases in the pay rate for the position held at the time of injury.⁹

⁶ *Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

⁷ *See Richard M. Knight*, 42 ECAB 320, 324 (1991); *Albert C. Shadrick*, 5 ECAB 376 (1953).

⁸ 20 C.F.R. § 10.303(b); *see Domenick Pezzetti*, 45 ECAB 787, 790 (1994).

⁹ *See Domenick Pezzetti*, *supra* note 8.

The decisions of the Office of Workers' Compensation Programs dated November 5 and March 18, 1998 are affirmed.

Dated, Washington, DC
December 6, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member