

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SELDEN H. SWARTZ and DEPARTMENT OF AGRICULTURE,  
FOREST SERVICE, ROGUE RIVER NATIONAL FOREST, Medford, OR

*Docket No. 98-48; Submitted on the Record;  
Issued April 7, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity.

The Office accepted that appellant's May 27, 1977 employment injury resulted in a herniated disc at L5-S1, for which surgery was performed on July 22, 1977. The Office paid appellant compensation for temporary total disability during his initial absence from work and also accepted recurrences of total disability beginning August 1, 1978, July 23, 1986 and June 30, 1988. These recurrences followed periods during which appellant worked in positions outside the employing establishment.

On October 25, 1993 appellant obtained employment as the education services director for Cascades East Area Health Education Center in Bend, Oregon at a salary of \$37,000.00 per year. By decision dated December 1, 1993, the Office terminated appellant's compensation for disability effective October 25, 1993 on the basis that his actual earnings exceeded the pay rate of the position of survey technician he held at the employing establishment when injured.<sup>1</sup> Appellant held this job until February 28, 1995, when the Bend office was closed and operations were consolidated to Klamath Falls, Oregon. By letter dated February 23, 1995, appellant requested reinstatement of his compensation for temporary total disability effective February 28, 1995.

By decision dated June 20, 1996, the Office found that appellant's wage-earning capacity beginning March 1, 1995 was represented by the position of magnetic resonance imaging (MRI) technician. Appellant requested a review of the written record and, an Office hearing representative, by decision dated December 2, 1996 found that appellant's wage-earning capacity was not properly determined, as the position of MRI technician was not shown to be reasonably available in appellant's area.

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<sup>1</sup> This decision was not accompanied by a notice of appeal rights.

By decision dated January 22, 1997, the Office found that appellant's earnings in his position of education services director fairly and reasonably represented his wage-earning capacity and that he was not entitled to compensation because these actual earnings exceeded the current pay of the job he held when injured. Appellant requested reconsideration and the Office, by decision dated July 24, 1997, found that the additional evidence was not sufficient to warrant modification of its prior decision.

The Board finds that the case is not in posture for a decision.

Appellant contends that the Office should not have used the position of education services director to represent his wage-earning capacity on the basis that he did not have the experience required for the position and that he did not actually perform the duties of this position. A comparison of appellant's experience to the position description for education services director shows that appellant did not meet the qualification first listed: "Four years or more of progressively responsible program management experience." In a February 12, 1996 letter, appellant stated that the only duty he performed during his tenure in this position was to organize a career program of speeches for high school students and that the position of education services director was "on paper only, a position that need[ed] to be filled." The position description states that the education services director is "responsible for planning, organizing, directing and evaluating health education programs for professionals;" and that other duties include: "(1) Assess the educational needs of rural communities and rural health care professionals; (2) Plan, organize and coordinate health care professionals continuing education programs and community health education programs; (3) Develop and maintain a continuing education resource center for use by health care professionals."

Appellant's contentions indicate that the position in which he was employed from October 25, 1993 to February 28, 1995 may have been makeshift work, which cannot be used as the basis of an employee's wage-earning capacity.<sup>2</sup> If the duties performed by appellant were not those normally performed by an education services director, this is an indication that the position was makeshift and is not representative of appellant's wage-earning capacity.<sup>3</sup> When the evidence raises a serious question of whether a position actually performed by an employee for a limited period in the past may have been a makeshift position, the Office cannot use this position as representative of that employee's wage-earning capacity without investigating this question.<sup>4</sup> The use of what may be an inappropriate position as the basis of an employee's wage-earning capacity will be more closely scrutinized where the Office applies its loss of wage-earning capacity decision prospectively, that is, to a period after the employee no longer was working in the position used as representative of his or her wage-earning capacity.<sup>5</sup>

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<sup>2</sup> *Samuel J. Chavez*, 44 ECAB 431 (1993).

<sup>3</sup> *James Jones, Jr.*, 39 ECAB 678 (1988).

<sup>4</sup> *Mary Jo Colvert*, 45 ECAB 575 (1994).

<sup>5</sup> See *Albert L. Poe*, 37 ECAB 684 (1986). (Although medical evidence indicated the employee was not physically capable of performing the duties of the position he held for almost six years, the Board allowed the Office to use this position as representative of his wage-earning capacity during the period he actually was

In its July 24 and January 22, 1997 decisions, the Office did not address appellant's contention that the position of education services director did not fairly and reasonably represent his wage-earning capacity. The case will be remanded to the Office for an appropriate investigation of this contention, to be followed by a decision addressing whether appellant's actual earnings in the position of education services director fairly and reasonably represented his wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated July 24 and January 22, 1997 are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.  
April 7, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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employed in the position, but not after he retired from it.)