

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DONNA M. ROWAN and U.S. POSTAL SERVICE,
POST OFFICE, Nashville, TN

*Docket No. 03-908; Submitted on the Record;
Issued July 11, 2003*

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 found that appellant was not entitled to wage-loss compensation during the period May 6, 2000 to August 31, 2001, based upon her actual earnings in private employment for that period.

On May 22, 1998 appellant, then a 35-year-old letter carrier, filed a claim alleging that on that date she sustained multiple contusions and abrasions when she fell into an open manhole while in the performance of duty. On June 29, 1998 the Office accepted appellant's claim for contusions of both knees, left ankle sprain, contusion of the left elbow and temporary aggravation of arthritis of the knee and thoracic strain, resolved. On January 18, 2000 appellant filed a claim for occupational disease, alleging that she suffered pain in both knees and ankles, back pain and undue stress, causally related to her employment injuries. By letter dated August 10, 2000, the Office informed appellant that it had administratively doubled the two claims together. Appellant was off work for intermittent periods from May 22, 1998 until she returned to limited duty on September 1, 2001. Appellant returned to full duty on November 15, 2001.

On May 24, 2002 appellant filed a claim for compensation, Form CA-7, claiming wage-loss compensation for periods between January 2000 and December 2001. Appellant indicated on the claim form that for intermittent periods between February 2000 and August 2001 she had been privately employed. On the claim form, the employing establishment indicated that appellant was on leave without pay from January 1, 2000 to August 31, 2001, for a total of 2712 hours. The employing establishment noted that appellant returned to limited duty on September 1, 2001 and returned to full duty November 15, 2001. Finally, the employing establishment indicated that, on May 22, 1998, the date of her original injury, appellant earned \$13.51 per hour as a Grade 5, step A employee and worked an average of 32 hours a week.

In a letter dated October 2, 2002, the Office informed appellant that payment for compensation for the period January 1 to May 5, 2000 had been approved, but that additional information was required regarding her private employment during the period May 6, 2000 to

August 31, 2001 before payment could be made. The Office noted that appellant had reported working for Madison Children's Home from May 6, 2000 to August 31, 2001, and with Kelly Services, Inc. from May to August 2000, but that more detailed information regarding her specific dates of employment was required. By letters dated October 2, 2000, the Office asked appellant, Madison Children's Home and Kelly Services, Inc. to provide detailed information regarding appellant's employment.

In a response dated October 31, 2002, Madison Children's Home confirmed that appellant had been employed as an assistant program manager from May 2000 through September 2001, that she earned \$12.00 an hour, and that she worked 40 hours a week, plus overtime. In addition, appellant provided the payroll check register sheets from Madison Children's Home listing her dates of employment and indicating that for the relevant periods of the years 2000 and 2001 she had earned gross income of \$22,877.63 and \$17,316.00 respectively. Appellant also submitted earnings statements from Kelly Services, Inc., listing her dates of employment during the relevant periods of the years 2000 and 2001, and indicating that she earned gross income of \$586.75 and \$60.00 respectively.

In a decision dated January 16, 2003, the Office noted that, during the period May 6, 2000 to August 31, 2001, appellant had worked for private employers, Madison Children's Home and Kelly Services, Inc., and had earned a total of \$40,360.38 during this time. The Office informed appellant that it had divided these total earnings by the number of weeks during this time period, 68.86, to determine that appellant earned an average weekly pay of \$586.12. The Office noted that, on May 6, 2000, the weekly pay rate for a Grade 5, step A employee, appellant's grade when injured, who averaged 32 hours per week, as appellant did, was \$444.48. The Office concluded that, as appellant's wages earned in private employment during the period May 6, 2000 to August 31, 2001 met or exceeded the wages she would have earned if she had been working with the employing establishment, no loss of wages had occurred and she was not entitled to wage-loss compensation for this period.

The Board finds that the Office properly found that appellant was not entitled to wage-loss compensation during the period May 6, 2000 to August 31, 2001.

In the January 16, 2003 letter decision, the Office denied appellant's claim for wage-loss compensation for the period May 6, 2000 to August 31, 2001, based on the fact that appellant had earned equal or greater wages in private employment during this time. This decision did not constitute a formal wage-earning capacity determination, but rather was a reduction of compensation using the formula developed in *Albert C. Shadrick*.¹ A claimant is not entitled to receipt of temporary total disability benefits and actual earnings for the same time period. The Office, therefore, offsets actual earnings pursuant to the *Shadrick* formula. In a prior decision, *Lawrence D. Price*,² the Board explained that, if a reduction of benefits based upon actual earnings is not accompanied by a determination that actual earnings "fairly and reasonably" represent wage-earning capacity, an informal reduction of benefits utilizing the *Shadrick*³

¹ 5 ECAB 376 (1953).

² 47 ECAB 120 (1995).

³ *Albert C. Shadrick*, 5 ECAB 376 (1953).

formula is proper rather than a formal loss of wage-earning capacity determination. In addition, the Board has held that any worksheet used to calculate deduction of earnings is to be clearly marked that it is an actual earnings calculation and not a loss of wage-earning capacity determination.⁴

The language used in the January 16, 2003 decision and the accompanying worksheet are consistent with the above procedures. The decision does not discuss appellant's "capacity" to earn wages but instead notes that for the period May 6, 2000 to August 31, 2001 "no loss of wages has occurred." Moreover, there is no attempt to determine if the actual wages earned while working for either Madison Children's Home or Kelly Services, Inc., "fairly and reasonably" represented appellant's wage-earning capacity. Finally, the Board notes that the accompanying worksheet clearly stated "[a]ctual [e]arnings [c]alculation-[n]ot an LWEC [loss of wage-earning capacity] [d]etermination" across the top. The Board therefore finds that the January 16, 2003 decision simply represents a determination that any compensation for the period May 6, 2000 to August 31, 2001 should be offset by appellant's earnings in private employment.

The Board further finds that the Office's computations utilizing the *Shadrick* formula are correct. The formula developed in the *Shadrick* decision, has been codified by regulation at 20 C.F.R. § 10.403,⁵ and section (c) of this regulation provides the actual formula to be utilized by the Office.⁶ First, the Office must determine appellant's "wage-earning capacity in terms of percentage" by dividing her earnings by the current, or updated, pay rate for the position she held at the time of injury. In this case, the Office properly determined appellant's wage-earning capacity in terms of percentage by dividing her actual average earnings for the period May 6, 2000 to August 31, 2001 of \$586.12 per week⁷ by the current, or updated, pay rate for the job held at the time of injury, or \$444.48,⁸ to arrive at more than 100 percent wage-earning capacity.⁹ As the record indicates, and appellant does not dispute, that for the period May 6, 2000 to August 31, 2001 she worked for Madison Children's Home and Kelly Services, Inc., and had

⁴ *Id.*

⁵ 20 C.F.R. § 10.403.

⁶ 20 C.F.R. § 10.403(c).

⁷ As noted above, appellant earned a total of \$40,360.38 during the 68.86 weeks she was privately employed. This equates to an average weekly wage of \$586.12.

⁸ The record reflects that on the date of injury appellant was a Grade 5, step A employee, earned \$13.51 an hour, and worked an average of 32 hours a week, or 1664 hours a year. Based on information obtained from the employing establishment, the Office determined that, as of May 6, 2000, a Grade 5, step A employee earned \$13.89 per hour. The Office then calculated that, on May 5, 2000, a Grade 5, step A employee working an average of 32 hours a week would earn an average of \$444.48 per week.

⁹ 20 C.F.R. § 10.403(c); *Nancy L. Christiansen*, 48 ECAB 579 (1997); *Bernard A. Newman*, 44 ECAB 759 (1993). Where the Office learns of actual earnings that span a lengthy period of time (*e.g.*, several months or more), the compensation entitlement should be determined by averaging the earnings for the entire period, determining the average pay rate, and applying the *Shadrick* formula (comparing the average pay rate for the entire period to the pay rate of the date-of-injury job in effect at the end of the period of actual earnings). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(d)(4) (June 1996).

actual earnings equal or greater than the wages she would have earned in her date-of-injury position, under the Office's procedures these earnings should be offset against any potential compensation for the period during which appellant had actual earnings. As this is not a formal wage-earning capacity determination, the Office properly found that appellant was not entitled to compensation using the *Shadrick* formula only for the period appellant had actual wages from her private employment.¹⁰

The decision of the Office of Workers' Compensation Programs dated January 16, 2003 is affirmed.

Dated, Washington, DC
July 11, 2003

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ *Id.*