

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of REDRICK T. HOBBY and DEPARTMENT OF THE NAVY,  
CHARLESTON NAVAL SHIPYARD, Charleston, SC

*Docket No. 98-1826; Submitted on the Record;  
Issued October 13, 2000*

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DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity on November 10, 1997; (2) whether the Office met its burden of proof to modify appellant's loss of wage-earning capacity determination on April 1, 1998; and (3) whether the Office properly determined that an overpayment of compensation benefits occurred in appellant's case in the amount of \$1,007.86 for the period December 29, 1997 through March 28, 1998.

The Board has carefully reviewed the evidence of record and finds that the Office improperly computed appellant's loss of wage-earning capacity on November 10, 1997.

In this case, appellant's notice of traumatic injury, filed on June 23, 1993, was accepted for contusions of the neck, back and right ankle and a herniated nucleus pulposus at C5-6 after appellant, a crane operator, fell down some steps. By letter dated March 16, 1995, the Office advised appellant that he had been placed on the periodic compensation rolls to receive compensation benefits for temporary total disability.

In August 1995, the Office referred appellant to a rehabilitation specialist. In August 1997, appellant completed a course of studies, which qualified him to work as a paralegal. On October 20, 1997 he began work as a paralegal for a law firm with wages of \$280.00 per week. By decision dated November 10, 1997, the Office noted that appellant had been reemployed as a paralegal effective October 20, 1997 and advised him that his compensation benefits would be reduced based upon his actual earnings of \$280.00 per week.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an injured employee's

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

disability has ceased or lessened, thus justifying termination or modification of those benefits.<sup>2</sup> 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.<sup>3</sup>

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>4</sup> Section 8106(a)<sup>5</sup> of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the disability. Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his wage-earning capacity.<sup>6</sup>

The Office found that he had a loss in earning capacity of \$436.24 weekly, based on the difference between his weekly compensation rate of \$703.60 and his adjusted earning capacity of \$265.36. The Office reduced appellant's disability compensation to \$1,284.94 every four weeks.

Board precedent provides that, generally, wages actually earned are the best measure of a wage-earning capacity and that, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, they must be accepted as such measure. Office procedures provide that a determination regarding whether actual earnings fairly and reasonably represent wage-earning capacity will be made after an employee has been working in a given position for more than 60 days.<sup>7</sup> In *Corlisa L. Sims*,<sup>8</sup> the Board noted that the 60-day period was a minimum period of reemployment before the Office can make a determination that the position fairly and reasonably represents wage-earning capacity. If the Office makes a determination on wage-earning capacity prior to the expiration of the 60-day period, the decision must be reversed.

In the present case, appellant had not been employed in the position for 60 days, but rather 20 days when the Office made the wage-earning capacity determination. The Board, therefore, concludes that the Office improperly determined appellant's wage-earning capacity based upon his actual earnings as of October 20, 1997, after 20 days of reemployment.

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<sup>2</sup> *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

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

<sup>4</sup> *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

<sup>5</sup> 5 U.S.C. § 8106(a).

<sup>6</sup> 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120, 121 (1995).

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

<sup>8</sup> 46 ECAB 172 (1994).

Given the disposition of the first issue of wage-earning capacity, the second issue of modification of the wage-earning capacity determination is moot. The Board also finds that the Office improperly found on May 18, 1998 that an overpayment occurred in this case because its overpayment determination was based upon the Office's April 1, 1998 modification of its determination of appellant's loss of wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated November 10, 1997, May 18 and April 1, 1998 are reversed.

Dated, Washington, DC  
October 13, 2000

David S. Gerson  
Member

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member